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BEFORE THE

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HOUSE OF REPRESENTATIVES

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UNITED STATES DEPARTMENT OF JUSTICE

THURSDAY, APRIL 6, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:03 a.m., in Room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr., (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order. A quorum for the taking of testimony is present.

Before swearing in the Attorney General and allowing him to make his opening statement, I would like to talk a little bit about the ground rules for today's hearing.

The Attorney General's schedule allows him to be here until 3 p.m. It is the Chair's intention to have his opening statement first, and then the Chair will recognize Members alternately by side in the order in which they appear. The Chair intends to enforce the 5-minute rule strictly, meaning that the Member who has the time will be able to complete the question and the Attorney General will be able to answer the question when the red light goes on. But the Chair will, at the conclusion of the Attorney General's answer, recognize the next person in line.

The Chair also intends that when we have the votes sometime around 11:30 to recess the Committee until 15 minutes after the last of the rolled votes. So I would strongly encourage Members and staff, if they wish to have lunch, to utilize that time for that purpose.

If everybody has asked questions, we will go on a second round of questions, again, strictly enforcing the 5-minute rule, and I will use the list of Members in the order in which they showed up at the beginning of the hearing to recognize Members in the order in which they've received. So—or appeared. So if you wish to have a second round of questions, it would behoove you to return promptly when the hearing resumes, because if you are not there, you will fall to the bottom of the list.

Are there any questions about this procedure? If there are not any questions, today we welcome again Attorney General Alberto Gonzales to appear before the Committee. This is a general hearing on the operations of the Justice Department, and, Mr. Attorney General, would you please stand, raise your right hand, and take the oath?

[Witness sworn.]

Chairman SENSENBRENNER. Let the record show the witness answered in the affirmative.

Mr. Attorney General, the floor is yours.

TESTIMONY OF THE HONORABLE ALBERTO R. GONZALES, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Attorney General GONZALES. Good morning, Chairman Sensenbrenner, Ranking Member Conyers, and Members of the Committee. I appreciate this opportunity to discuss a number of issues that are of vital importance to Congress, the Justice Department, and the American people.

When I reflect on the 14 months that I have served as Attorney General and the countless ways the Department impacts lives across this great Nation, I am reminded that we have a unique responsibility as stewards of the American dream, the dream of living and prospering in a safe, secure, and hopeful society.

Our record in securing this dream I believe is strong. We have not suffered another terrorist attack here at home, and our Nation's violent crime rate is at its lowest level in more than three decades.

But now we have to do more. To guide the work of the Department, I have established priorities rooted in the pursuit of the American dream: fight terrorism; combat violent crime, cyber crime, and drug trafficking; protect civil rights; and preserve Government and corporate integrity.

In each of these six areas of special emphasis, we have a plan to secure the hopes and the opportunities and the cherished values that make our country great.

First, on terrorism, our top priority. The terrorists seek to destroy the American promise of liberty and prosperity, and they are determined to attack us again here at home. Thank you for your multi-year effort to reauthorize the PATRIOT Act. It was a tough process, but an important one.

We continue to work to prevent another terrorist attack by prosecuting those who might harm Americans. This fight is not easy. Terrorism cases are some of the most difficult to investigate and prosecute, so we have had to adapt our efforts to a new world of changing techniques and technologies. This cutting-edge work has led to many successes.

Last week, Ahmed Omar Abu Ali was sentenced to 30 years in prison for providing support to al-Qaeda, conspiring to assassinate President Bush, and conspiring to hijack and destroy commercial airplanes in an attack similar to the attacks of September 11, 2001. This terrorist will now be behind bars in a Federal prison where he can't harm American citizens.

He joins others that the Department has removed from society, such as Richard Reid, the so-called shoe bomber; John Walker Lindh, the American Taliban; and members of the Virginia Jihad Network.

We've broken up terrorist cells in Portland, Oregon, Brooklyn, and Buffalo, New York, and recently charged three men in Toledo, Ohio, with conspiring to provide material support to terrorists and conspiring to commit acts of terrorism against individuals overseas, including U.S. military personnel serving in Iraq.

In addition, as you know, the Justice Department has been authorized to stand up a National Security Division. This will bring under one umbrella the Department's primary national security elements, and this fulfills a key recommendation of the WMD Commission. It's another step in eliminating the infamous wall between our intelligence and law enforcement teams.

In addition to our ongoing fight against terrorism, the Justice Department continues to focus on five strategic priorities with a targeted agenda focused on producing results. I thought I would give you a sense of those results just over the past few weeks. Every American deserves to live free from the fear of violent crime. We remain focused on reducing gun crime and liberating communities from the stranglehold of gang violence.

We are reducing gun crime across the country through the President's Project Safe Neighborhoods program. The numbers show that this initiative has been very successful. That is probably why most U.S. Attorneys across the country have started to use their PSN programs to target violent gangs operating in their districts.

We have responded with a comprehensive anti-gang strategy that uses the successful PSN model to shut down violent gangs that terrorize our streets, our neighborhoods. Nationwide, the strategy focuses on prevention, prosecution, and preparing prisoners for a return to society.

As part of that effort, I was in Los Angeles last week to announce that L.A. is one of six areas that will participate in a pilot project to target anti-gang resources in new and imaginative ways.

In addition to L.A., this program will provide $2.5 million to implement innovative anti-gang solutions in Cleveland, Dallas-Fort Worth, Milwaukee, Tampa, and a gang corridor that stretches from Easton to Lancaster, Pennsylvania, near Philadelphia.

When we talk about violence, especially keeping our children safe, we often fear what can happen as they walk to school or play on a ball field. But recent headlines have reminded us that our children also can log onto the Internet and open themselves to new and hidden threats. The Internet must be safe for all Americans, especially children.

I recently announced a major new initiative: Project Safe Childhood. The goal of this project is to prevent the exploitation of our kids over the Internet, to clean up this new neighborhood just as we've worked to reduce gun crime on our city streets.

U.S. Attorneys in every district will partner with local Internet Crimes Against Children Task Forces and community leaders to develop a strategic plan based on the particular needs of their communities. They will then share resources and information to investigate and prosecute more sexual predators and child pornographers than ever before. And they will coordinate in seeking the stiffest penalties possible.

Two weeks ago, I announced the indictments of 27 people for allegedly participating in a pornographic chat room called "Kiddypics and Kiddyvids." Some participants of the chat room have been charged with using minors to produce images of child pornography and then making those images, including a live show of an adult sexually molesting an infant, available to other members through the Internet.

The Project Safe Childhood initiative will help us target this kind of horrific behavior and prosecute individuals who harm our children.

Even as advanced technologies help cultivate new dreams, too often those dreams are wiped out by the pitfalls of illegal drug abuse.

No community will fully prosper if drug abuse is rampant. And that's why we will continue to dedicate ourselves to dismantling drug-trafficking organizations and stopping the spread of illegal drugs.

Just last week, I announced the largest narcotics-trafficking indictment in our history. Fifty members of the Colombian narco-terrorist group FARC have been indicted for allegedly importing more than $25 billion worth of cocaine into the United States and other countries. The FARC is responsible for overseeing the prosecution of more than 60 percent of the cocaine imported into the United States.

Several FARC members appear on the Justice Department's Consolidated Priority Organization Target, or CPOT, List, which identifies the most dangerous international drug-trafficking organizations. The list was created at the beginning of the Administration to ensure that drug enforcement resources were directed in the most productive fashion possible, and last year, we dismantled six of these CPOT organizations and disrupted the operations of six more.

We're also continuing and expanding our work to combat the spread of methamphetamine across the Nation. Thank you for passing the Combat Methamphetamine Epidemic Act which provides law enforcement with additional tools to disrupt the production and trafficking of meth.

Law enforcement has done a good job of shutting down small meth labs here in the United States. We need to do more. Also, production continues in "super labs" outside of our borders, especially in Mexico, and the finished product comes back to the United States through illegal drug-trafficking routes. We are working with our counterparts in Mexico to address the production and trafficking of methamphetamine, including providing training and equipment to law enforcement teams across the border.

Forty years ago, the color of your skin was as much of an obstacle to the American dream as violent gangs, sexual predators, and drug dealers are today. We've come a long way from that brand of State-sponsored racism, but we must continue to safeguard the civil rights that are fundamental to the opportunities that we cherish in this country.

All Americans should have the same chance to pursue their dreams. We will continue to aggressively combat discrimination wherever it is found, and I am pleased that the Department prosecuted a record number of criminal civil rights cases in the last 2 years.

This year, we have begun Operation Home Sweet Home. Under this initiative, we will bring the number of targeted investigations under the Fair Housing testing program to an all-time high, ensuring the rights of all Americans to obtain housing fairly.

We are, of course, also anxious to renew our commitment to the fundamental right to vote by working with Congress to reauthorize the Voting Rights Act.

Lastly, human trafficking has emerged as one of the foremost civil rights issues of our day. Three weeks ago, I was in Chicago to announce the release of a report detailing the Justice Department's efforts to halt this pernicious evil. There is no place in our compassionate society for these peddlers of broken dreams. President Bush has pledged his support for this effort, and I have made it a high priority at the Justice Department.

Millions of people come to America every year to pursue the American dream because of the rights and liberties we've guaranteed for generations. And our Government and our economy are the envy of billions more because we have systems that are open, honest, fair, and dependable.

Integrity in Government and business is essential for a strong America. Taxpayers and investors deserve nothing less. And that's why we will investigate and prosecute corruption wherever we find it, and we will preserve the integrity of our public institutions and corporations.

This list of priorities, of course, is not exclusive. We have other responsibilities that are no less important to the American dream.

For instance, enforcing our immigration laws will help us remain an open and welcoming society, by cracking down on illegal activity and closing our borders to criminals and terrorists. The President has called for comprehensive immigration reform policy that is based upon law and reflects our deep desire to be a compassionate and decent Nation. I join him in urging Congress to take action that makes sense for everyone in America.

And a tough and fair sentencing system will give teeth to our enforcement objectives, improve our deterrence efforts, and ensure that every American is treated fairly before the bar of justice.

Before the Supreme Court's decision in *United States v. Booker,* the Sentencing Reform Act and the mandatory Sentencing Guidelines were designed to generate similar sentences for defendants who commit similar crimes and have similar criminal records. There is a clear danger that the gains that we have made in reducing crime and achieving fair and consistent sentencing will be significantly compromised if mandatory sentencing laws are not reinstituted in the Federal criminal justice system.

In these strategic areas, and many more, we are working hard to protect and preserve the American dream. Crime is down. Drug use is declining. Our Nation is more secure today than ever before. We can, of course, all be proud but not complacent.

I appreciate your partnership as we strive to build upon the vital role of the Justice Department in securing this dream for future generations. Thank you, Mr. Chairman.

[The prepared statement of Attorney General Gonzales follows:]

PREPARED REMARKS FOR
ATTORNEY GENERAL ALBERTO R. GONZALES
AT THE
HOUSE JUDICIARY COMMITTEE
OVERSIGHT HEARING

WASHINGTON, D.C.
THURSDAY, APRIL 6th, 2006

Good morning, Chairman Sensenbrenner, Ranking Member Conyers, and members of the Committee.

I appreciate this opportunity to discuss a number of issues that are of vital importance to Congress, the Justice Department and the American people.

When I reflect on the 14 months I've served as Attorney General – and the countless ways the Justice Department impacts lives across this great Nation – I am always reminded that we have a unique responsibility as stewards of the American Dream.

The American Dream is about living and prospering in a safe, secure, and hopeful society. The Justice Department stands guard over that dream – by fighting crime, preserving civil rights, and protecting our Nation from terrorists.

Our record is impressive. We have not suffered another terrorist attack here at home, and our Nation's violent crime rate is at its lowest level in more than three decades.

Now, we have to build upon that record. To guide the work of the Department, I have established priorities rooted in the pursuit of the American dream: fight terrorism; combat violent crime, cyber crime, and drug trafficking; protect civil rights; and preserve government and corporate integrity.

In each of these six areas of special emphasis, we have a plan to secure the hopes and opportunities of the American dream – a secure homeland, safe communities, a fair and equal chance to succeed, and strong support for the cherished values that make our country great.

***

First, on terrorism, our top priority. The terrorists seek to destroy the American promise of liberty and prosperity – they stand in the way of peace and progress. They are determined to attack us again here at home. Thank you for your multi-year effort to reauthorize the PATRIOT Act. It was a tough process, but an important one.

We continue to work to prevent another terrorist attack by staying on the offensive, working hard to detect their plans, bringing known operatives to justice and increasing our efforts to disrupt their ability to use our open society as an invitation to attack.

This fight is not easy. Terrorism cases are some of the most difficult to investigate and prosecute because of the novel and challenging issues they raise.

We've had to adapt our efforts to a new world of changing techniques and technologies…and work both harder and more

creatively to stop planned attacks and prosecute terrorists in the courtroom. This cutting-edge work has lead to many successes.

Most recently, of course, a jury found that Zacarious Moussaoui was eligible for the death penalty after determining that he was responsible for deaths on September 11th, 2001. We are pleased with the jury's ruling in this important case. Our efforts on behalf of the victims of 9/11 will continue as we pursue the next phase of this trial.

In addition, last week, Ahmed Omar Abu Ali was sentenced to 30 years in prison for providing support to al Qaeda, conspiring to assassinate President Bush, and conspiring to hijack and destroy commercial airplanes in an attack similar to the attacks of September 11th, 2001. This terrorist will now be behind bars in a federal prison where he can't harm American citizens.

Moussaoui and Abu Ali join the other terrorists that the Department has removed from society such as Richard Reid, the so-called "shoe bomber"; John Walker Lindh, the "American Taliban"; and members of the Virginia Jihad Network and another former cell located in Brooklyn.

We've broken up terrorist cells in Portland, Oregon, Buffalo, New York and recently charged three men in Toledo, Ohio with conspiring to provide material support to terrorists and conspiring to commit acts of terrorism against Americans overseas – including U.S. military personnel serving in Iraq. In all, we've charged 431 people and secured 241 convictions or guilty pleas in terrorism related cases since 9/11.

And we're continuing to search for new ways to improve our ability to combat terrorism – whether it is in the courtroom, at our borders, in our cities, with our international partners, or here in Washington, D.C.

As you know, the Justice Department has been authorized to stand up a National Security Division. This will bring under one umbrella the Department's primary national security elements – including attorneys from the Counterterrorism and Counterespionage Sections of the Criminal Division, as well as those from the Office of Intelligence Policy and Review who specialize in the Foreign Intelligence Surveillance Act. This fulfills a key recommendation of the WMD Commission. It's another step in eliminating the infamous "wall" between our intelligence and law enforcement teams.

The President has nominated U.S. Attorney Ken Wainstein to serve as the first Assistant Attorney General for the Division. Ken is the right man for the job and I hope the Senate will consider his nomination quickly.

In addition to our ongoing fight against terrorism, the Justice Department continues to focus on five strategic priorities that are fundamental to the American Dream: combating violent crime, drug trafficking, and cyber crime; protecting civil rights; and ensuring that our public and private institutions operate with integrity.

We've been working in these areas with a targeted agenda focused on producing results. I thought I would give you a sense of those results over just the past few weeks.

***

Every American deserves to live free from the fear of violent crime. We remain focused on reducing gun crime and liberating communities from the stranglehold of gang violence.

As you probably know, we're reducing gun crime across the country through the President's Project Safe Neighborhoods program. The numbers show that this initiative has been very successful. That's probably why most U.S. Attorneys across the country have started to use their PSN programs to target violent gangs operating in their districts.

As usual, those people on the front lines – including U.S. Attorneys, federal law enforcement officers, police chiefs, and community activists – know what they need to keep citizens safe. So we've responded with a comprehensive anti-gang strategy that uses the successful PSN model to shut down violent gangs that terrorize our streets and neighborhoods. Nationwide, the strategy focuses on prevention, prosecution, and preparing prisoners for a return to society.

As part of that effort, I was in Los Angeles last week to announce that L.A. is one of six areas that will participate in a pilot project to target anti-gang resources in new and imaginative ways. In addition to L.A., this program will help combat gang activity in Cleveland; Dallas-Fort Worth; Milwaukee; Tampa; and a gang corridor that stretches from Easton to Lancaster, Pennsylvania, near Philadelphia.

Each location will receive nearly $2.5 million dollars to implement innovative solutions in those three strategic areas: prevention, prosecution, and prisoner re-entry. The United States Attorney in each area will work with State, local and

community partners to intensify and expand their collective efforts to combat violent gangs.

***

When we talk about violence – especially keeping our children safe – we often fear what can happen as they walk to school, or play on a ball field, or stand on a busy sidewalk with friends. But in today's world, our children are not always safe once they come inside. They can log onto the Internet and open themselves to new and hidden threats.

The Internet must be safe for all Americans, especially children. That's why we are committed to ensuring that there are fewer places on the Web where our children are in danger.

I recently announced a major new initiative: Project Safe Childhood. The goal of Project Safe Childhood is to prevent the exploitation of our kids over the Internet – to clean up this new neighborhood just as we've worked to reduce gun crime on our city streets.

U.S. Attorneys in every district will partner with local Internet Crimes Against Children Task Forces and community leaders to develop a strategic plan based on the particular needs of their communities. They will then share resources and information to investigate and prosecute more sexual predators and child pornographers than ever before. And they will coordinate in seeking the stiffest penalties possible.

Two weeks ago, I announced the indictments of 27 people for allegedly participating in a pornographic chat room called "Kiddypics and Kiddyvids." Some participants of the chat room

have been charged with using minors to produce images of child pornography and then making those images – including live shows – available to other members through the Internet. For example, according to the indictment, one defendant allegedly produced live streaming video of himself sexually molesting an infant.

The Project Safe Childhood initiative will help us target this kind of offensive behavior and prosecute the individuals who harm our children over the Internet.

***

Even as advanced technologies help cultivate new dreams, too often those dreams are wiped out by the pitfalls of illegal drug abuse.

No community will fully prosper if drug abuse is rampant. That's why we will continue to dedicate ourselves to dismantling drug trafficking organizations and stopping the spread of illegal drugs.

Just last week, I announced the largest narcotics-trafficking indictment in our history. Fifty members of the Colombian narco-terrorist group FARC have been indicted for allegedly importing more than $25 billion dollars worth of cocaine into the United States and other countries. The FARC is responsible for overseeing the production of more than 60 percent of the cocaine imported into the U.S.

Three senior leaders of this violent group are in custody in Colombia and we've begun the process to have them extradited to the United States. Several additional FARC members appear

on the Justice Department's Consolidated Priority Organization Target, or CPOT, List – which identifies the most dangerous international drug-trafficking organizations. The list was created at the beginning of this Administration to ensure that drug enforcement resources were directed in the most productive fashion possible.

This initiative has been successful. Last year, we dismantled six of these "CPOT" organizations and disrupted the operations of six more. From Afghanistan to Mexico and from South America to the Middle East, we are identifying the world's most significant drug dealers and then working with our international partners to arrest them and extradite them to the United States for prosecution.

We're also continuing and expanding our work to combat the spread of methamphetamine across the Nation. This drug is easy to manufacture and extremely addictive. The Combat Methamphetamine Epidemic Act provides law enforcement with additional tools to disrupt the production and trafficking of meth. It establishes a national standard regulating meth ingredients, confronts the human and environmental consequences of small toxic labs, and increases penalties for convicted drug kingpins.

Law enforcement has done a good job of shutting down small meth labs here in the United States. Last year we announced the results of Operation Wildfire, which led to more than 400 arrests and dismantled more than 50 labs.

Now, we also continue to target Super Labs outside of our borders. Meth is manufactured in large quantities in Mexico, but

the finished product comes back to the United States through illegal drug trafficking routes.

The Administration is working with our counterparts in Mexico to address the production and trafficking of methamphetamine. Also, the Drug Enforcement Administration has provided training and equipment to meth-focused law enforcement teams in Mexico. To support this effort, Mexico has imposed import quotas on the primary ingredient used to make this destructive drug.

***

Forty years ago, the color of your skin was as much of an obstacle to the American dream as violent gangs, sexual predators, and drug dealers are today. We've come a long way from that brand of state-sponsored racism, but we must continue to safeguard the civil rights that are fundamental to the opportunities we cherish in this country.

All Americans should have the same chance to pursue their dreams by earning a job, finding a home for their family, and voting for their government representatives. We will continue to aggressively combat discrimination wherever it is found. I am pleased that the Department prosecuted a record number of criminal civil rights cases in the last two-year period.

Earlier this year, I announced Operation Home Sweet Home – which will refocus and expand the Civil Rights Division's Fair Housing Act testing program.

We will investigate suspected offenders with testing visits designed to expose discriminatory practices. Over the next two

years, we will bring the number of these targeted tests to an all-time high, ensuring the rights of all Americans to fairly obtain housing.

The President and I have both called for the reauthorization of the Voting Rights Act. This was one of the most important pieces of civil rights legislation in our history and deserves our Nation's attention.

Three weeks ago, I was in Chicago to announce the release of a report detailing the Justice Department's efforts to halt the pernicious evil of human trafficking – one of the foremost civil rights issues of our day.

The report tells the painfully human story of young men and women who are smuggled into the United States and sold as household servants or field workers, locked up in sweatshops and factories, or forced to work as prostitutes and sex slaves. There is no place in our compassionate society for these peddlers of broken dreams. President Bush has pledged his support for this effort, and I've made it one of my highest priorities at the Justice Department.

Because of the struggles of my parents and grandparents, I care deeply about civil rights in America today. I care about applying the law to everyone equally, so that everyone has an equal opportunity to pursue the American dream.

***

Millions of people come to America every year to pursue that dream because of the rights and liberties we've guaranteed for generations. And our government and economy are the envy

of billions more because we have systems that are open, honest, fair, and dependable.

Integrity in government and business is essential for a strong America…taxpayers and investors deserve nothing less. That's why we will investigate and prosecute corruption wherever we find it, and we will preserve the integrity of our public institutions and corporations.

***

This list of priorities is not exclusive. We have other responsibilities that are no less important to the American dream.

For instance, enforcing our immigration laws will help us remain an open and welcoming society, by cracking down on illegal activity and closing our borders to criminals and terrorists. The President has called for comprehensive immigration reform policy that is based upon law and reflects our deep desire to be a compassionate and decent Nation. I join him in urging Congress to take action that makes sense for everyone in America.

And a tough and fair sentencing system will give teeth to our enforcement objectives, improve our deterrence efforts, and ensure that every American is treated fairly before the bar of justice.

We are working hard to protect and preserve the American Dream. Today America is a safer and more secure place than it was. Crime is down, drug use is down, and we disrupting terrorist activity from coast to coast. I appreciate your

partnership as we strive to perpetuate the vital role of the Justice Department in securing that dream for future generations.

Thank you.

###

Chairman SENSENBRENNER. Thank you very much, Mr. Attorney General.

The Chair recognizes himself for 5 minutes for questions.

Mr. Attorney General, in early February I sent to you an oversight letter requesting detailed information on the NSA terrorist surveillance program. The Department's response has provided much substantive information on the legal basis for the program; however, there was one question at the center of this Committee's jurisdiction over the program that was not answered adequately. This question related to the legal debate preceding the implementation of this program and was prompted by reports that some high-level officials involved in the discussion over the legality of the program who did not agree with its legal basis.

Your response in the letter was, "The President sought and received the advice of lawyers in the Department of Justice an elsewhere before the program was authorized and implemented. The program was first authorized and implemented in October 2001."

I would like to ask you the question again today, Mr. Attorney General, so hopefully you can provide a more complete answer, and there are five parts to the question.

First, please explain how the proposal for the program was reviewed before it was authorized and initiated.

Second, who was included in this review prior to the program going into effect?

Third, what was the timeline of discussions that took place?

Fourth, when was the program authorized?

And, fifth, was the program implemented in any capacity before receiving legal approval?

Thank you.

Attorney General GONZALES. Mr. Chairman, I don't know that I have all parts of your question. What I can say is——

Chairman SENSENBRENNER. I can help you if you have forgotten.

Attorney General GONZALES. The program was not implemented before the President received legal advice regarding the scope of his authority to authorize this kind of program. The program was authorized by the President in October of 2001. Mr. Chairman, the program implicates some very tough legal issues. It implicates the requirements of the fourth amendment. It implicates FISA, which is a very complicated statute, the Foreign Intelligence Surveillance Act. It implicates the Authorization to Use Military Force. And it implicates the President's inherent authority as Commander-in-Chief.

And when you have these kinds of issues to be discussed and analyzed by lawyers, you are going to have good, healthy debate. We encourage good, healthy debate about tough issues. That is how you get to the right answers.

What I can say is that there was a great deal of debate and discussion about the program. The disagreement—and there were some disagreements. Some of the disagreements have been the subject of some newspaper publications. What I have testified before the Senate Judiciary Committee was that the disagreements that have been the subject of newspaper stories did not relate to the program that the President disclosed to the public in his radio ad-

dress in December of 2005. It related to something else. And I can't get into that, Mr. Chairman.

Chairman SENSENBRENNER. One of the questions that was asked was who was included in the review prior to the program being authorized.

Attorney General GONZALES. Mr. Chairman, who is read into the program is a classified matter so I can't get into specific discussions about specifically who was involved in reviewing the legal authorities for the President of the United States in authorizing this program. What I can say is that lawyers throughout the Administration were involved in providing legal advice to the President.

Chairman SENSENBRENNER. Mr. Attorney General, how can we discharge our oversight responsibilities if every time we ask a pointed question we are told that the answer is classified? Congress has an inherent constitutional responsibility to do oversight. We are attempting to discharge those responsibilities, and I think that saying how the review was done and who did the review is classified is stonewalling. And if we are properly to determine whether or not the program was legal and funded—because that's Congress' responsibility—we need to have answers. And we're not getting them.

Attorney General GONZALES. Respectfully, Mr. Chairman, our basis, our analysis of the legality of the program is reflected in the 42-page White Paper that was provided to the Congress. Irrespective of who was involved in preparing that analysis, that analysis represents——

Chairman SENSENBRENNER. Respectfully, Mr. Attorney General, that's your White Paper. We read the White Paper. We have legitimate oversight questions, and we're told it's classified, so we can't get to the bottom of this. Maybe there ought to be some declassification involved.

The gentleman from Michigan, Mr. Conyers, has an opening statement first, and then I'll recognize him for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman, and welcome, Mr. Attorney General.

As we meet today, I believe our Nation is on the verge of a full-blown constitutional crisis. Time and time again, when confronted with matters involving balancing the rights and liberties, the Bush administration has opted not only to intrude on those liberties, but to do so in secret and outside the purview of the courts and the Congress.

Those of us who raise these issues and voice these concerns don't do so because we want to coddle terrorists or criminals. The opposite. We do so because we have a historic and legitimate concern regarding the misuse and abuse of Government powers; not only under the PATRIOT Act but an entire array of unilateral authorities have been assumed, in my view, by the Administration since September 11.

When the Justice Department detains and verbally and physically abuses thousands of immigrants without time limit, for unknown and unspecified reasons targets tens of thousands of Arab Americans for intensive interrogations, we see a Department that has, in effect, institutionally racial and ethnic profiling, without the benefit of even yielding a single terrorism conviction.

When the President of the United States can take upon himself to label United States citizens as enemy combatants without trial, a lawyer, charges, or access to the outside world, some of us see an Executive branch that has placed itself in the constitutionally untenable position of prosecutor, judge, and jury. When our own Government not only condones the torture of prisoners at home and abroad and when we permit the monitoring of religious sites and mosques without any indication of criminal activity, we undermine our role as a beacon of democracy and make it much easier for other nations themselves to flaunt international law and human rights.

When Congress can pass laws that the President can sign on one hand and then argue does not apply to him on the other hand, we see an Executive that has cast aside the principle of separation of powers, the very bedrock on which our Nation was built.

There is no better illustration of the constitutional crisis we are in today than the fact that the President is openly violating our Nation's laws by authorizing the National Security Agency to engage in warrantless surveillance of United States citizens, and with all due respect, sir, the Department has made the situation worse by virtue of a series of far-fetched and constitutionally dangerous, after-the-fact legal justifications that you have proffered.

Who can seriously expect Members of Congress to believe that the use of force resolution that was authorized included domestic surveillance? When you yourself admitted, and I quote, "It would have been difficult, if not impossible"—in quotations—"to amend FISA to provide the wiretap authority."

In terms of inherent constitutional authority, if the Supreme Court didn't let President Truman use his authority to take over the steel mills during the Korean War in 1952 and wouldn't let President Bush in 2005 use the authority to indefinitely hold enemy combatants, it is hard to credibly argue that the Court would permit unauthorized domestic spying today.

Every Member of this panel wants the Justice Department to listen in on communications by terrorists. That's why we created a special FISA Court and created, in addition, a 72-hour emergency exception to it and made literally dozens of changes to FISA at your request over the last 5 years. But don't tell us that you don't have resources to protect our citizens privacy by completing the FISA paperwork, not when you have a budget of more than $22 billion and 112,000 employees at your disposal.

And, finally, Mr. Attorney General, if we are truly interested in combatting terror in the 21st century, we must move beyond symbolic gestures and color-coded threat levels and begin to make the hard choices needed to protect our great Nation. Let me suggest that if we really want to prevent terrorists from targeting our cities and our citizens, we need to stand up to the gun lobby and keep guns out of the hands of suspected terrorists. If we really want to prevent bombings like those which have devastated London and Madrid, we need to challenge the explosives industry to help us regulate sales of black and smokeless powder. If we want to protect our ports, our trains and railroads, and other easy terrorist targets, we need to stop passing new tax cuts for the wealthy and start

fully funding our homeland security needs and effectuate all of the 9/11 Commission's recommendations.

The reasons the terrorists hate us is because we respect the rights and liberties of all our citizens and cherish the rule of law. If we really want to defeat the terrorists, we should support and honor these strengths, not cast them aside. When we disobey our own laws, when our Executive branch ignores Congress and thumbs its nose at the courts, which we've seen in this domestic spying program, and time and time again over the last 5 years, we not only make our Nation less free, we make it less safe.

Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Does the gentleman want 5 more minutes now?

Mr. CONYERS. I would like to invite the distinguished Attorney General——

Chairman SENSENBRENNER. The gentleman is recognized for 5——

Mr. CONYERS [continuing]. To make any responses that he would like.

Chairman SENSENBRENNER. The Attorney General is recognized.

Mr. CONYERS. Thank you very much.

Did you hear what I was saying over the Chairman, sir? I'd like you to feel free to respond to anything that I've said which you may have agreement or disagreement

Attorney General GONZALES. Thank you, Congressman. I, unfortunately, have much disagreement with what you said, but I hope today that we have the opportunity to have an open dialogue and discussion, not just with you but other Members of the Committee.

I do not think that we are thumbing our nose at the Congress, at the courts. With respect to the terrorist surveillance program, we do believe that the Authorization to Use Military Force is an example of Congress providing authority, providing input into what the President should do in responding to this threat.

Now, we have to remember—I've heard some Members say, "I never envisioned that I was authorizing electronic surveillance when I authorized the President to use all necessary and appropriate force." The Supreme Court in *Hamdi*, the plurality, written by Justice O'Connor and then, of course, the fifth vote to be provided by Justice Thomas, interpreted those words to mean that what the Congress authorized was all those activities that are fundamentally incident to waging war. That's what the Congress authorized when it used those words, "fundamentally incident to waging war," all activities that are fundamentally incident. This is what you've authorized. And in the *Hamdi* decision, the Court said, therefore, you've also authorized the detention of an American citizen. Even though the authorization never used those words, "detention," Justice O'Connor said, "It is of no moment"—those were her words. "It is of no moment that we use those words." Congress has authorized the detention of an American citizen captured on the battlefield fighting against America because detaining the enemy captured on the battlefield is a fundamental incident to waging war.

We submit, sir, that the electronic surveillance of the enemy during a time of war is also fundamentally incident to waging war. It

is an activity that was conducted by Washington during the Revolutionary War, by President Lincoln during the Civil War, by President Wilson during World War I, by President Roosevelt during World War II. It is fundamentally incident to waging war, and, therefore, we believe that when Congress used those words, "all necessary and appropriate force," that it authorized the President to engage in electronic surveillance.

Mr. CONYERS. All right. Let me ask you one other question. Please indicate on the record since the beginning of the Bush administration our Government has engaged—whether our Government has engaged in any domestic warrantless surveillance outside of the emergency surveillance provisions of FISA and outside of the so-called terrorist surveillance program.

Attorney General GONZALES. Well, of course, Congressman, the United States Government is engaged in surveillance under three baskets: one under Executive Order 12333, which is classified. It has been fully briefed to the Intel Committee. There are procedures governing the collection of electronic surveillance, and that also has been fully briefed to the Intel Committee. Collection is also under FISA. And collection under the terrorist surveillance program. Those are the ways that colleague of electronic surveillance is ongoing today, as I understand it, to my knowledge.

Mr. CONYERS. And that is the extent of the surveillance that is going on.

Attorney General GONZALES. Again, I can only comment as to what the President has confirmed and as to 12333 and as to collection under FISA.

Mr. CONYERS. Well, let me try for one other question here within our time. Numerous members of the Bush administration, including the Vice President and General Hayden, have asserted that had warrantless surveillance been in place before September 11, the attack could have been avoided. Given what the 9/11 Commission has reported about this event and the FBI Agent Sametz's recent testimony regarding the disarray at the FBI, do you support their assertions, those of the Vice President and General Hayden?

Attorney General GONZALES. I've got, of course, a great deal of respect for General Hayden and for the Vice President. I'm not going to dispute their assertion.

Mr. CONYERS. I return my time, Mr. Chairman. Thank you.

Chairman SENSENBRENNER. The gentleman from Florida, Mr. Keller.

Mr. KELLER. Thank you, Mr. Chairman, and thank you, Mr. Attorney General, for coming before us today. You've just testified that you think we must enforce our immigration laws, and on March 25, President Bush in his radio address mirrored your comments. He said, "To keep the promise of America, we must enforce the laws of America."

I want to talk to you about one of the most important laws we have on the books in terms of illegal immigration, and that is the law dealing with smuggling illegal aliens into the U.S. for financial gain. As you know, that's a felony and it's punishable by a minimum of 3 years in prison under Title VIII U.S. Code Section 1324, which I am holding up.

I want to tell you something which you may not be aware of. I recently spent a full week on the Mexican-California border riding around with Border Patrol agents. I was with them 2:00, 3 in the morning as they arrested various illegal aliens and smugglers, which are also known as "coyotes." I learned some things from these Border Patrol agents directly that I want to relay to you.

These coyotes get approximately $1,500 per person that they illegally smuggle into the U.S. The Border Patrol agents told me that they have arrested some of these alien smugglers between 20 and 30 times. They tell me that the U.S. Attorney in San Diego for the Southern District of California, Carol Lam, has repeatedly refused to prosecute them, that the prosecutions have been slashed dramatically, that under the guidelines and practice of this U.S. Attorney, the only way you're really going to see a prosecution is if someone dies in the transport of the illegal aliens or if one of these alien smugglers attempts to run over someone going through a port.

One example is Antonio Amparo Lopez, who has been arrested for alien smuggling for financial gain. He has been arrested more than 20 times. He has a long criminal history. The U.S. Attorney has refused to prosecute this attorney—this alien smuggler.

It's a concern not only to me. Congressman Darrell Issa has been leading the charge on this issue. It's a concern to him. Chairman Jim Sensenbrenner has raised concerns about it. Chairman Duncan Hunter has raised concerns. Nineteen members of the Republican California delegation wrote to you and President Bush on October 20 of 2005.

The morale is so bad among these Border Patrol agents that I show you a photograph that they call the "Wall of Shame." It has pictures of over 200 coyotes that have been arrested by the Border Patrol agents in the Southern District of California who this U.S. Attorney has repeatedly failed to prosecute.

Here's some straight talk. The pathetic failure of your U.S. Attorney in San Diego to prosecute alien smugglers who've been arrested 20 times is a demoralizing slap in the face to Border Patrol agents who risk their lives every day. It also undermines the credibility that you and President Bush have when you talk tough about enforcing the laws, and it renders meaningless the laws this Congress passes to crack down on alien smugglers.

Now, as you might imagine, there is a defense that this U.S. Attorney raises. She and her assistant say, "Well, we just don't have the resources to prosecute these coyotes. We have to focus on other priorities."

Well, this U.S. Attorney has 120 U.S. Attorneys working for her, and so I wondered what they are spending their time prosecuting since this isn't a priority. And I have in my hand a press release that U.S. Attorney Lam sent out recently on March 22, 2006, bragging that they have successfully prosecuted someone who sold a baseball card with Mark McGwire's picture on it, even though there was a forged signature of the famous slugger. And if I were Attorney General for a day, I would probably call up the U.S. Attorney in San Diego and say, "Here's a tip. Stop worrying about baseball cards and start worrying about our national security and enforcing our laws."

Now, my criticism isn't personal to you or President Bush. I have very high regard for both of you. Very high regard. But my questions are two, and then I'm going to shut up and give you the chance to respond.

Question number one: What, if anything, will you do to see that the U.S. Attorney in San Diego prosecutes those alien smugglers, at least those who have been repeatedly arrested by Border Patrol agents?

And, second, what resources, if any, do you need from this Congress to give to you to make sure these coyotes are prosecuted and that our laws are actually enforced?

Chairman SENSENBRENNER. Mr. Attorney General?

Attorney General GONZALES. Yes, thank you, Congressman. The enforcement of our immigration laws is important to the President. It is important to me. I am aware of what you're talking about with respect to the San Diego situation, and we are looking into it. We're asking all U.S. Attorneys, particularly those on our Southern borders, to do more, quite frankly. We need to be doing more.

There is quite a challenge to some of our officers on the border. There are five U.S. Attorney districts that handle a great number of the immigration-related prosecutions, and so it is a tremendous strain and burden. But I think we have an obligation to determine the scope of the problem and to see what we need to address the problem. There are two things that would be helpful.

One is we hope that the Congress fully funds what the President has asked for in terms of monies for our U.S. Attorneys. That'll be very, very important so that we can have the resources available to prosecute these kinds of cases.

Two, the U.S. Attorneys along the Southern border tell me that the existing law regarding alien smugglers could be tighter. There is a discussion and debate now about what that language should be. No one wants to prosecute those who are engaged in Good Samaritan activities. Obviously, that's not—that should not be criminalized. But we believe that the language could be tighter; that would make it easier to achieve prosecutions. And we look forward to working with the Congress to arrive at language that would help us achieve that.

I directed my staff to schedule a meeting with the members of the California delegation and the DAG. I intend to call Congressman Issa as well to talk to him about this issue because I was made aware of this as a big priority for the Congressman. And we are looking at the situation in San Diego, and we are directing that our U.S. Attorneys do more, because, you're right, if people are coming across the border repeatedly, particularly those who are coyotes and they're smugglers or they're criminals or felons, they ought to be prosecuted. And so we need to try to figure out to make our resources work so that that can happen.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from California, Mr. Schiff.

Mr. SCHIFF. Mr. General, welcome to the hearing today. I appreciate all the time you're going to be spending with the Committee.

My question is really the same question that the Chairman posed at the outset, and that is, how can we discharge our oversight responsibilities given some of the positions that the Justice Depart-

ment has taken in terms of the information provided to us? But let me give a little more content to the specific questions I have.

A year ago, you testified before the Committee urging Congress to reauthorize the PATRIOT bill. You discussed at length how important, crucial, various activities and authorities were to our national security. These included provisions relating to wiretapping and other electronic surveillance.

You went at great length to describe the safeguards that were in place. For example, in discussing multi-point wiretaps, you stated that the provision "contains ample safeguards to protect the privacy of innocent Americans." In addition, you stressed the fact that an independent court had to find probable cause to believe that the target was either a foreign power or a foreign agent. And, finally, you argued that the Federaly courts have found these authorities consistent with the fourth amendment.

You also discussed how other sections might implicate personal records of Americans and also had specific language designed to protect first amendment rights of Americans.

You concluded your testimony with the admonition, pointing out the existence of thorough congressional oversight, saying, quote, that you must fully inform the appropriate congressional Committees with regard to authorities under the PATRIOT Act.

However, we've now learned that the Administration was engaging in activities that touched on the PATRIOT Act and FISA but were wholly outside any statute that—statutes that occupy this field, without informing the very individuals that you cited in your discussion of congressional oversight. And so we've now come to realize that the debate that we had over FISA in the PATRIOT bill, complete with the pledge that you and others at the Department were, quote, open to any ideas that might be offered for improving these provisions, and, quote, would be happy to consult with us and review our ideas, was somewhat meaningless or duplicitous, or worse.

In the Senate, for example, an Administration witness, when a Senator asked whether we needed to amend FISA—said, Do we need to change the standard? Are you having problems with FISA? The response was, no, FISA was just fine the way it was.

In fact, the answer to our Committee and the answer to the Senate Committee might as well have been you don't need to change FISA because, in fact, we don't feel bound by FISA or we interpret the Authorization to Use Military Force such that whatever you do here we don't feel bound by. Moreover, even if it's not in the Authorization to Use Military Force, it's within our inherent authority as Commander-in-Chief to disregard what you do on the PATRIOT bill or FISA.

And so it comes back to how do we do our job and why should we, when you come back to this Committee and ask for further authority, why should we give the benefit of the doubt to the DOJ when it may very well be that even without our authority, you're conducting surveillance that we know nothing about.

And I really—I guess I have a couple specific questions. I've introduced legislation with Representative Flake, the NSA Oversight Act, that says basically when we passed FISA in title III and we said these were the exclusive means of domestic surveillance, we

meant what we said; that the Authorization to Use Military Force didn't create an exception to that; and that if you need to change it—and there might be reasons why you need to change FISA—you should come to us and make the case for an amendment. I still think that's the right policy.

I have two questions, one of which I asked the Chief of the Office of Legal Counsel when he briefed our Committee and really couldn't get an answer from, and that is, do you believe under *Hamdi*, under the authority incident to waging war, or under your inherent authority as Commander-in-Chief, that you can surveil a purely domestic call between two Americans? The concern I have is that there's no limiting principle to the one you've established for doing what you need to do in the war on terrorism.

And the second question I have is: When you testified before this Committee last year, were you aware of the NSA program?

Attorney General GONZALES. When I testified before the Committee last year, I was aware of the NSA program. Yes, sir, I was aware. I don't believe that I said anything in that hearing that was not completely truthful.

Your question was——

Mr. SCHIFF. Whether a purely domestic call—what are the circumstances under which you could conclude you don't have to go to court to tap a purely domestic call, even though it's not within the program you have now, could you later decide on the basis of the Authorization to Use Military Force or your inherent legal authority as Commander-in-Chief, that you have the authority to take—to tap a purely domestic call between two Americans.

Mr. COBLE. [Presiding.] The gentleman's time has expired, but you may respond, Mr. Attorney General.

Attorney General GONZALES. What I will say, Congressman, is that, of course, is a different question than what the President has confirmed to the American people that this program includes. The question is whether or not, given what the Supreme Court has said, the Authorization to Use Military Force allows the Supreme Court in *Hamdi*, again, Justice O'Connor writing for a plurality said that the authorization to use force was Congress saying to the President of the United States, you can use or engage in all those activities that are fundamentally incidental to waging war. That's what the Supreme Court says that Congress meant when it used those words "necessary and appropriate force." And then the question becomes whether or not the activity that you're asking about, is that something that is fundamentally incidental to waging war against this enemy. You know, that's something that I'd want to look at, but that's the question that we would have to answer. Is domestic surveillance of Americans who have some relationship to al-Qaeda—let's just make it a little bit easier question, because I think it's a tougher question if it has no relationship to al-Qaeda, because then you can't tie it to the Authorization to Use Military Force.

However, if the conversation is one that's domestic and involving conversations relating to al-Qaeda or affiliates of al-Qaeda, then you have to answer the—ask the question: Is that—is the electronic surveillance of that kind of communication, is that something that's fundamentally incident to waging war? And you would look at

precedent. What have previous Commander-in-Chiefs done? We know that previous Commander-in-Chiefs have certainly engaged in electronic surveillance during—of the enemy during a time of war and have gone beyond that. President Wilson authorized the interception of all cables to and from America and Europe without any limitation based upon the Constitution, his inherent authority as Commander-in-Chief, and based upon an authorization very similar to the one passed by this Congress.

Mr. SCHIFF. So you can't rule out purely domestic warrantless surveillance between two Americans?

Attorney General GONZALES. I'm not going to rule it out, but what I've outlined for you is the framework in which we would analyze that question.

Mr. COBLE. The gentleman's time has expired.

The distinguished gentleman from Utah, Mr. Cannon, is recognized for 5 minutes.

Mr. CANNON. Thank you, Mr. Chairman, and, Mr. Attorney General, we appreciate your being here. I want you to know that I share the concerns that have been expressed thus far, but would like to ask you a couple of programmatic questions.

Since the 1970's, there have been significant questions about the accuracy of the National Firearms Act maintained by the ATF. The Gun Control Act of 1968 provided an amnesty whereby individuals could come forward and register weapons which were often war trophies that they got from their parents who fought overseas.

In 1998, an IG report found that the ATF contract employees had improperly destroyed NFA records and ATF employees had not followed proper procedures during the registration. This bureaucratic mess has left many of my constituents with potentially illegal guns solely because of ATF mistakes.

Would you support legislation allowing collectors to re-register so they are in compliance with the law, especially if they have the appropriate paperwork? And would you agree that an individual should not be faced with prosecution or the loss of a valuable weapon because of ATF's negligence?

Attorney General GONZALES. Well, I don't want to prejudge whether or not there should or should not be a prosecution, Congressman, without knowing the facts. I'm not familiar of the incident that you're describing, but I'd be happy to look into——

Mr. CANNON. It's not an incident. There's a report that deals with many incidences.

Attorney General GONZALES. I'm not familiar with the report, but I'm happy to discuss with you and look at legislation. I want to have the opportunity to look at that report.

Mr. CONYERS. Thank you. We'll follow up on this. It happens to be—I have just in my district many, many people who have this problem, and they have paperwork that came from the ATF, but it's ignored by——

Attorney General GONZALES. That shouldn't be the case.

Mr. CANNON. Thank you. I appreciate your stating on the record that it should not be the case, and we'll follow up with that.

Another issue that is not monumental but pretty important is the Federal Government's stubborn insistence in litigating to preserve the Federal excise tax on long-distance telephone service.

Last August—this is 7 months ago—Congressman Feeney and I wrote to you asking that the Government not seek certiorari in the American bankers case, and notwithstanding the United States did not seek cert. in the case, the IRS is continuing to insist that telecommunications carriers collect the tax, which is, of course, a relic of the Spanish-American War.

Just this past week, the Sixth Circuit denied the Government motion to rehear an earlier decision that favored the taxpayer. The United States is now zero for ten in these cases with additional appellate losses in both the D.C. and the Eleventh Circuits.

Given that complaints are being settled at 100 cents on the dollar, something that strongly indicates the weakness of the Government's position, why does the Department continue to litigate these cases?

Attorney General GONZALES. Congressman, all I will say is that we have a very earnest client and—— [Laughter.]

But, obviously, we need to see whether or not the courts are giving us a message, and so that position of the United States, as always, is being evaluated.

Mr. CANNON. Zero and ten makes one understand "earnest" to mean that they are intent on continuing to collect revenue, but perhaps not earnest in fulfilling the law which establishes their purpose.

Attorney General GONZALES. Well, Congressman, we believe there are arguments that can be made, but again, this is something that is under consideration.

Mr. CANNON. Does the Department have a policy to conform to a judicial opinion and stop litigating if it's faced with a certain number of adverse decisions? And if so, what is that number?

Attorney General GONZALES. I don't know—I don't think—there is not a specific policy. We obviously have very experienced litigators. This involves folks within the Civil Division, obviously, and the Solicitor General's office. And so as I've indicated, this is an issue that we are reviewing at the highest levels.

Mr. CANNON. Thank you. It's one that is just—it's hard to invest when you have uncertainty. We have to jerk the uncertainty out of the system because we're requiring the telecoms and other communications companies, the cable companies now, to do extraordinary things with extraordinary opportunities that will make America a much better place, and this little uncertainty makes a big difference in the whole process. I appreciate your willingness to focus on that.

Attorney General GONZALES. I certainly appreciate your concerns, Congressman.

Mr. CANNON. And recognizing that the yellow light is on, I'm not going to burden you with another question, but just to suggest that we ought to take a look at ATF's approach to absolute requirements of compliance on every particular—for licensees and I think that's—they've shown extraordinary recalcitrance to deal with Congress' insertion of the term "willful" into the requirement to revoke a license, and I would appreciate it if you would look at that. Perhaps you can follow up with a written question on that point.

Thank you, Mr. Chairman. I yield back.

Mr. COBLE. I commend the gentleman from Utah. You prevail over the illumination of the red light.

The distinguished gentlelady from Texas, Ms. Jackson Lee, is recognized.

Ms. JACKSON LEE. Thank you very much, and good morning, Mr. Attorney General.

Attorney General GONZALES. Good morning.

Ms. JACKSON LEE. It's a pleasure to have you here this morning. We do go back a long way, and we respect the Texas roots that you have.

Attorney General GONZALES. Thank you.

Ms. JACKSON LEE. So I beg your indulgence as I raise a number of concerns that cause me a great deal of, if you will, consternation. I agree with you that we are unique and responsible as stewards of the American dream, and I am uncomfortable with the fact that we have ignored that dream.

Might I cite for you a historical precedent, and that is, of course, during the Nixon years in the dark moments of the Watergate debacle, and when President Nixon asked Attorney General Elliot Richardson to fire Archibald Cox, he refused and resigned. Frankly, I think we have come over a number of years, and some of these issues have preceded you, where it would warrant the Attorney General of the United States to resign, whether it was Ashcroft or in this current instance yourself, out of principle that things were being done wrongly. Let me quickly go to a series of questions.

We now have seen the end of a tainted period in our congressional history with the resignation of a particular Member, but many lives have been impacted negatively by this influence. I sat in the Justice Department in the fall of 2003 with my colleagues from Texas discussing an untoward map that retrogressively impacted Hispanics and African Americans. There were the professional staff and there was a political staff by the name of Hans Barnes McCoffley, closely to his name. The eight career staff said that this map should be turned back because it was retrogressive. I believe that occurred in the Georgia case as well. They gave us a memo or a memo was written in December of 2003 that said that this map for Texas was retrogressive and it would injure African Americans and Hispanics.

Ultimately, of course, that memo was never seen by those of us who had to ultimately go to court, and the political operatives changed and overruled that detailed, thoughtful, compliance with the Voter Rights Act memo. In addition, they never wrote a memo to explain why they overturned it.

Of course, you might say that the courts did not allow us to prevail, but as you well know, Mr. Attorney General, in the courts the finding is on delusion, not on retrogression, and it's a much harder test in that instance than preclearance. The career professionals of the Department of Justice, of which many, many professionals over the decades have said that they've never been overturned on these cases, was overturned by political influence and grandstanding. And the lives of hundreds of thousands of Hispanics and African Americans in the State of Texas have been denied their right to be represented by the person of their choice.

I ask you to respond to that, and let me quickly give you some other questions.

Under FISA, many different questions have been asked—or many different statements have been asked about whether or not this abusive power has been used on Americans. That is our fear. I lived through, as a Member of the Select Committee on Assassinations, the investigation into the assassination of Dr. Martin Luther King. I read FBI files on the COINTELPRO program that suggested that Mr. King, Dr. King, was a communist, of which we have found that it was, of course, with no basis whatsoever.

And so can you say with absolute certainty under oath that no purely domestic communications are intercepted in connection with the warrantless surveillance program? And can you give us details that that is the case?

I also note that in your testimony you were very limited in your commentary on the voting of New Orleans on April 22nd and the preclearance that I believe was falsely given, because it was represented that the Black legislators agreed with the State of Louisiana. They did not. Can you tell me whether we can get a review of that since the premise of the preclearance was inaccurate and allow satellite voting outside of the State of Louisiana so that hundreds of thousands of Black voters and others would be able to vote?

And I ask that the General would ask those—answer those questions, please.

Mr. COBLE. Well, the gentlelady's time is about to expire, but you may respond, Mr. Attorney General.

Attorney General GONZALES. Great. Congresswoman, I must take issue with you, respectfully, regarding the comparison between what is ongoing today and what happened during the Nixon era. President Nixon engaged in conduct I think to hide conduct related to political enemies. This President came out immediately after the story ran in the New York Times. He went before the American people and said, "I authorized this." There was no coverup. He came out and said, "I authorized this."

He did so—he did so upon the advice and recommendations of folks in the intelligence community who recommended to him that we needed to have this information to protect America. He did so upon the recommendation of folks in operations who told him we have the capability and technology to give you this information. He did so upon the recommendations of lawyers in the Administration who said, "Mr. President, you have the legal authority under the Constitution to do so."

And so this is—respectfully, Congresswoman, this is not even in the same universe as what happened——

Ms. JACKSON LEE. And, respectfully, General, my time is short. Could you answer the question of whether there is domestic surveillance and what happened with the redistricting case? I appreciate it.

Attorney General GONZALES. I thought I heard your question to be whether or not can you assure us that there has not been domestic surveillance. What I can confirm is what the President disclosed to the American people. This is what he authorized. Can I tell you that mistakes have not happened? I can't give you assur-

ances that the operation has been operated perfectly. What I can tell you is that we have had the Inspector General of the NSA involved in this program. We've had the Office of Oversight and Compliance out at NSA reviewing this program from—this is from the inception. There are monthly due diligence meetings involved where the senior officials out at NSA get together and talk about how the program is operating in order to ensure that the program is operated in a way that's consistent with what the President has authorized. That's their objective. And I've been told by the lawyers at NSA and others at NSA there has never been a program at NSA that has had as much oversight and review than this program has.

With respect to New Orleans, New Orleans passed a statute—the New Orleans legislature passed a statute to allow for an election. That was precleared. Based upon additional discussions with the New Orleans Legislature, there was additional legislation passed. That is currently under review within the Department of Justice. I take issue with anyone who says that there's been any politicalization of the office. We make decisions based on what the law requires, and only that. We are not going to consider any other factors beyond what the law requires.

And the protection of civil rights to me is personal. It's very important to me personally. And I've had numerous conversations with the head of the Civil Rights Division. He understands how important this is for me that we get it right in each and every case. And so I have no reason to believe that there has been anything but strict adherence to what the law requires with respect to the New Orleans election.

Ms. JACKSON LEE. And the Texas redistricting?

Attorney General GONZALES. Well, the Texas redistricting, Congresswoman, of course, the decision to preclear was made before I became Attorney General.

Mr. COBLE. Mr. Attorney General, I hate to rein you in, but we have got a lot of folks waiting to be heard, and we are going to have a second round. So the gentlelady's time has expired.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. COBLE. I am next in line. Good to have you on the Hill today, Mr. Attorney General. After the 9/11 attacks, sir, I, along with others, indicated that one of my great concerns about subsequent attacks would likely be maritime based or by water, i.e., port or harbor.

Now, last Monday, sir, I am told that the Attorney General issued a report indicating that the FBI's efforts may not be as effective as they could be at various seaports and harbors. Now, I realize, sir, that there are multifaceted functions being performed by the Coast Guard, by Customs, by border, and FBI. How has your Department, Mr. Attorney General, reallocated its sources to investigate and prosecute offenders under the Reducing Crime and Terrorism at America's Seaports Act and to address some of the shortcomings that were raised by the Inspector General's report?

Attorney General GONZALES. It was a report from the Inspector General. We are now studying the report. We are looking carefully at the recommendations, and we look forward to moving forward and implementing those recommendations, which will make, in fact, America safer and our ports safer.

With respect to the new authorities provided to us under the reauthorization of the PATRIOT Act, my understanding is that we are in the process now of revising the U.S. Attorneys manual so that we can move forward and prosecute these new offenses, one relating to seaports. So, Congressman, what I can say is that we're looking at the recommendations made by the IG, and we'll be responding appropriately.

Mr. COBLE. Well, I am confident that we are now safer than we were prior to 9/11, but I am equally confident that our seaports continue not to be invincible. I think there's vulnerability there, and I'm not blaming you for that. It's just the nature of the beast, perhaps. But if you could keep us up to speed on your responses to the IG's report, I would be—I think the Committee would be appreciative to you for that.

Attorney General GONZALES. I'd be happy to do that, Congressman.

Mr. COBLE. As you pointed out, Mr. Attorney General, and as others on the Committee have indicated, FISA is indeed generously laced with complex issues. Let me try to simplify it and give you a very general question.

What rights does a United States citizen have regarding information that may be used against him or her under the NSA surveillance activities? That's a very general question, I'll admit, but can you give me a general answer?

Attorney General GONZALES. Congressman, can you repeat your question? I want to make sure that I understand it.

Mr. COBLE. Maybe it's too general. What rights does a United States citizen have regarding information that may be used against him or her regarding an interception or surveillance by NSA? And if that's too general, you can be more specific in your answer.

Attorney General GONZALES. Congressman, I'm afraid that in this open hearing I'm not comfortable talking about what happens to the information that's gathered from the program. What we do with the program has been briefed to the Subcommittees of the Intel Committee, so they understand what we do with the information.

I can tell you that, from the outset, we have always been sensitive to the fact that, with respect to collection under this authority, as we would be sensitive to collection under FISA or 12333, that it's done in a way that we don't compromise prosecutions or compromise investigations. So we are very sensitive about that.

I don't know if that's responsive to your question. I apologize if it's not.

Mr. COBLE. Well, I think that's maybe as well as you can do because it is—it's very generously laced with complex matters.

My time is about to expire, and I see the Chairman is back. Let me put this question—let me throw this to you, Attorney General, and we can talk about this subsequently. I'm concerned about intellectual property and the piracy related thereto. But the red light is about to illuminate. That will be for another day or maybe later today.

Attorney General GONZALES. Yes, sir.

Mr. COBLE. Do you want to say anything quickly about that?

Attorney General GONZALES. Well, intellectual property protection is, of course, extremely important and something that's referred to in our Constitution. It's very important for our economy. We need to encourage ingenuity. Part of encouraging that is to protect it, and one of the ways we protect it is through enforcement. And so we are focused on that. Also, education, quite frankly. I've done two events out on the West Coast with children, informing them, trying to educate them that intellectual property is protected and there are consequences, bad consequences if you steal it.

Mr. COBLE. Thank you, Mr. Attorney General.

The distinguished gentleman from California, Mr. Berman, is recognized.

Mr. BERMAN. Thank you very much, Mr. Chairman. Thank you, Mr. Attorney General, for being here. I'm distressed by the Administration's position and your answer on this issue of the electronic surveillance program that has come out. I noticed in response to Mr. Conyers' question you talked about the healthy debate within the Justice Department. Mr. Delahunt found an article which—in Newsweek magazine which describes that healthy debate. A group of Justice Department lawyers involved in a rebellion that basically—against lawyers centered in the office of the Vice President, and with the acknowledgment of the Deputy Attorney General at the time, led resistance against a President who wanted virtually unlimited powers in the war on terror, demanding that the White House stop using what they saw as far-fetched rationales for riding roughshod over the law and the Constitution. These lawyers found to bring Government spying and interrogation methods within the law.

The result of this was ostracized, denied promotions, and otherwise retaliated against for taking their positions.

Attorney General GONZALES. So the story says, sir.

Mr. BERMAN. That's what the story says.

In response to Mr. Schiff's question, explain to me why my thinking is wrong here. You're doing these things incidental to war. Mr. Schiff poses a question: If the President at his discretion concludes that electronic surveillance of two persons in the United States is incidental to the war on terror that we are fighting and that Congress would like to be your partner on and not simply a potted plant in this fight, if the President decides in his discretion that this is incidental to war, and without simply—perhaps by informing some—a few Members of Congress, does he have the power under your argument, does he have the authority under your argument to engage in that kind of surveillance——

Attorney General GONZALES. Congressman——

Mr. BERMAN [continuing]. Without a warrant?

Attorney General GONZALES [continuing]. Respectfully, we could spend all day talking about hypotheticals. What I've outlined is——

Mr. BERMAN. Well, your argument——

Attorney General GONZALES [continuing]. The framework—the framework that we would use in analyzing that question.

Mr. BERMAN. But the question isn't whether you're doing it. The question is whether you have the authority to do it.

Attorney General GONZALES. Well, again, you're asking me to provide a legal answer to a question, and what I've given for you is the framework in which we would analyze——

Mr. BERMAN. Well, the framework you've given—the framework you've given, there is a law about detention of people——

Attorney General GONZALES. 4001(a)——

Mr. BERMAN. Yes, there's a law about detention. The authorization of the use of force trumps that law because the President feels that he has the powers incidental to engaging that war to trump that law.

Attorney General GONZALES. You are mis——

Mr. BERMAN. To cite President Wilson—to cite President Wilson and what he did before the Supreme Court ever said that surveilling conversations between private parties constituted an unreasonable search and seizures and before there was a FISA law is not an argument that—you should have at least the intellectual honesty, it seems to me, to explain why the intervention of both the Supreme Court decisions on electronic surveillance and the passage of a FISA law don't affect what President Wilson might or might not have done or how he did it. No one wants you—as Mr. Conyers said, no one in this Congress wants you not to be able to surveil even domestic parties who are suspected or for whom there's any reasonable belief that they may be engaged or planning or participating in some way in terrorist activities. We want you to have that power.

We do think that part of this is having some third party check whether there's some reasonable relationship between what the facts are and what you want to do. That's all we're asking about. And I just—I find your notion that this is somehow solely within the Executive's prerogatives based on being incident to a war, it makes the whole debate about the PATRIOT Act ridiculous.

What are the standards? You come in and you admit last year that relevance should be a standard for seizing business records. Why? If it's incidental to war in the minds of the President, why are we spending time here playing around in something like a Young Democratic or Young Republican Convention with resolutions that have no meaning when you have this inherent power that's incidental to the power of the Commander-in-Chief during war?

Attorney General GONZALES. But, of course, sir, in that discussion about business records, we were talking about business records of everyone for different circumstances. We weren't limited focused on records relating to al-Qaeda, our enemy in a time of war. So it's a much different debate, much, much different debate.

I don't know what you're—I'm sorry if I—your question?

Chairman SENSENBRENNER. [Presiding.] The gentleman's time has expired. The other gentleman from California, Mr. Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

I don't know, Mr. Attorney General, whether you enjoy these functions as well as some of us appear to. I'm going to disappoint you. I'm not going to ask you whether you think you should resign. I'm not going to suggest that if we just raise taxes we'd get rid of our problems in the war on terror. I'm not going to suggest that

you ought to be limited to only talking about Republican Presidents and not talking about Democratic Presidents.

But I'd like to talk about something that is current that goes through a number of Administrations, and that's the disappointment that some of us have with certain aspects of the FBI's activities. The case where a Brooklyn grand jury just returned indictments against a former FBI supervisory agent, DeVecchio, for his, I'll say, participation in four murders carried out by organized crime is disturbing, to say the least, because it echoes some experiences that were brought to light by Mr. Delahunt in a valiant effort to try and suggest that in some cases the relationship between or among law enforcement, local, State, and Federal, is oftentimes skewed in the Federal direction with a lack of oversight of the FBI.

This Congress has in the past attempted to deal with this problem by requiring the Department to come up with processes and procedures that require supervision of agents. It is so disturbing to me as the former chief law enforcement officer of the State of California that I've joined with Mr. Delahunt in introducing legislation that would require the FBI to notify local or State law enforcement officials, that is, prosecutors, when there is evidence of a felony being committed with the acquiescence and knowledge of FBI agents.

And so, Mr. Attorney General, with all due respect, I ask you what the position of the Administration is on this. This is not something that's being visited upon your Administration. This is something that has existed for some period of time. And, frankly, there is a real frustration from my side—and I know Mr. Delahunt joins me in this—in a failure of the Federal Government to understand that, first, in most cases law enforcement works together, that is, local, State, and Federal; secondly, that the primary responsibility for prosecution of most violent crime, particularly homicides, lies with local and State jurisdictions; and that rogue operations allowed under the FBI in the guise of pursuing organized crime which allows organized crime to commit murder is absolutely corrosive to the process. And I have every intention with Mr. Delahunt to pursue this legislation. I guess my question would be whether the Administration would support us in this or oppose us in this. And if you would oppose us in this, could you give us some idea as to why you think that the policies in place are sufficient when we have evidence, at least to the sufficiency of a grand jury in Brooklyn, to bring an indictment against a former FBI supervisory agent?

Attorney General GONZALES. Thank you, Congressman. You're absolutely right. The Federal Government must work close together and does work close together with State and local officials. You're right, most violent crime is prosecuted at the local level, although we're finding more and more times the local officials, because we have stiffer sentences, are looking to us to try to handle some of the more difficult prosecutions.

With respect to rogue operations to allow organized crime to commit murder, which is what I think you said, I would be—well, I'm not aware that we have such a policy in place. If our policies allow this kind of conduct to occur, that would be something I would be very interested in and would look into.

In terms of your legislation, I can't comment as to whether I would oppose it or support it. I want to make sure that I understand. If we have a problem with our policy that can't be solved through our policies, then it may be something that I would support. But I'd like to get a little bit more information about where we stand and obviously look at the details of your legislation before commenting on it. But if we have a problem here, I'd be happy to work with you on it.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Just to follow through on that, Mr. Attorney General, the Inspector General did a review of the Attorney General's guidelines and found in terms of the FBI's dealings with confidential informants. There's a set of guidelines that have been promulgated by one of your predecessors, Attorney General Reno. The findings were that there were guideline violations in 80 percent—87 percent, rather, of the confidential informant files. And in terms of the notification, the requirement to notify local, State, and other law enforcement agencies, there was in excess of 40 percent failure in that regard. Let me suggest that is a real problem, Mr. Attorney General, and it's got to be addressed. And I look—you will be receiving a letter—we will give it to Will Moschella before he leaves—that is authored by myself and Congressman Lungren, and we'd like to have some answers in a timely fashion.

Attorney General GONZALES. Yes, sir. You'll have it.

Mr. DELAHUNT. Thank you.

You know, you've referenced the fact that the Intelligence Committee has been briefed on the terrorist surveillance program, however it might be described. You know, I would respectfully suggest that it's this Committee that has jurisdiction over the Department of Justice, that has jurisdiction and oversight responsibility of the Department of Justice. What about a regular briefing opportunity for you or your representatives to come before the Judiciary Committee and brief us? Is this an idea that you would entertain?

Attorney General GONZALES. Well, Congressman, obviously the Department does not operate the program. Our role is to provide legal advice as to the authorities for the program. NSA, as you know, operates the program. And there is—has been—there were 14 briefings to——

Mr. DELAHUNT. I'm not interested in how many briefings there were. I'm interested in knowing the legal basis, and if you want to do it behind closed doors, that clearly is an option. But we are here posing questions to you today, and we keep hearing, I think, the response to critical questions: "It's classified."

I have no doubt—and I'm not speaking for the Chairman, but that most Members of this Committee would be more than welcome to hear your views in a classified setting to explain the authorities and the processes that we have expressed concern about.

Attorney General GONZALES. Congressman, we have laid out our analysis of the legal authorities. The questions that I'm demurring on are questions relating to the operations of the program which are classified and which have been briefed to the Intel Committee.

But with respect to the legal authorities and our legal position, I've testified for 8 hours before the Senate Judiciary Committee.

I've testified to Senate Intel, House Intel. We've laid out the 42-page paper. So our legal analysis——

Mr. DELAHUNT. I thank you, Mr. Attorney General. You've answered the question for me.

Let me go to the Presidential signing statements issue for a moment.

Attorney General GONZALES. Yes, sir.

Mr. DELAHUNT. You know, when the President signed the PATRIOT Act, the recent version, in the signing statement he said that he would, for all intents and purposes, ignore the rules if he believed that the national security and foreign relations and executive operations might be harmed.

Those are rather large loopholes, I'm sure. And, likewise, when Congress last fall outlawed torture by Government agents, he signed the statute and then expressed in a signing statement that he would interpret it as he saw fit if he thought that national security was at stake.

You know, we're operating in the dark, again. Is there any mechanism that exists that would inform Congress as to those provisions that the President would interpret implicated national security, or are we ever going to know about it? Or is he, you know—or are we—I guess are we just—we don't want to be a constitutional nuisance, but at the same time, it's my belief that as the first branch of Government, we have a right to know what the President is going to ignore and when he's going to inform so we can fill—can fulfill our responsibility for oversight.

Attorney General GONZALES. I want to thank you for the question. I think there has been a lot of misunderstanding about signing statements.

First of all, Presidents of both parties have entered into signing statements, and Presidents of both parties, whether or not there's a signing statement or not, believe that when they sign a bill into legislation—legislation into law, that they are not waiving or giving away any authority they have under the Constitution. And so that's all those statements mean, is that to the extent the situation arises where the President, a President has the duty and has the authority under the Constitution to take action, he's going to do that, even though he may have signed legislation.

This President intends to fully comply with the McCain amendment, the McCain law. He does not believe in torture. We don't condone torture. The same with respect to the authorities under the PATRIOT Act. We intend to abide by the requirements of the PATRIOT Act, the reauthorization requirements. But, on the other hand, a President of the United States—no President can give away, certainly for himself or for future Presidents, his authority under the Constitution. And that's what those statements in the signing statement relate to.

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman, and thank you, Mr. Attorney General, for being here with us this morning.

I'd like to raise an issue that we've discussed in previous hearings with former Attorney General Ashcroft and also in my Sub-

committee with Mr. Boyd and others from the Civil Rights Division. I refer to the Memorandum of Understanding between the Department of Justice and the city of Cincinnati.

As I've stated before, there have always been concerns about this agreement's impact on the ability of the police to effectively combat crime in Cincinnati. For example, we had specific problems with the Department of Justice's effort to add overly restrictive mandates on the police related to the so-called hard hands policy and also the K-9 procedures, and we worked closely with the Cincinnati police leadership and the Department of Justice to address these issues.

As you know, Cincinnati has always had an extremely effective and professional police department. Right now, even with fewer officers than they truly need, the Cincinnati police force is doing an incredible job, but they face an increasingly difficult task.

We've seen increasing violence related in large part to drug trafficking and a murder rate that is completely unacceptable—79 murders in 2005, and just last night, a man was shot in his car in the Over-the-Rhine neighborhood of Cincinnati. That happens to be the neighborhood that the Opening Day parade goes through that we just had in Cincinnati of the first professional baseball team. The President threw out the pitch there, but this goes right through that neighborhood. And it was the third fatal shooting in that neighborhood this week, and we've already had 23 murders in Cincinnati this year.

Now, it's my understanding that after 3 years, if there's substantial compliance by the city, the parties can agree to terminate the agreement, and it's also been brought to my attention through the city's quarterly reports that the city is meeting the requirements of the agreement.

Many people in our community would like to put this in the past and allow the police department to focus on the business of protecting our citizens. How do you characterize their substantial compliance and the city's ability to meet the early termination criteria?

Attorney General GONZALES. How do I characterize it?

Mr. CHABOT. Yes.

Attorney General GONZALES. Congressman, I must confess I'm not intimately familiar with the details of this agreement, and so I don't know what our position is related to the question that you have asked. But I will find out and get a response back to you.

Mr. CHABOT. Okay. I would very much like to follow up with you and the Department, and we've had efforts in the past and your Department has in many instances worked cooperatively. So we want to continue that. But I think many want to basically make sure that the police department are not burdened with unnecessary paperwork and requirements that really keeps them from doing proactive police work to make sure that everybody in the city is protected. So I appreciate your willingness to work on that.

My second question deals with the Voting Rights Act. Over the last 6 months, I've chaired ten hearings on the Voting Rights Act in the Constitution Subcommittee, and during those hearings, among other things that we've discussed, we discussed the language provisions of the act. We're reviewing for reauthorization

those temporary provisions, not the permanent sections of the act, which is section 203.

We have seen increased enforcement and litigation in that area relative to the language requirements. Could you discuss the reasons for the increase and if you're working with those covered jurisdictions so they're able to comply with the act and the criteria for when litigation is commenced against these jurisdictions?

Mr. WILLIAMS. Well, the reason we're seeing increased enforcement litigation is because it is the law and we have an obligation to enforce the law. I think that the right to vote is perhaps the greatest right that we have. It should be available to people of all color, all ethnicities. It often represents freedom, quite frankly. It is a chance to exercise some degree of control over one's life, no matter how poor, no matter what community, no matter what background. And so it needs to be protected.

It is not a—it is not an important or a valuable right if, in fact, you can't exercise it because you can't understand English. And for that reason, that's why it's—I believe it's important that we enforce and protect the rights under section 203.

Mr. CHABOT. Thank you, Mr. Attorney General, and I assume that you'd be willing to go with us back and forth in writing to make sure that we get all the necessary information relative to the language requirements.

Attorney General GONZALES. Yes. And, by the way, I do understand that in certain jurisdictions—I met with the mayor of New York City recently, and he explained to me there are so many languages in that city and it creates a tremendous burden. And I appreciate that, and so that would be something that I think perhaps that this Committee should look at. Obviously, we want to protect the ability of people to vote. We want to ensure that people can vote, irrespective of the fact that they can't understand or speak English well. But I understand that there can be and apparently are significant burdens in some communities.

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentlewoman from Florida, Ms. Wasserman Schultz.

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman.

Mr. Attorney General, welcome to the Judiciary Committee. My question also deals with the terrorist surveillance program, and the Bush administration has stated that the congressional war authorization after September 11th provided a legal justification for the Administration to begin the NSA wiretapping. And in your essentially non-answers to both the majority and the minority's questions that we provided to you in writing, you have further indicated that you think that that's where your authorization is derived from.

Yet in a December 19, 2005, press briefing, you were asked why the Administration decided not to amend—come to the Congress and amend the FISA law so that you could have express authorization for this program, and I'll read you what your answer was to that question. You said, "We've had discussions with Members of Congress, certain Members of Congress, about whether or not we could get an amendment to FISA, and we were advised that that was not likely to be, that that was not something we could likely

get, certainly not without jeopardizing the existence of the program, and, therefore, killing the program; and that—and so a decision was made that because we felt that the authorities—the authorities were there, that we should continue moving forward with this program."

Now, Mr. Attorney General, when my kids, as a Mom, tell me that the reason that they did something without asking me is because they thought I would say no, that's really not an acceptable answer to me when my kids try to do it. So it's not an acceptable answer when the Administration tells Congress or indicates that they have not asked for our express authority in changing the law, that the answer is that you didn't think we would say yes.

This is a really disturbing program, Mr. Attorney General, and I'm really confused because you also on the one hand say that you have the authority expressly granted to you in the war authorization, yet you say the reason that you didn't ask us to amend the FISA law to give you that express authority is because you thought we'd say no.

So which is it?

Attorney General GONZALES. Well, you say it's a disturbing program. I have heard very few people say this is not a program that's important for the national security of this country. In fact, most of the people on both sides of the aisle, virtually all—everyone who is aware of the parameters of this program say this is an essential program for the protection of national security of this country.

There was——

Ms. WASSERMAN SCHULTZ. Mr. Attorney General, it's a disturbing program when you don't have express—when there's a question that has not been answered about whether you have the express authority to engage in it. That's what's disturbing, not the program itself. If you've been given that express authority, that's one thing. So if you could answer my question, I'd appreciate it.

Attorney General GONZALES. We believe that the authority does lie within the Authorization to Use Military Force, and that supplements the President's constitutional authority as Commander-in-Chief to engage in electronic surveillance of the enemy during a time of war. We believe that that authority is there under the Constitution. We also believe that the authority—that authority is supplemented by the Authorization to Use Military Force. And whether or not the words are not—whether or not the words "electronic surveillance" are included in that authorization is of no moment, to quote Justice O'Connor. The Congress authorized all those activities that are fundamental incident to waging war——

Ms. WASSERMAN SCHULTZ. Mr. Attorney General, with all due respect, I've heard you say and read all those specific comments about yours and the Justice Department's opinion. But on December 19, 2005, you specifically said that the reason that you did not come to Congress to amend the FISA law to specifically give you that authority is because you didn't think we would say yes and you didn't think—and you thought that that would jeopardize your ability to continue and move forward with this program.

Attorney General GONZALES. That was related to a conversation that we had with the leadership of the Congress, and it wasn't just

my judgment that legislation was impossible without compromising the program. It was the collective judgment of everyone there.

Ms. WASSERMAN SCHULTZ. Well, I understand that that might be who you spoke to, but it's irrelevant who you told that to. There are many Members of Congress that believe that you should have come to the Congress. There are many people in the general public that think you should come to Congress and expressly ask for that authorization.

So if you were given the opinion by some Members of Congress that we would say no if you asked for that authority, then why didn't you explore that possibility with other Members of Congress? I generally believe that if you think you don't have the authority and you don't ask for it because you think you'll be told no that that means you don't—you think you don't have the authority.

Attorney General GONZALES. Well, clearly, Congresswoman, you know, in a time of war, it's always best in my judgment to have both the Executive branch and the legislative branch working together and to be in agreement.

On the other hand, the President is Commander-in-Chief, and even Congress in the Authorization to Use Military Force recognized in that authorization that the President does have the constitutional authority to deter and prevent attacks against America. And we believe that—again, that we do have the authority. Obviously, we were aware that there may be questions about the President's authority and that's why there were discussions about seeking legislation, and there was a collective agreement that that process of pursuing legislation would compromise the effectiveness of this program.

Ms. WASSERMAN SCHULTZ. Thank you.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman, and it's good to see you again, General.

Just to assist in one of the earlier questions from my colleague from Texas on the other side of the aisle regarding the redistricting map and the litigation regarding that Federal approval, I thought it was interesting. Chief Justice Roberts during oral arguments on that pointed out that under the disastrously unfair gerrymandering done in 1991, that the Democrats had way over 20 percent more representation in Congress than they had Statewide votes; whereas, after the Republican plan——

Mr. NADLER. Chairman, we can't hear.

Mr. GOHMERT. Okay. I'd suggest some people stop talking over there.

But, anyway, that after the Republican plan last year or so, there was only a 5-percent disparity, that fortunately Republicans were taking that in the right way.

But, anyway, I did want to go back to 50 U.S.C. 1861, the provision of section (a)(1), and I'm going to ask you if you have a problem with the revision of this nature. You've indicated that they're nothing but domestic—only domestic surveillance that is connected to a foreign agent or a known terrorist have been surveiled. But under the provision of 501, there is something that nobody has

seemed to have pointed out that I picked up on, especially in view of the discussion about domestic. But under (a)(1) it says, "for an investigation to protect against international terrorism or clandestine intelligence activities."

Now, it's not under your Administration or President Bush's administration that that has ever been used, that clandestine intelligence activity has ever been used without a foreign nexus. And that's my understanding. You only pursue that if there is a foreign nexus. Is that correct?

Attorney General GONZALES. Congressman, you know, I'm not sure that I understand the question, and I apologize. It's not——

Mr. GOHMERT. Okay. My terminology is exactly from section 501. It says you can pursue an investigation to protect against, A, international—the "A" is mine—international terrorism or, B, clandestine intelligence activities. Now, there's no requirement in that provision that there be a foreign connection. And my understanding is that your office interprets that to mean, or at least you don't pursue it unless there is a foreign connection.

Attorney General GONZALES. Congressman, I apologize. I don't know the—I can't confirm that. I think that's probably right, but I——

Mr. GOHMERT. And I'm not trying to trap you.

Attorney General GONZALES. No, and I understand.

Mr. GOHMERT. But from your prior testimony, that was my understanding, that there had to be a foreign terrorist connection or you didn't pursue it.

Attorney General GONZALES. What the President has authorized is the collection of communications where one in the communication is outside the United States and where we have reasonable grounds to believe, determined by a career professional out at NSA who knows about al-Qaeda tactics, about al-Qaeda communications, about al-Qaeda aims, that that person believes there's reasonable grounds to believe that one party to the communication is a member of—a member or agent of al-Qaeda or of an affiliated terrorist——

Mr. GOHMERT. No, I've seen your answers and I understood that from your answers, and that's why this is not a trap and it's not something to bully you at all. But I would like to make sure section 501 is better clarified so that in a subsequent Administration that somebody doesn't come in and say, You know what? We're worried this church over here may be involved in intelligence activities in the community that could be clandestine. Never mind there's no foreign link. Therefore, under 501, we think we can go in and start surveilling them.

And so I was interested in protecting against future Administrations' abusing 501 in an interpretation that has not ever been done before in adding something like "foreign" to that provision. Would you have a problem with clarifying that for future use, for future Administrations?

Attorney General GONZALES. I would be happy to work with you on that.

Mr. GOHMERT. All right, thank you.

One other area, back beginning last June, when I'd seen some newspaper reports that our district attorney in Austin had indicted

corporations and then turns around and said, but you know what, if you will give $100,000 here to who I tell you to, I'll dismiss the charge. Not I don't have a case, I'll dismiss it; not I've got a case I'm moving forward. I'm going to extort $100,000 from you to pay over here, and if you'll do that, I'll go ahead and dismiss the charge. Paraphrasing, of course.

And I had pointed that out in a letter to the U.S. attorney, who kicked it back to Justice here. And then I got a letter in September indicating that. I subsequently followed up and pointed out under 18 U.S.C. section 666—interesting number—that anybody who receives more than 10 grand in Federal money and solicits money or anything of value on behalf of anybody, then they could commit a crime and go to prison for 10 years. And if we can't get the Department of Justice to follow up on what may well be a horrible case of extortion that sends a terrible message to small-time JPs or prosecutors saying, hey, you can extort money however you want to because they won't even pursue $100,000 amount.

And I'm just wondering, are you open to having your Justice Department look into those type of violations?

Attorney General GONZALES. What I can say, Congressman, is that the matter is under review.

Mr. GOHMERT. It is under review? Thank you.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Attorney General, I have several questions, but just one quick question on the wiretap, because the debate has gotten into the question of whether or not the wiretap is a good idea. The real question is whether or not a wiretap ought to be done with a warrant or without a warrant. And that's what we'd like to debate. The basis of your rationale suggests, as the gentleman from California mentioned, would cover just about anything without limitation. And the problem we have is that we really don't know, because of the answers you've given, exactly what the program is all about.

Attorney General GONZALES. Can I interrupt you just to say that the limitations that I would offer up would be the fourth amendment, search must be reasonable. And of course limitations that the Supreme Court outlined in *Hamdi,* and that is that the activity must be fundamentally incidental to waging war. So there are limitations.

Mr. SCOTT. And that decision is made without any checks and balances of a warrant, and that's what the question is. Let me——

Attorney General GONZALES. Well, the fourth amendment, sir, doesn't require necessarily a warrant. It requires that the search be reasonable.

Mr. SCOTT. Okay. And that question—and once the President determines that it's reasonable, then that's the beginning and the end.

Attorney General GONZALES. And the courts have long recognized that there are special needs outside the——

Mr. SCOTT. Let me just ask the question. When you do a wiretap, is the target selected on an individualized basis with individualized consideration?

Attorney General GONZALES. You mean in connection with this program?

Mr. SCOTT. Right.

Attorney General GONZALES. As I indicated, I don't want to get—I cannot get into the operations of this. But I can confirm that there is a determination case-by-case, by a career professional at NSA that a party to the communication is a member or agent of al-Qaeda or an affiliated terrorist organization.

Mr. SCOTT. All that consideration is made on an individualized basis for an individual wiretap?

Attorney General GONZALES. In connection with an individual communication, yes, sir.

Mr. SCOTT. And are there any wiretaps that you're doing that would not—that you would not be entitled to get a wiretap warrant for?

If you'd gone to get a warrant, could you have gotten a warrant?

Attorney General GONZALES. Well, of course, without, you know, without—I can't—I can't promise you that we—that a warrant would be approved in every case because obviously it's going to depend on the circumstances, whether or not you can satisfy the probable cause standard. So I can't answer that question.

Mr. SCOTT. On March 31, 2006, in Los Angeles, California, you made an announcement of an anti-gang initiative. In that initiative, you announced $2.5 million grants and insisted that $1 million of it go to prevention, $1 million go to law enforcement, and $500,000 to re-entry programs to slow down the revolving door when people come right back. Can you please explain to this Committee why a comprehensive approach is necessary to actually reduce gang membership, because we apparently haven't gotten that message.

Attorney General GONZALES. I believe, Congressman, that when you're talking about kids and young adults, if you're in the area of enforcement, for many of our kids in the Hispanic community and the Black community, the battle is lost. Their future is probably lost. And that's why I think it's important to focus not just on enforcement, which of course is—I think is an important deterrent, but we need to get to these kids before they join the gangs. And that's why education and prevention, I think, is equally important. And of course if we fail in discouraging kids from getting into gangs and they get into gangs and we can prosecute them and they go to jail, then we need to help them become productive members of society. If they need transitional housing, we need to provide that. If they need job readiness training, we need to provide that. If they have a problem with substance abuse, we need to provide—help them with that. So I think it does require a comprehensive approach.

Mr. SCOTT. Is it your testimony that a 60 percent for prevention and re-entry is a reasonable allocation of our resources?

Attorney General GONZALES. I couldn't comment on that, Congressman. What——

Mr. SCOTT. Well, that's a good—that's not a bad allocation.

Attorney General GONZALES. What I would say, you know, I'm the chief law enforcement officer of the country. That's my primary

focus. But I don't think I can be effective in dealing with this issue if we're not also looking at education and re-entry.

Mr. SCOTT. And you can do your job a lot better if you'll allocate more resources toward prevention. Isn't that right?

Attorney General GONZALES. Well, again, it's Congress's job to——

Mr. SCOTT. Just as you have.

Attorney General GONZALES. Congress decides where the appropriations should go. I do believe that education and prevention is an important component of addressing the gang violence.

Mr. SCOTT. Let me pose two questions to you, since my time is just about up, and get information back if you don't have time to respond. One is deaths in custody. Several years ago, as you know, we passed a bill to report deaths in custody to the Attorney General. Much of that has come in. We'd like for you to comment on that after the—later. And we passed legislation about a year ago on ID theft, which included $10 million to help you investigate consumer ID theft to the extent that people can do this kind of thing and not get caught because of the labor-intensive nature of the investigations. Do you need more money to investigate consumer ID theft?

And if you could respond to those either quickly now or in writing.

Attorney General GONZALES. On the death in custody, I will have to. On the ID theft, I'll just say that I'm not here to ask for more money, but I am here to tell you this is a serious, serious problem and I'm worried about it.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Iowa, Mr. King.

Mr. KING. Thank you, Mr. Chairman.

And Mr. Attorney General, I do appreciate your testimony here and I know it can't be an easy day. But we all are interested in a number of different areas, and you cover such a broad territory with your responsibilities. I want you to know I respect and appreciate that and I'll seek to focus on the things that are of significant interest.

There was testimony before the Crime Subcommittee about activities with regard to ATF and focusing on participants or customers in the firearms shows and some discouraging activities on the part of the ATF that might have—and I want to lay about three questions out here with regard to some of these things that have to do with the second amendment, intimidation, I would call it, of attendees at firearms shows and in fact encouraging local police officers to conduct homes—residency checks and inquiries.

Another one would be the accuracy of the reports by the firearms dealers. And I know we have at least some testimony on one particular one that had a 4/100ths of a percent margin of error, a .0004 margin or error, yet was facing and received revocation of his license. And the position of the AG's office that no errors are permissible even though the Senate Judiciary Committee report, and the language that was passed in 1986, emphasizes that the definition for the word "wilfully" with regard to errors in firearms reports is—and I'll quote—"is to ensure that licenses are not revoked for inadvertent errors or technical mistakes."

Your position on those issues. And I hit that quickly because I have another subject I hope I can get. Thank you.

Attorney General GONZALES. Well, I'm aware of the situation that you referred to in Virginia. Obviously there should not be intimidation. I think what happened there is not going to happen again, let me just say that.

With respect to the revocation of licenses, there are limits about what we can do. And I know there's some discussion about whether or not there should be more discretion given or alternatives should be pursued in terms of what happens if a license is inaccurate. And all I can say is I'm happy to look at that and work with you on that, that issue.

Mr. KING. Is it your position that the word "wilfully" has a practical significance with regard to interpretation of the law?

Attorney General GONZALES. Well, I'd like to get back to you on that.

Mr. KING. And I hope we can have a conversation on that and look forward to that?

Attorney General GONZALES. I would look forward to that.

Mr. KING. Okay, and then—let me shift to another subject. That's section 203 of the Voting Rights Act. You have testified on that to some degree with Mr. Chabot. And I'm reflecting on your statement, if you can't exercise your right to vote, then you can't—if you can't understand English. Well, unless we have the Voting Rights Act, section 203.

First I'd ask you, with the exception of Puerto Rico, if you could point out circumstances by which a person would arrive at voting age and be able to—and not have a significant command of the English language, at least to the level that they should be able to vote on a ballot in a voting booth. And in those circumstances, how does that happen in America?

Attorney General GONZALES. Well, I think you can come of voting age and become a citizen with a basic level of understanding of English. But as you know, sometimes when you get into the voting booth, you can have a long ballot, you can have some very complicated referendums, and some people are simply more comfortable if they can read it in a different language.

My own personal view, Congressman, is, is that English represents freedom in this country. You need and should be able to speak English well and read and write in English well. And so let me emphasize that. And when I talk to Hispanic groups about this issue, I tell them that's got to be a focus. If we want our kids to progress, that's important. However, I do worry about people not feeling totally comfortable when they go into the voting booth on election day.

Mr. KING. Okay, thank you.

And then, with regard to surname analysis, requiring that they use a surname analysis to determine the concentrations of certain ethnicities to direct whether the ballots need to be provided in those languages. And I would point out that, especially Hispanic surnames, are among the oldest surnames in the United States of America. People have been here the longest and may be the most proficient, among the most proficient in English. And I would submit that that's not a legitimate evaluation of the proficiency in lan-

guage and that we do have census analysis where people self-identify their language skills. Wouldn't it be more appropriate to use the census analysis for that purpose rather than just a simple analysis of surnames?

Attorney General GONZALES. It may be, Congressman. We have to look at that.

Mr. KING. And could we have that conversation as well?

Attorney General GONZALES. Yes, sir.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Maryland, Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman. And welcome, Mr. Attorney General.

Our colleague Mr. Berman in his remarks characterized part of the Administration's legal argument with respect to the wiretapping debate as a "lack of intellectual honesty," and I got to tell you, reading the 43-page report and legal analysis, I think that's an apt characterization. Let me just——

Attorney General GONZALES. Can I interrupt you?

Mr. VAN HOLLEN. Yes, you may.

Attorney General GONZALES. Okay. Can I——

Mr. VAN HOLLEN. But, Mr. Chairman, you may—if it comes out of my 5 minutes, I really—you can——

Attorney General GONZALES. Well, go ahead.

Mr. VAN HOLLEN. All right. Because I only get 5 minutes, and your response—but let me ask you this. Ms. Wasserman Schultz asked you a question regarding this is what you characterized as a collective agreement between yourself, the Administration, and certain leaders in Congress, that it would be difficult to get this authority, this express authority through Congress.

Now, let me ask you, you would agree——

Attorney General GONZALES. Without compromising the effectiveness of the program.

Mr. VAN HOLLEN. You would agree with me that if you don't have that authority, an agreement between yourself and leaders of Congress doesn't make it okay to go ahead, right?

Attorney General GONZALES. Absolutely. And whether or not FISA works or not, it wouldn't matter. I mean, that's not the question. The question is: Does the President have the authority?

Mr. VAN HOLLEN. Let me ask you this: Who—which—if you could tell us this collective agreement, what Members of Congress made this agreement with you?

Attorney General GONZALES. What I can say is that the leadership——

Mr. VAN HOLLEN. I don't think it's a question of Executive privilege. This is a discussion with Members of Congress. Can you tell us which—there is this collective agreement. Who was it?

Attorney General GONZALES. Certain Members in the House and certain Members in the Senate——

Mr. VAN HOLLEN. And you're not—you're not willing to tell us who made the collective agreement?

Attorney General GONZALES. I can say that the leadership of the Congress and the leadership of the Intel Committees.

Mr. VAN HOLLEN. Democrat and Republican both?

Attorney General GONZALES. Both sides of the aisle.

Mr. VAN HOLLEN. All right. Let me ask you—I'm trying to understand the extent to which the authorization to use force in Afghanistan is essential to your argument, so let me give you a hypothetical. If you had an organization out there that was not related to al-Qaeda in any way, under your analysis would the President still have the legal authority to intercept electronic transmissions if they believed they were someone wanting to do harm to the United States or involved in some activity or plot to do harm to the United States, under your analysis could the President use the NSA program to intercept those communications?

Attorney General GONZALES. Well, I need to go back and look at the language, the specific language with respect to Afghanistan. You're talking about the authorization to use force——

Mr. VAN HOLLEN. Yeah.

Attorney General GONZALES [continuing]. That passed? Okay. Okay. And, again, your question, Congressman? I'm sorry.

Mr. VAN HOLLEN. Well, my question goes to what extent does your argument hinge on the authorization to use force. So if you had—under the authorization the President has to make a finding that the organization is somehow related to al-Qaeda, okay? Let's say you had an organization out there we considered a terrorist organization, but it had no relationship to al-Qaeda. We suspect they're involved in a plot against the United States. Can you use the NSA wiretap?

Attorney General GONZALES. Well, then we're—look, in evaluating that question, I referred to Justice Jackson in the Youngstown analysis in terms of whether or not—what is the scope of the President's power versus congressional power. And so we believe that—it's a three-part test, as you know, and we believe that with the authorization to use force, you are in the first part. Congress—the President is taking action consistent with the express or implicit approval of Congress. And there his authority is the greatest.

If you don't have the authorization to use force, that doesn't mean that the President taking action is unlawful. It simply means you move into the third part of the Jackson analysis, where you have the President taking action, exercising his constitutional authority, minus whatever constitutional authority Congress might have in the area, and so we would have to make that evaluation as to whether or not—could Congress constitutionally limit the President's authority under the Constitution as Commander-in-Chief to engage in electronic surveillance of the enemy. That's the analysis that we——

Mr. VAN HOLLEN. Well, let me just ask you with respect to that issue. Do you think FISA—I mean, part of your argument under the authorization to use force is——

Attorney General GONZALES. I think it would—it would raise serious constitutional concerns, and, you know, I go back to Judge Silberman's statement in *In Re Sealed,* the 2002 case of the FISA Court of Review, where he looked at the—he canvassed the Court's decisions about the President have authority and said all the courts that have looked at this issue have found that the President of the United States has the inherent authority under the Constitution to engage in electronic surveillance of the enemy for foreign intel-

ligence purposes. And assuming that to be true, FISA cannot encroach upon that authority.

Mr. VAN HOLLEN. Let me ask the last question here, which is that what is it under the FISA statute, if anything—what kind of standards or criteria in that statute that would make you unable to get the authorization from the FISA Court to do the kind of intercepts that are being done now?

Attorney General GONZALES. I'm not suggesting that we wouldn't get the authorization. It's a——

Mr. VAN HOLLEN. Let me—could I give you a hypothetical?

Attorney General GONZALES. It's a question of timing.

Mr. VAN HOLLEN. If I—let me just give you a hypothetical. If we were to take the FISA justices and put them over at the NSA, in your opinion is there any intercept that you're receiving now that they would not authorize under the current FISA statute?

Attorney General GONZALES. Well, that's an impossible question for me to answer. What I will say is that the question is not whether or not a FISA Court would approve the application. The question is the time it would take. We're not talking—with respect to FISA, in a straightforward case you may be able to get approval from the Court within a matter of hours or days, or maybe weeks. But under FISA it could be days, weeks, months. And so when you're talking about fighting an enemy that we're fighting today where information is critical, in certain circumstances that's the problem that we have under FISA.

But let me just emphasize, FISA in my judgment has been a wonderful tool. It really has been, and we utilize it all the time. What people need to understand, though, is FISA—we use FISA not just for foreign—we use FISA for collections here within the United States. We use FISA against foreign powers beyond al-Qaeda. And we use FISA even during peacetime.

And so because of those circumstances, I think the restrictions that we have in FISA probably make sense when you're talking about domestic collection in peacetime. And so when we—when people start talking about amending FISA, I think people need to understand that FISA covers much more than simply international communications involving al-Qaeda.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Virginia, Mr. Forbes.

Mr. FORBES. Thank you, Mr. Chairman, and thank you, Mr. Attorney General, for being here today.

When I hear some alarming statements like we're headed for this looming crisis of confidence or this great constitutional crisis or the sky is falling, they concern me, or at least they did 35 years ago when I first read about them and I heard them being made as a political science student in undergraduate school. And then I quickly realized that every time somebody didn't like the Administration or they didn't like a particular law, they reached up and grabbed those off the shelf and used them, instead of sometimes looking at the facts.

Today, I'd like for you to examine some of the facts. In section 202 of H.R. 4437, that was where we reformed the anti-smuggling provisions in the Immigration and Nationality Act, and specifically two questions.

One is, What problems, if any, are there with the current anti-smuggling provisions? And would section 202 address those problems?

And, secondly, we've heard a lot of critics of the House bill who have alleged that these provisions would be used to prosecute priests and doctors who provide aid to illegal aliens. How valid are those allegations?

Attorney General GONZALES. Well, I would be worried about it if I were a priest or doctor, quite frankly. I know that's not the intent. As I indicated before in response to an earlier question, the U.S. Attorneys on the Southern border are concerned about the current language, the current law, and they appreciate a tightening up of the language. No one, however, wants to engage—no one wants to criminalize Good Samaritan behavior.

The other thing I worry about is creating whole carve-outs, quite frankly, because we then tell alien smugglers what conduct they should engage in and they would fall within the safe harbors provided in the statute.

And so it's a delicate balance and I understand it, but I think the law can be written in a way that we make it easier for prosecutors to go after alien smugglers, but we don't criminalize priests and doctors who simply want to help their fellow man.

Mr. FORBES. It's been reported that China has over 3,000 front companies in the United States that exist mainly to obtain sensitive U.S. technology. In February 2006, a Federal grand jury indicted two men on charges of conspiring to illegally send military equipment, including an F-16 jet aircraft engine to China, in violation of the Arms Export Control Act. Where would you rank China on the list of the top ten suspicious foreign collection efforts against the U.S.? And would you consider China to be one of the top counterintelligence priorities? And how is DOJ responding to this threat?

Attorney General GONZALES. I would consider China to be one of the top counterintelligence priorities for the Department. I would prefer to defer to perhaps the DNI or the CIA Director in terms of where I specifically would rank China. We have a very active—regrettably, we have a very active and robust counterespionage section within the Department because there are a lot of countries, of course, that are engaged in espionage against the United States from abroad and here within the United States. That counterespionage section is going to, as you know, be merged into the National Security Division. When that is stood up, I think that that will make us much more effective. We're asking for additional agents to help us with this effort. But the bottom line for us is it's a serious threat to the national security of this country.

Mr. FORBES. The last question I have for you is I am deeply concerned about the criminal prosecution of obscenity cases, and we're well aware of the proliferation of trafficking in and display of obscene material, much of which exploits children, women, and other innocent victims, and only whets the appetite of pedophiles and sexual abusers.

Can you outline for the Committee what steps the Justice Department has taken and will take to increase the investigation and prosecution of these kind of crimes?

Attorney General GONZALES. Well, it is a serious issue. I outlined in my opening statement that we've created this new initiative, Project Safe Childhood, where we want to work with the Internet Crimes Against Children Task Forces that currently exist. We want to supplement their efforts. U.S. Attorneys now understand that this has to be a priority for the Department, and through that effort we intend to provide planning in terms of the strategy district by district. We intend to provide training to State and local prosecutors. We intend to provide education, which means that we need to alert parents how serious this threat is to our children.

And so it's something that we are very focused on. We've created an obscenity prosecution task force within the Criminal Division of the Department of Justice, and I believe that there have been 46 prosecutions over the past few years. Sometimes these can be different cases to make, but we're focused on it. I think it's important. I've had a lot of parents come up to me and say they need help in protecting their children, even within their own homes.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from California, Ms. Sánchez.

Ms. SÁNCHEZ. Thank you, Mr. Chairman, and thank you, Mr. Attorney General, for being here.

As you may know, your Department entered into an agreement with California's Secretary of State to implement HAVA's voter database requirements, and that's resulting in L.A. County a rejection rate of 43 percent of all new voter registration forms. And the registrar recorder of Los Angeles County, the League of Women Voters, many others, including myself, are very concerned about the potential disenfranchisement of these voters that this could cause.

So I'm wondering if you would commit to respond to some written questions specifically regarding that database and why the rejection rates are so high.

Attorney General GONZALES. I'd be happy to do that. I was in Los Angeles just last week. I spent some time with the mayor, and he didn't raise it with me, but if this is—obviously it sounds like a serious issue. I'd be happy to look at it.

Ms. SÁNCHEZ. Very serious. Forty-three percent is a pretty high rejection rate, and I appreciate your willingness to answer some specific questions on that.

I want to move to some questions regarding immigration. Last year, the House passed Chairman Sensenbrenner's immigration enforcement bill, and one of the most controversial provisions of that legislation would make unlawful status a criminal offense. If that provision becomes law, there will be an estimated 11 million new criminals in the United States.

I know that the Justice Department has ceded authority over immigration to Homeland Security, but your Department retains the jurisdiction over enforcement of our criminal law.

So my question to you is: Does the Justice Department have the resources to arrest and process 11 million potentially new criminals in the United States?

Attorney General GONZALES. Obviously, it would present a challenge to the Department.

Ms. SÁNCHEZ. Would it require significant plus-up in funding for the Department to enforce that?

Attorney General GONZALES. Well, again, I'm not here to talk about or ask for increased funding for the Department, but it would present some significant challenges for us.

Ms. SÁNCHEZ. Okay. A 2003 Inspector General's office report found a sharp rise in civil rights and civil liberties complaints filed by immigrant detainees immediately the PATRIOT Act became law. How many civil rights complaints have immigrant detainees filed against the Department of Justice since you were sworn in in February?

Attorney General GONZALES. I do not know, but we obviously can——

Ms. SÁNCHEZ. Can you provide that information for us?

Attorney General GONZALES [continuing]. Provide that answer.

Ms. SÁNCHEZ. As well as providing us with the number of complaints that were filed, could you also break out the number of those complaints that involve acts of violence?

Attorney General GONZALES. If we can do that, yes.

Ms. SÁNCHEZ. Okay, great. As you know, immigration is a pretty timely topic, and the Senate is currently involved in the issue of how to fix our broken immigration system. And one issue that they are trying to address is employer sanctions. In 2005, the Department of Justice only instituted sanctions against three companies in the entire country for their use of undocumented labor.

So my question is: Why aren't we enforcing the laws against hiring illegal labor by applying employer sanctions on the books against those who violate those laws?

Attorney General GONZALES. I think that's an excellent question, quite frankly. Someone mentioned that to me on my West Coast trip, and I found it somewhat—I found it surprising and somewhat alarming, quite frankly. And I don't know whether it's a situation of these kinds of cases being difficult to prosecute. I don't know the circumstances, but I intend to find out. And I agree that we need to have comprehensive immigration reform, and part of that has to be enforcement of employer sanctions. They have a role to play. I think we need to—we need to have a structure in place where it's not so burdensome upon employers to make a determination whether someone is in status or out of status. But once we've got that infrastructure in place, we need to ensure that employers are following the law. And I think in order to have an effective immigration policy, that's got to be an important component of it.

Ms. SÁNCHEZ. So this is just an issue that you've recently become aware of?

Attorney General GONZALES. I recently became aware of it last week, actually, on my trip to Los Angeles.

Ms. SÁNCHEZ. So it never occurred to you that perhaps the pull for many of these immigrants is work opportunities and that one way to try to reduce that pull would be to try to enforce laws that are on the books right now——

Attorney General GONZALES. Quite the contrary. Quite the contrary. There's a reason—I know the reason why people come to this country. It's because they want a better life, a better job to provide

for their families. No, I understand why people come into this country.

Ms. SÁNCHEZ. But yet when we talk about enforcement of immigration, it seems like the enforcement aspect of it is simply upon the people that are coming and not upon the economic pull that brings them here——

Attorney General GONZALES. Well, I agree that we shouldn't just focus on the folks who are coming. We should focus on the people that are helping them come, like the alien smugglers, and we ought to be focusing on employers who are hiring them when they shouldn't be. I agree with that.

Ms. SÁNCHEZ. So you would use your leadership then to try to help enforce the laws that are on the books against those who are violating——

Attorney General GONZALES. I think that's important.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Attorney General, welcome. We are delighted to have you with us today, and we appreciate your being willing to take so many questions on such a wide variety of issues.

I'd like to talk to you about intellectual property, but before I do so, I do want to acknowledge the interests of the last Member who questioned you about immigration issues and her concern about the fact that legislation is now pending which makes people who are illegally in the country felons. As she knows, an amendment was offered on the floor of the House to revert that back to a misdemeanor status, and she and all but eight other Members on her side of the aisle voted against that amendment. So while I appreciate her concern, I'm a little perplexed by the way that she and other Members of her party have handled that, because the opportunity existed to eliminate that——

Ms. SÁNCHEZ. Would the gentleman yield?

Mr. GOODLATTE [continuing]. Provision, which I voted for. I'm afraid I don't have enough time because I've got to ask some other questions, but we'll talk, I'm sure, later.

Attorney General Ashcroft in 2004 released a report of the Department's task force on intellectual property. It was completed after a very thorough investigation and analysis and contains a number of very thoughtful suggestions, and I'd like to ask you to ask the Department to take a look back at that report to see what recommendations have been implemented, which have not, and whether or not there is anything that we can do to help you follow through on some of the recommendations that would help us to combat the unauthorized reproduction and distribution of copyrighted materials. This is a very, very serious problem around the world, but that includes a serious problem here in the United States, and——

Attorney General GONZALES. Congressman, I believe—I will confirm this, but I believe all the recommendations have been implemented or we're certainly close to it. Shortly after I became Attorney General, I decided to continue the work of the intellectual property task force so that we could move forward and make sure

that the recommendations were implemented. I agree this is a serious issue. It is an issue that I can't deal with solely within our borders, and that's why when I travel overseas, particularly to China, for example, we talk about the importance of the enforcement of intellectual property laws and the protection of intellectual property rights. And so I agree with you this is an important issue, and I can assure you that we're focused on it.

Mr. GOODLATTE. I thank you, and that is encouraging. If you would, if you could have somebody respond to the Committee with information about how the report is being implemented, that would be very helpful for us to conduct our oversight in that area.

One thing I'm particularly interested in is how many FBI agents are dedicated to intellectual property crimes, and I understand the competing priorities that face the Justice Department and the FBI, but intellectual property is our economic future and it demands a lot of attention.

Do you think the Department needs more agents in this area?

Attorney General GONZALES. Congressman, let me see what we are already doing and maybe have a conversation with the Director before answering that question. We obviously can give you an answer.

Mr. GOODLATTE. And, also, if you feel that in your efforts to implement that report and other efforts you think that we should be providing you with additional resources, including human resources, to fight piracy, please let us know that as well.

Attorney General GONZALES. I'd be happy to do that. Of course, we have recently suggested some changes in the laws, and so there are some additional tools that would be helpful. I'd be happy to visit with you about that as well.

Mr. GOODLATTE. The other area that I'd like to address with you is something that—there was a brief discussion regarding child predators earlier on, and we certainly appreciate your concern and your efforts to deal with that. I wonder if you could explain the extent to which the Department is enforcing our Nation's obscenity laws in general, including any recent prosecutions of online obscenity?

Attorney General GONZALES. Well, there's been a lot in the news lately about that. I indicated earlier that we have—in 2005, I did establish an obscenity prosecution task force within the Criminal Division at the Department of Justice. It is led by a career prosecutor. We have five attorneys dedicated to it. We have ten FBI agents. We have one agent from the Internal Revenue Service and one postal inspector. And so we've had something like, I think, 46 prosecutions in the past few years, and I believe that there are still something like 12 persons or entities under indictment. And so those represent sort of the scope of our efforts.

I must tell you, this is an area that I have concerns about. With the changing technology, it is so easy to access obscene materials. And it's so easy for our children through their cell phones, through the iPods, through computers, and it's something that I worry about, quite frankly, as a parent and as the chief law enforcement officer of the country. And I would urge Congress to likewise focus on this issue.

Chairman SENSENBRENNER. The gentleman's time has expired.

We are about ready to have a vote, and let me outline what the process will be after the bell rings.

The next Member who is up for questions is the gentlewoman from California, Ms. Waters. There will be one vote only. There is no previous question vote or no rolled votes that are scheduled. And the vote will take place at 11:30. After whoever is questioning the Attorney General at 11:30's time has expired, the Committee will then recess for 45 minutes, and 45 minutes after the recess time, we will come back.

I will call on Members who have not asked questions in the order that they have appeared, so those of you who haven't asked questions have a great incentive to come back, to be here when we start up again. And then we'll go through a second round of questions until the time we have the AG for runs out. And that will be in the order in which everybody appeared this morning rather than when they appeared this afternoon.

The gentlewoman from California, Ms. Waters, is now recognized.

Ms. WATERS. Thank you very much, Mr. Chairman.

Mr. Gonzales, you were in my district at Jordan Downs Housing Project. You came with some kind of program. I don't know what it is. I'm reading about some of it in the paper. Don't you think that it would make good sense that you would have the—give me the common courtesy of indicating that you're going to come to Jordan Downs Housing Project and you're going to pay for cameras to be installed and you're going to put together a task force or a team working with someone supposedly to deal with gang problems and crime. I was just there 2 weeks prior to your coming in, with the Black History Month celebration, with the employment project where I had UPS and a contractor with Verizon, and others coming out to help get people jobs. I have to give some hope. I wasn't able to talk with them about your visit because I didn't know about it, and now some people think that simply I came to pave the way for you to come in and bring cameras to place them under surveillance.

There probably is no good answer——

Attorney General GONZALES. The answer is it would have been courteous.

Ms. WATERS. I beg your pardon?

Attorney General GONZALES. Yes, it would have been courteous to do so. Yes, ma'am.

Ms. WATERS. Do you plan on doing that in the future?

Attorney General GONZALES. Yes, ma'am, I think that would be a good idea.

Ms. WATERS. Yes, please, don't come back without doing it, okay?

Secondly, we are in the middle of an immigration reform debate in the Congress of the United States. Many of us voted against Mr. Sensenbrenner's bill because it's too tough, it's too punitive. It makes felons out of folks who, as you said, are coming to work to try and have a better life.

We support a path to legalization, but in the middle of this debate, while we're fighting for a path to legalization, we find when we look down in New Orleans Federal contractors are hiring illegal immigrants. You're doing nothing to enforce the law. You keep talking about you enforce the law. An article that appeared in the

Los Angeles Times documents 10,000 to 20,000 immigrants and all of the description of how they're sleeping, basically on the ground, eating one meal a day, being exploited by Federal contractors. You appear to be just as blind as Brownie, who didn't see all of the folks in New Orleans who were outside the Convention Center.

Why aren't you enforcing the law?

Attorney General GONZALES. Congresswoman, we are enforcing the law. I don't——

Ms. WATERS. You're not enforcing the law. Why aren't you enforcing the law in New Orleans?

Attorney General GONZALES. Well, we are enforcing the law in New Orleans, and we do have a good story to tell with respect to, say, for example, enforcing fraud through our Hurricane Katrina Task Force.

Ms. WATERS. How many contractors have you cited for breaking the law?

Attorney General GONZALES. I don't know but we can certainly find out.

Ms. WATERS. No, don't find out and tell me. Do your job. Get a special task force. Go into the golf course. You cite those contractors who are breaking the law and exploiting these workers. You are not doing your job, Mr. Attorney General.

Attorney General GONZALES. Yes, ma'am.

Ms. WATERS. And we want it done. You add to the fire that's going on here. It's hard for us to continue to fight for a pathway to legalization while people see what is going on and the Attorney General is not enforcing the law. We cannot make excuses for you, so don't sit here and try to patronize me and talk about, yes, I understand, and, yes, I will get back to you. Don't get back to me. You just do your job.

In addition to that, let me talk to you about Georgia. Why did you override your team, your staff, Mr. Robert Berman, Amy Zebrinski, Heather Moss, and Toby Moore, who were part of a five-person task force inside your office that advised you about the ID requirements of the legislation that was presented for clearance to you from Georgia? You rejected their advice. You literally took a State with a history of denying voting rights. You literally took that State, who has a requirement to have any changes in the law cleared by you, and you overrode your staff, allowing them to require six forms of ID rather than 17 forms of ID, and still with the requirement that the ID be purchased. And this business of signing some form to say you are too poor to pay for it you seem to think is all right, and you were advised that the information was——

Chairman SENSENBRENNER. The gentlewoman's time has expired. Would the Attorney General care to answer that?

Attorney General GONZALES. We did our job with respect to looking at what the law requires and preclearing the law in Georgia. And the fact that there may be disagreement, not just within the Civil Rights Division but within every other component within the Department of Justice doesn't mean the decision was wrong or unlawful. It simply means that there may have been disagreement.

At the end of the day, the bottom line from my perspective is: Have we made the decision that is supported by the law in this case? We did.

Chairman SENSENBRENNER. The gentleman from Arizona, Mr. Franks——

Ms. WATERS. Mr. Chairman, unanimous consent for 30 seconds, please.

Chairman SENSENBRENNER. The Chair will object to that because the ground rules were established, and we're 5 minutes away from——

Ms. WATERS. Well, I'll say it anyway. Mr. Gonzales, you ought to be ashamed of yourself.

Chairman SENSENBRENNER. The gentlewoman will comply with the rules.

The gentleman from Arizona, Mr. Franks, is recognized.

Mr. FRANKS. Thank you, Mr. Chairman, and thank you, Mr. Attorney General. I have to applaud your patience and attitude here in the face of some impertinent comments from some of the Committee Members here. I think you've done a great job, and just for the record, you don't need my permission to come to my district. You're welcome anytime. And we would be glad to have the Attorney General of the United States promoting justice in Arizona.

Having said that, I know you've faced a lot of questions today related to the terrorist surveillance program by the Administration, and I would be numbered among those, sir, that believe that the President's designation as the Commander-in-Chief of the United States of America not only empowers him in this particular program, but certainly I think he would have a duty to do some of the things that I think the program is doing. I think it's very important, what you're doing.

It occurs to me that if the President has the constitutional power and even the authority from this Congress to hunt down terrorists, to ferret them out and kill them, that he probably should also—that should encompass his power to listen to them on the phone before he proceeds.

And having said that, I know that the questions have been focused on the FISA Court and the FISA issue here. And, incidentally, I think you would have been also derelict to try to bring the law—to try to change the law in the FISA Court in the face of some of the demagoguery that's in this body right now. I think you would have probably, as you say, worked against the national security in bringing that issue before the Congress.

Having said that, the FISA Court has on two occasions made clear indication that the President was—that Presidents were within their constitutional authority to surveil foreign terrorist communications in our country. Do you know of any case where the FISA Court has ever ruled to the contrary in any way?

Attorney General GONZALES. Not only the FISA Court, but I'm not aware of any court ever saying that the President does not have the inherent authority under the Constitution to engage in electronic surveillance for foreign intelligence purposes, and all of those cases were in the peacetime context. And so I think it's even more true than in a wartime context. One could make certainly a stronger argument that the President has the authority under the Constitution.

Mr. FRANKS. Thank you, Mr. Attorney General.

I am going to have to, in the interest of time here, shift gears on you here a little bit, come closer to home, in a situation that's occurred in my district that I'm really not sure how quite to handle.

With a lot of the discussion of immigration, all of us believe that the immigration laws need to be enforced and that there should be a fair and balanced approach regardless of where those immigrants come from.

Recently, some of the Serbian immigrants that have come to my district, who came here documented and in a legal fashion, I believe were subjected to what amounts to a vendetta on the part of a person within the U.S. Attorney's Office. And just to briefly explain it, this person in the U.S. Attorney's Office is a former prosecutor from the Hague and called upon some of the Serbian immigrants who were already in this country with good jobs, doing things that we would all consider productive to the United States, were called upon to testify in what would be a political trial—or a trial that—they were called upon to testify, and they felt like that this might put them in some sort of danger or otherwise, and they were in no way required to testify. But on being told that they would not testify, the U.S. Attorney suggested to them that they would be hearing from her, and they certainly were. They were arrested and their lives were disrupted in the most profound way, and the basis was a retroactive examination of their application for citizenship. And some of the reasons given were very arbitrary and not applied across the board.

I'm just wondering who would—we have contracted—we asked the U.S. Attorney to meet with us, and they refused to do that. Who would in your Department be someone that we could look to to take a look at that? Because the situation is pretty blatant.

Attorney General GONZALES. Well, why don't you communicate, if you don't mind, Congressman, with Will Moschella, who is our legislative person, and we'll see what's going on here.

Mr. FRANKS. We'll do that. Then in the 30 seconds that I have remaining, could you address the guidelines by the military on chaplains who are—in some cases the guidelines that say to certain chaplains in our military that they cannot pray according to the dictates of their own faith in a public situation. It seems to me, you know, that one of the cornerstones of all freedom is the freedom of religion. If you can tell people what to think or who to worship or how to worship, then it seems like you've taken every vestige of freedom from them.

Attorney General GONZALES. Congressman, I'd have to defer to the Department of Defense. I'm not as familiar as perhaps I should be with respect to the DOD guidelines.

Mr. FRANKS. I'm hoping you'll take a look at that, Mr. Attorney General. Thank you for being here, sir.

Chairman SENSENBRENNER. The gentleman's time has expired.

We are about ready to get to a vote, so there is now going to be a previous question vote on the rule as well as on the rule itself. I think that what we should do then is simply recess for an hour and come back at 12:30. And the order of questioning will be Weiner, Inglis, Lofgren, Flake, Nadler, Feeney, Wexler, and Issa. And then we'll go to the top of the list.

So those of you who are at the top of the list that I just read off have an incentive to be back here at 12:30.

Without objection, the Committee is recessed until 12:30.

[Whereupon, at 11:31 a.m., the Committee was recessed, to reconvene at 12:30 p.m., this same day.]

AFTERNOON SESSION

Chairman SENSENBRENNER. The Committee will be in order. A quorum for the taking of testimony is present. When the Committee recessed for the lunch break, the Attorney General was responding to questions of Members who are recognized under the 5-minute rule. We will continue that procedure this afternoon until 3 o'clock. The next in the order of appearance this morning to be recognized is Mr. Weiner of New York.

The gentleman from New York is recognized for 5 minutes.

Mr. WEINER. Attorney General, welcome.

Mr. Attorney General, do you have the highest security clearance that is available in the United States Government?

Attorney General GONZALES. As far as I know, yes.

Mr. WEINER. Is it—and this is probably an obvious question, it is illegal for you to share information you got that was classified with another citizen who doesn't have that type of clearance. is that correct?

Attorney General GONZALES. Yes.

Mr. WEINER. Is it also illegal for you to tell someone who works for you, say your deputy, to go share information? Is that still a crime for you to do, or is it just a crime for that person?

Attorney General GONZALES. Well, if I don't have the authority, I guess potentially that's a crime for me. If that's your question. I mean——

Mr. WEINER. It is. So——

Attorney General GONZALES. Would I have the authority to grant that clearance?

Mr. WEINER. No. No, what I'm saying is if this was information that was not supposed to be going to Person X, and you told the first deputy attorney general give this information to Person X. Would both he and you, both your deputy and you, be committing a crime under the existing statute?

Attorney General GONZALES. Possibly, Congressman. I guess I—I'd want to think about that, but I—yes, possibly.

Mr. WEINER. Can you tell me a situation where it wouldn't be just so I can understand the law?

Attorney General GONZALES. No. I can't tell you a situation. But again, if in fact this is a line of question that you're serious about, I'm happy to look into it.

Mr. WEINER. If I gave you any impression that I wasn't serious about my line of question, I apologize for that, because I'm asking you a serious question.

Attorney General GONZALES. Right.

Mr. WEINER. If the President, hypothetically, were to share classified information with a citizen who were not entitled to that information, not covered by the highest security clearance—this was classified information, he shared it with another person—is the President covered under the same law that you and I are?

Attorney General GONZALES. No. He's not.

Mr. WEINER. He's not. Tell me a little bit about the differences, just in the context of sharing classified information with someone who is not entitled to have it.

Attorney General GONZALES. I think the President has the inherent authority to decide who in fact should have classified information. And if the President decided that a person needed the information, that he could have that information shared.

Mr. WEINER. Under any circumstances? Just if he wanted to, say, give it for a purpose that it would help with the national security, he could share that information?

Attorney General GONZALES. He could decide—I believe the President would have the authority to simply say this information is no longer classified for purposes of sharing it with this person. I think that there's a national security interest in having this information shared with this individual.

Mr. WEINER. Gotcha. Now, if—does that authority that the President have extend all the way down the chain? For example, if he said to the Vice President, who then said it to the Vice President's chief of staff, who then said it to someone else, how far in your scene, does the President's authority only go for his direct actions or anyone working beneath him?

Attorney General GONZALES. I don't know, Congressman. That's not a question that I've ever—that I've thought about, so I don't know the answer to that.

Mr. WEINER. It's not a question you've——

Attorney General GONZALES. I don't know the answer to your question.

Mr. WEINER. Gotcha. And in the context of the present news, I'm puzzled that you hadn't thought of it. I mean, frankly, since the——

Attorney General GONZALES. Well, Congressman, I'm——

Mr. WEINER [continuing]. Testimony—let me just finish my question. Since there has now been public testimony in front—or testimony that has become public that alleges exactly that thing, that the President said to the Vice President you go reveal the—tell your deputy or you take whatever means are appropriate or you think to do this, to leak classified information, that's exactly the allegation that is being considered now by prosecutors, is it not?

Attorney General GONZALES. Well, I don't know what's being considered by prosecutors because I'm recused from that case. And that's why I haven't thought about this issue. And I don't know exactly the details of what's been reported. There's oftentimes information on television that is totally inconsistent with the truth. But——

Mr. WEINER. What is the—where were you, what job did you have at about July of 2003?

Attorney General GONZALES. I was the Counsel to the President.

Mr. WEINER. And tell me a little bit, did you—as part of your job description, not as part of your specific acts, part of your job description, offer the President advice on compliance with Federal law?

Attorney General GONZALES. Of course. Part of my job was to give the President advice regarding authorities, yes, legal authorities.

Mr. WEINER. And you'd never once considered the idea whether the President would be acting lawfully if he asked his Vice President or someone working for the Vice President to reveal top secret information? That never—that's not something you even thought about?

Attorney General GONZALES. Congressman, I can't recall whether or not that was something that I ever thought about. And if it was something that we ever discussed, it's not—it would not be something that I would disclose to this Committee.

Mr. WEINER. Understood. And just so I understand, in conclusion, what is the penalty if you, the Attorney——

Attorney General GONZALES. I don't know.

Mr. WEINER. I haven't finished the question. What is the penalty or the range of penalties if you, the Attorney General, or the President of the United States, or a Member of Congress, willingly, knowingly—leave out those other words—passed along tip secret information to someone who did not have the right to have it, didn't have the clearance? Do you have any idea what the penalties are?

Attorney General GONZALES. I do not know.

Mr. WEINER. If you could, would you——

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. WEINER. If you would be so kind before my second round, perhaps a member of your staff can get that information? Thank you.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Forbes.

Mr. FORBES. Thank you, Mr. Chairman.

Mr. Attorney General, once again thank you for being here. I've got two questions I'd like to ask. First of all, I want to clarify an earlier response that you had to a question that I asked you about the application of the anti-smuggling provisions in section 202 of H.R. 4437. If that provision were passed in the form as passed by the House of Representatives, would the Department of Justice prosecute priests and doctors who provided humanitarian aid to illegal immigrants?

Attorney General GONZALES. No, we would not.

Mr. FORBES. Has the Department of Justice ever prosecuted individuals who have provided purely humanitarian relief to illegal immigrants?

Attorney General GONZALES. No, I don't believe so.

Mr. FORBES. And in fact the language that's in the bill, your Department has looked over previously before the passage. Is that correct?

Attorney General GONZALES. That is correct.

Mr. FORBES. Okay. And the other question I had was in relationship to your response to Congressman Scott's question about gangs, when he asked it earlier, and the prevention aspects of it. The information that I have here is testimony and information that we received when we were doing the gang legislation. All the experts that we had testified in law enforcement across the country agreed on certain things about gang activity in the United States. One of the things that they agreed upon was that if we want to success-

fully go after the gangs, that we've got to do what we did with organized crime, and that is to bring down the gang networks. Would you agree with that?

Attorney General GONZALES. I would.

Mr. FORBES. The other thing that they seemed to be unanimous about is, if you looked at some of the most violent gangs we have in the country, particularly MS-13 among others, that anywhere between 65 and 75 percent of the members of that gang were here illegally. Do you agree with those numbers?

Attorney General GONZALES. I don't know with certainty, but that wouldn't surprise me.

Mr. FORBES. A huge percent, a large percentage. Now, specifically, could you tell us what prevention programs that we could utilize that would help us in going after the networks and bringing those down or help reach those individuals who are here illegally in those gangs, what would you recommend that we use in prevention programs that would stop those two aspects?

Attorney General GONZALES. Well, I don't know that I can identify specific programs that would be effective vis-a-vis the network or vis-a-vis certain kinds of gangs or certain kinds of gang members. The truth of the matter is, is that perhaps the only thing we can do is enforce the laws and prosecute these folks.

When I was talking about the importance of education earlier, what I meant—what I said, certainly intended to say, was that there is certainly a group of—a segment of our community, young kids in particular, that there is hope that we can discourage them from joining a gang. But I didn't mean to suggest that prevention or education would be effective in all cases. And as I indicated in my earlier response, as the chief law enforcement officer of the country, I am focused on law enforcement. We have about, for the 2007 budget, about $400 million that we're spending on gangs, dealing with the gang issue. And a vast majority of that is for law enforcement, because that is the primary responsibility of the Department of Justice.

Mr. FORBES. And the only reason for my question, and to follow up, is that all the testimony that we've had from families and people across the country is not that prevention programs don't have a place but, as far as our priorities, that the top priority we have is to bring down those networks, that we've got to go after the networks.

And the second thing is that many of our prevention programs, although they make us feel good and we like to do them because they're the right things to do, that sometimes, if you're talking about people coming here illegally in the first place, they bypass those prevention programs, so they're not going to be valid in pulling down the networks.

And the third thing is a lot of the kids that we want to reach are scared to death to go out in their neighborhoods to get to the prevention programs because of these networks.

And so our focus has been go after the networks, pull them down, go after the people here illegally, and then use the prevention programs. Would you agree with that approach?

Attorney General GONZALES. I agree with that approach, yes.

Mr. FORBES. Thank you, Mr. Attorney General. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. And I welcome the opportunity, Mr. Attorney General, to ask you several questions about the NSA program that has been the subject of our—so much of the questioning in the morning session.

Before I do, I think that it's important to clarify the concern here. I would guess that we would have a unanimous conclusion among the Members of this Committee and, I would say, probably among the Congress that if someone in the United States is talking to an al-Qaeda member, that we want to know about that. That's not the problem. The problem, or the concern, is whether it's really more an article I concern than a fourth amendment concern, and whether the rule of law, whether laws duly enacted are going to control the Executive branch. This isn't about President Bush, it's about the Executive branch and about the legislative branch.

So I'm seeking to understand exactly what the Department—or what the Administration has done, why they have done it. And I think a good outcome would be to regularize this in a way that preserves the rule of law, frankly.

You testified in the Senate that the Department of Justice was establishing probable cause that a party to the communication is a suspected foreign agent. Is there probable cause as to both parties to the communication being suspected foreign agents? And if not, is that the primary reason why the FISA warrants would be unavailable?

Attorney General GONZALES. I don't believe I testified that DOJ was determining probable cause in the Senate Judiciary Committee meeting—hearing. If I said that, then I misspoke. I hope that what I said was that it is career folks at NSA.

Ms. LOFGREN. All right. If—let me amend the question, then. Would that be the primary reason why a FISA warrant would not be available?

Attorney General GONZALES. Well, I—we never suggested that it wouldn't be ultimately available. I've never suggested that if an application were completed and submitted to the FISA court that it wouldn't be approved.

Ms. LOFGREN. So you're saying, if I can—I don't want to be rude, but we only have 5 minutes.

Attorney General GONZALES. Yes, ma'am.

Ms. LOFGREN. You're saying that you could get them but you've declined to do so.

Attorney General GONZALES. Well, I believe—you know, I haven't done an itemized inventory of the actions taken under the program and whether or not they would satisfy all the applications under FISA. That's something that is hard to do after the fact. But again, the problem is not that we couldn't get approval under FISA. The problem has been is that because of the procedures in place under FISA, it takes an extraordinarily long period of time in certain cases to get approval under FISA.

Ms. LOFGREN. So, if I may——

Attorney General GONZALES. Yes, ma'am.

Ms. LOFGREN. If I'm hearing you correctly, the Administration has decided not to comply with FISA because there's—as an alternative to streamlining the FISA processes.

Attorney General GONZALES. Congressman, I would characterize it differently. I would say that the Administration has decided that it is going to use all the tools that is lawfully available to it to deal with this threat.

Ms. LOFGREN. Well, we're—let me just ask, does every individual intercepted communication have a suspected foreign terrorist overseas as at least one party to the communication? And if your answer—does your answer apply only to the so-called Terrorist Surveillance Program, or would it apply to all of the Administration's intelligence programs?

Attorney General GONZALES. Well, if we're talking about the Terrorist Surveillance Program, there is a determination—and I answered this in response to an earlier question. With respect to the Terrorist Surveillance Program, there is a determination by a career official out at NSA that one party to the communication——

Ms. LOFGREN. Is overseas.

Attorney General GONZALES. That one party is overseas and that one party, that there's reasonable grounds to believe that one party is a member or agent of al-Qaeda or an affiliate terrorist organization.

Ms. LOFGREN. If that is true about the Terrorist Surveillance Program, can you make that reassurance to us relative to the other programs that are ongoing in the Administration?

Attorney General GONZALES. No, ma'am, I can't, because, for example, under FISA we're allowed to collect certain communications that may not be overseas. So long as we meet the requirements of FISA, however, you know, we're obviously committed to do so under the FISA Act.

Ms. LOFGREN. Let me ask, once a non-probable-cause party has been identified in a communication with a party who is a suspected foreign agent, are the first party's communications subsequently intercepted even where the suspected foreign agent is not a party to those communications?

Attorney General GONZALES. Congressman, you're asking me now to get into details about the operations, how we work—how this program operates. And I can't answer that question.

Ms. LOFGREN. I would hope that the Chairman——

Chairman SENSENBRENNER. The time of the gentlewoman has expired.

The gentleman from New York, Mr. Nadler.

Ms. LOFGREN. Mr. Chairman? Could I just ask that we explore a classified briefing for the parts of the answers that the Attorney General cannot give us?

Chairman SENSENBRENNER. We can explore that, but there are up sides and down sides to that, and this is not the place to discuss them.

The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you.

Mr. Attorney General, you said a few minutes ago that the President can declassify anything; that is, if the President, through the Vice President, outed Valerie Plame as a CIA agent, that would

have been legal because it's the President's decision to declassify anything he wants?

Attorney General GONZALES. Mr. Nadler, you're asking me questions——

Mr. NADLER. No, I'm asking a case. Assuming those were the facts, that would have been legal?

Attorney General GONZALES. I'm not going to answer questions related to the investigation.

Mr. NADLER. Well, but you said that——

Attorney General GONZALES. I'm recused from this case. I'm recused from the Plame investigation.

Mr. NADLER. Forget the Plame investigation. Can the President, on his own, declassify anything he wants?

Attorney General GONZALES. I believe the President would have the authority as commander in chief to determine which information——

Mr. NADLER. Yes, is your answer. Please don't waste my time. Yes.

Attorney General GONZALES. I'm not wasting your time.

Mr. NADLER. You are, because you're—I only have 5 minutes and—The answer's yes. You didn't have to say what you said.

Are there standards? Does the President have to make a finding that declassifying something is—does not injure the national security, or can he do it for political reasons?

Attorney General GONZALES. The President has the constitutional authority to make the decision as to what is in the national interest of the country.

Mr. NADLER. For whatever reason he feels like?

Attorney General GONZALES. He has the authority under the constitution to make that determination.

Mr. NADLER. Okay.

Attorney General GONZALES. My judgment.

Mr. NADLER. Okay, so he could do it for political reasons and that would be—and no one can second-guess that, if he wanted to.

Attorney General GONZALES. This President could make the decision to declassify information based upon national security reasons.

Mr. NADLER. He could do it for political reasons if he wanted to, and no one could second-guess that because he's the commander in chief. Right?

Attorney General GONZALES. The President's going to make the determination as to what is in the best interests of the country.

Mr. NADLER. Yeah, he might. But he could. I'm asking you a theoretical question about the authority of the President—not necessarily this President. A President could declassify something for political reasons and no one has the authority to second-guess him because he's the commander in chief. That's what you're saying?

Attorney General GONZALES. The President does have the inherent authority——

Mr. NADLER. Okay. Thank you.

Attorney General GONZALES [continuing]. To make the determination regarding——

Mr. NADLER. Let me ask you a different question.

Attorney General GONZALES [continuing]. Of classified——

Mr. NADLER. The Bush administration continues to claim that Guantanamo is filled with only dangerous terrorists. On March 8th, the *New York Times* revealed that a lawsuit by the Associated Press has now demonstrated the truth in shameful detail. The suit compelled the release of records from hearings for some of the 760 or so men who have been in prison at Guantanamo Bay. Far too many show no signs of being a threat to American national security. Some, it appears, did nothing at all. And they have no way to get a fair hearing because Gitmo is created outside the law. Close quote.

The transcripts describe the case, for example, of Abdur Sayed Rahman, a poor chicken farmer detained in Guantanamo for almost 5 years because he was mistaken for Abdur Zahid Rahman, the former deputy foreign minister of the Taliban, who had a similar name. This is one of many cases of mistaken identity, apparently, turning an innocent person into a prisoner without any judicial review or due process, which President Bush assured us could not occur under his vigilant watch and just due process measures.

Do you think—"I'm only a chicken farmer in Pakistan," this fellow said, when he was finally given the opportunity to appear in front of a tribunal, which the Supreme Court forced the Administration to create. Do you think in light of this information that we should perhaps give more due process not to terrorists—the Secretary of Defense said that the terrorists have no rights—but to people who haven't been determined to be terrorists? Somebody thought they might be, we paid a bounty to some Pakistani warlord and they turned over people they said were terrorists, but we don't really know that. We have to determine whether they are.

Do you at least agree that a new judicial review procedure that provides for swift processing and prosecution of detainees in a manner that ensures the country's national security but also ensures a full and fair judicial hearing for the detainee to determine whether he is in fact an enemy combatant should be instituted?

Attorney General GONZALES. No.

Mr. NADLER. Because?

Attorney General GONZALES. Because I believe that we have a process in place that goes well beyond what even the Geneva Convention requires. There was a determination made when someone was captured on the battlefield as to whether or not there were an enemy combatant. They were then sent to——

Mr. NADLER. Excuse me. Who made that determination?

Attorney General GONZALES. The battlefield commanders on the ground.

Mr. NADLER. Except that many—except that I gather that most of the people at Guantanamo were not captured by American troops on the battlefield but were given to us by various Pakistani or Afghani warlords who said that they had—who told us that they were enemy combatants.

Attorney General GONZALES. And then when we take custody of someone in that circumstance, there is another determination made as to whether or not is this person an enemy combatant.

Mr. NADLER. And on what basis is that determination made? And by whom?

Attorney General GONZALES. Well, looking at the facts, like—the same way that it was done during World War II when battlefield determinations were made on the ground——

Mr. NADLER. In World War II, people were fighting in uniforms. When we captured people, we didn't take them from someone else.

Attorney General GONZALES. Sometimes it's hard to tell who the real enemy is, particularly when they're trained to lie about their status and to lie about their conditions. And once they get to Guantanamo, once they get to Guantanamo, we do have a combatant status review tribunal process which has been in—which was put in place after the Supreme Court decision in Hamdi. There is an annual——

Mr. NADLER. I know, but——

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentleman from Florida, Mr. Wexler.

Mr. WEXLER. Thank you, Mr. Chairman.

Thank you, sir. I was hoping you can clear up some confusion I'm having. What I'm trying to do is square what—the descriptions both you and the President provide as to the surveillance programs and a specific instance that happened in my district in Palm Beach County in Florida.

Putting aside the legalities and the constitutional issues, if I understand your policy position, it's essentially this: You are the country's leading law enforcement officer. We are at war with a terrorist enemy. It's your obligation to leave no stone unturned to protect the American people. I agree. I can't imagine anyone here who would disagree.

You describe those incidents where, regardless of what type of communication it is, there is a terrorist connection and therefore you need to implement intrusive techniques or whatever techniques are available to you to protect the American people. Again, I'm with you 110 percent.

My issue comes up when the other part of the story is not told. The other part of the story, as I understand it, is warrantless surveillance programs are being conducted by agencies of the United States Government on American citizens who have nothing at all whatsoever to do with terror in any respect.

The Truth Project in Lake Worth, Florida, which has been reported by the *New York Times*, many papers, TV stations—I think the Pentagon itself has a report—essentially is a group of Americans, if I understand the group correctly—grandmothers, some Korean War veterans. They met in a church. As far as I know, church meetings are not suspect—yet. And they decided that they may disagree with the policy we have in Iraq, and they also decided that they may disagree with the way in which the United States goes about recruiting soldiers and the information that our soldiers are given. And they engaged in a program to provide different information.

They then found themselves on a "credible threat" list and found themselves subject to warrantless surveillance. Every one of them an American. Every one of them, if I understand it, has never had any training in Pakistan or Afghanistan. Their alleged violation

was freedom of speech and they may have had a political ideology that was different than yours, maybe different than mine.

Would you acknowledge for us today that agencies of the United States Government have conducted warrantless surveillance on Americans in respect to communications that have nothing whatsoever to do with terrorists or terrorism?

Attorney General GONZALES. Not to my knowledge, no.

Mr. WEXLER. Not to your knowledge. Okay. I would respectfully suggest, sir, that you review the Pentagon report and the Pentagon documents regarding the Talon Project, in which the Pentagon is going around this country identifying people as credible threats, and they're Americans that have nothing to do with terror. This is under your watch, sir, with all due respect. Please look into it.

If I could follow on a totally different issue. Twenty-five thousand American women every year are raped in America and then become pregnant as a result of the rape. If I understand, the Department of Justice national protocol for sexual assault medical forensic examinations rules that have been provided under your watch, sir, you do not allow for the provision of emergency contraception information. Emergency contraception that would prevent, after a rape, 25,000 American women from becoming pregnant. What's the justification? What's the justification for putting 25,000 American women through a double hell after having been sexually assaulted, of then going to an American hospital and knowing that our own Department of Justice provides rules that exempts out information that might prevent that poor victim of a sexual assault from having to go through the double trauma of getting pregnant as a result of it? What's the justification?

Attorney General GONZALES. I'll have to get back to you with an answer on that, Congressman.

Chairman SENSENBRENNER. The gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman.

General Gonzales, I very much appreciate your being here and being here particularly for such an extended period of time. I apologize that I wasn't here for the first round earlier—I'm sorry, for my normal place in the first round, Mr. Chairman, you're right.

But I have looked over your dialogue with Mr. Keller and I want to, first of all, thank you for recognizing the challenges we face in the border in San Diego, also your willingness to meet with the California delegation, to take this a little further on a personal basis.

I would like to just delve into this just a little bit more in one sense. Over a year ago, we got the appropriators to agree to create opportunities for earmarking of additional dollars, over a million dollars, to allow for coyote, or illegal—people who smuggle illegals, but it doesn't seem to have gone in the right direction. And I know that you said full funding would make a difference. Can you quantify for me, when you say "full funding," now, and if not completely now then in writing, what are we talking about to have a zero tolerance for people who traffic in human beings?

Attorney General GONZALES. I can't give you specific numbers, Congressman, but would be happy to try to get that information for you.

Mr. ISSA. Can you give me an idea of—the best way to put this is, do you believe that the courts could handle this if—and we're not talking about the illegals, we're just talking about the people who are the smugglers. Do you believe the courts can handle that within their capacity, separate from the question of U.S. attorneys?

Attorney General GONZALES. I would have concerns about it, quite frankly. I know a lot of the courts, particularly along the border, are straining with dealing with these kinds of cases. And so this would clearly present additional challenges for those courts. For that reason, I think one thing to consider is whether or not we need additional judges. That would be one thing to consider.

Mr. ISSA. Well, you know, we added five additional judges in San Diego, so that was one of the reasons for my question, is that we did reduce the case load down to at or around the national average. But I would appreciate it in your response, in addition to the dollars, if you could give us an estimate of the human power that would be necessary to be added either in the prosecution or, of course, in the Federal courts, because this Committee has jurisdiction over both.

Lastly I'd like to talk to you about is there a way, in your opinion, if we don't dramatically reduce the capability, the capacity of human smugglers, is there a way to prevent the smuggling of Hezbollah or al-Qaeda or other operatives through our southern border?

Attorney General GONZALES. It would be hard.

Mr. ISSA. Okay. That covers me today. My thanks. And thank you, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. Thank you for being here, Mr. Attorney General. I apologize for missing my place in the first round also.

I'm interested in all of the issues that have been raised on a more global level and terrorism, but the thing that I'd really like to focus on in my questioning is what's going on in our communities. There was an extremely troubling report about Black males and their condition and plight, employment, prison, confinement being even more dramatically worse than even the official statistics would have you believe. And we've known that it's been a really serious issue and problem for a long time.

In your opening statement, which I was here for because I wanted to hear the general parameters that you were going to cover, you mentioned one of your initiatives being preparing prisoners for return to society. And that's an issue that's disproportionately important to African Americans because African Americans, especially males, are disproportionately in the prison population. And what they're finding is that once they have any kind of prison record, there's really no re-entry programs, there's not treatment, there's no jobs. They can't get a job, they can't vote in a lot of States when they come out of prison. So it's just a vicious cycle. They almost don't have another alternative but to return to the same kind of life.

So I guess my specific question is can you talk to us a little bit more about what that prisoner re-entry initiative is that you made

reference to in your opening statement. And on a more general level, are there other things that you perceive that your office can do in conjunction with Members of Congress, other people who are interested in attacking this serious problem that, in our estimation, is exacerbated by our drug policy and our sentencing policy. Are there things that you can propose that we ought to be working on together to try to address this on a very serious level?

Attorney General GONZALES. Thank you, Congressman. You're right, this is a problem. The President believes that we have an obligation to try to work with those in prison to ensure that when they're done their time, that they can become productive members of our society. Now, for that reason, he does support, as do I, programs like Prison Industries, where people in prison can learn job skills. We also support programs like Life Connections, which we have in five prisons and we hope to expand to eight next year to provide basic services to people in prison.

What I spoke to specifically in my opening was related to part of the focus of gangs. We have a new gang initiative and it is focused on three components. One is education, one is enforcement, and the other is prisoner re-entry. We have focused—these are kind of like pilot projects, but we're trying to see whether or not this kind of approach works in these specific neighborhoods. They were based upon the applications submitted by the U.S. attorneys in these neighborhoods looking at the specific needs in those districts and submitting an application that we believe would be effective in those areas.

So it would be a program, with respect to the prisoner re-entry part of it would look at whether or not prisoners, did they have—did they need transitional housing when they got out; if so, is that something that could be provided. If they had problems with drugs, could we provide substance abuse treatment in connection with their departure from prison. If there was a question regarding getting them ready for jobs or some kind of job-readiness programs that we could put in place.

And so, again, these are targeted on six projects around the country to see whether or not we can focus on the specific needs of these particular areas from the education, enforcement, and prisoner re-entry side.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Arizona, Mr. Flake.

Mr. FLAKE. Thank you, Mr. Chairman.

Thank you, Mr. Attorney General. I want to follow along with the questioning that Adam Schiff started with regard to the warrantless wiretaps, the NSA program.

I just want to understand your answer. I wasn't here when he questioned, but was briefed by him. You mentioned that you would not rule out wiretapping solely domestic calls, domestic-to-domestic calls, under the inherent authority that the President received under the War Resolution that we passed here. Is that correct?

Attorney General GONZALES. I can't rule it out, but let's remember the framework in which I've outlined, and that is, is that we are at war with al-Qaeda, there is a long history of presidents engaging in electronic surveillance of the enemy during a time of war. I don't think anyone can argue that the electronic surveillance of

the enemy during a time of war is a fundamental incident of waging war, which the Supreme Court says the authorization of the use of military force is what Congress provided to the President of the United States.

And so the question is, if you're talking about domestic surveillance involving al-Qaeda during a time of war, when we're at war with al-Qaeda, it's not something that I would rule out.

Mr. FLAKE. But the context for which——

Attorney General GONZALES. But that's not what the President has authorized. I want to emphasize that.

Mr. FLAKE. Can we be confident that there are no ongoing programs, or no programs that have been started and stopped, that have solely domestic-to-domestic, that have conducted surveillance on domestic-to-domestic communications?

Attorney General GONZALES. Congressman, I can't comment on anything beyond what the President has said, although I will say that in terms of what the activities of the program have been and are, have been briefed to certain Members of Congress.

Mr. FLAKE. Let me just say that we—all of the discussions we've had with regard to the PATRIOT Act have been during the time at which we are at war. And what I seem to be hearing is that these are, you know, maybe interesting or fun, but they're irrelevant.

Attorney General GONZALES. Not at all. A lot of the changes in the PATRIOT Act, even those changes related to FISA, are changes that were necessary, quite frankly, and would have been necessary irrespective of our conflict with al-Qaeda. And you have to understand that the tools of the PATRIOT Act go well beyond our conflict with al-Qaeda. They apply in the domestic context, for threats to our communities that go beyond al-Qaeda——

Mr. FLAKE. I understand, but——

Attorney General GONZALES [continuing]. And they apply in the peacetime context.

Mr. FLAKE. I understand. But with regard to domestic surveillance of communications solely domestic, domestic-to-domestic, you're saying that you don't rule out or you see it as still in the President's inherent authority to go ahead and do that without regard to the strictures of either FISA or, in this case, the PATRIOT Act.

Attorney General GONZALES. Well, again, every court that has looked at this issue has determined that the President does have the inherent authority under the Constitution to engage in electronic surveillance for the purpose of gathering foreign intelligence.

Mr. FLAKE. Let me shift gears here for a minute. In 1984, Congress enacted the Material Witness Law under which individuals can be detained as witnesses in an ongoing investigation. It seems that this has been taken beyond its original purpose. We have many, many cases now of individuals being detained for months at a time as material witnesses when there is no grand jury convened or no ongoing investigation with which they are going to be called as a witness.

Do you feel that the Material Witness statute has been used appropriately? Would you entertain or would you suggest that we need—do you need additional authorities so that you can actually

hold people who are suspected terrorists, rather than holding them under a statute that is ill-suited for that purpose?

Attorney General GONZALES. Congressman, I would respectfully disagree with your characterization. We can only hold people under a material witness warrant with the approval of a judge and under the supervision of a judge. And even if under those circumstances, I mean, the person is entitled to a lawyer, the person can disclose the fact that the person's being held as a material witness under a material witness warrant. I think people have——

Mr. FLAKE. Excuse me, I don't believe that's accurate that they are entitled to lawyer. Some have been held for weeks without access to a lawyer.

Attorney General GONZALES. Well, I can't—I can't——

Mr. FLAKE. The case of Brandon Mayfield.

Attorney General GONZALES. I can't comment on the specifics. Well, there the IG did not make a determination and a material witness warrant was inappropriate in that case. I think the finding there was that certain conditions—certain representations made in connection with acquiring the warrant didn't appear to be accurate. And I think that's what the IG held.

But in response to your question, I support the use of material witness warrants. People have this misperception that we're using these in all kinds of cases. In probably about 96 percent of the cases, we're talking about immigration cases, where we need material witness warrants in order to secure someone who is an undocumented alien and who would otherwise flee. Someone who is an undocumented alien, who has testimony that would help us prosecute an alien smuggler.

Chairman SENSENBRENNER. The gentleman's time has expired. We will now being the second round of questioning. According to the order that I have announced earlier, the gentleman from Michigan, Mr. Conyers, is recognized.

Mr. CONYERS. Attorney General Gonzales, could there be a possibility, and would you be willing to initiate the action that would compel the State of Louisiana to implement out-of-State satellite voting procedures similar to those made available for Iraqi citizens in their national elections?

Attorney General GONZALES. As an initial matter, Congressman, I think the procedures decided upon the State elected officials should be—I mean, I think they have the primary responsibility to decide what those procedures are. Now, having said that, those procedures must meet the requirements of the Constitution. This is a matter that has been reviewed by the Department of Justice, but more importantly has been reviewed in the courts. And while we can always argue about whether or not we could do more to ensure that people have the right and the ability to vote, the determination has been made, is that the legal requirements have been——

Mr. CONYERS. But would you advocate such a procedure, or would you feel compelled to not support such a procedure if it came forward?

Attorney General GONZALES. As a general matter, Congressman, I'm always in favor of doing what we can to encourage more people to vote.

Mr. CONYERS. It would expedite voting a great deal because, as we know, the candidates don't know where the voters are and the voters don't know who the candidates are. It's a big dilemma. I just wanted to get the maximum amount of support that I could from you on this very, very important and timely question.

Now, let me ask you about the whole area of special counsel. We've never had—this is the first Department of Justice where over 5 years we've never had one special counsel appointed pursuant to 28 C.F.R. Part 600. And I was wondering if there is some problem about special counsel. We have this epidemic of torture in Abu Ghraib, Guantanamo Bay, Iraq. We have problems with military contractors over there. We have the Thomas Noe fund-raising scandal in Ohio, the demotion of U.S. Attorney Frederick Black for daring to investigate Jack Abramoff. Potentially unconstitutional wiretapping.

I don't want to make these up or give you a laundry list. The fact of the matter is that it seems extraordinary to some of us on the Committee on Judiciary that, in all of this time, there's been no recourse to special counsel.

Attorney General GONZALES. Well, of course, Mr. Fitzgerald——

Mr. CONYERS. No, he—I don't think he's a special counsel in the terms that I'm using.

Attorney General GONZALES. Well, are you talking about—are you thinking in terms of more like an independent counsel?

Mr. CONYERS. Under the regulations in 28 C.F.R. Part 600. Because the special counsel has to make a report when all this is through.

Attorney General GONZALES. Let me just say this. You did indicate certain events or activities that you felt might warrant a special look. In each and every one of these cases there has been an examina—for example, what happened at Abu Ghraib. There have been multiple hearings. There have been multiple investigations.

Mr. CONYERS. But in the end, you don't feel that it's unusual that there have been no special counsels?

Attorney General GONZALES. Well, we have, obviously, procedures in place. We have career folks that give me advice as to when it may or may not be appropriate to appoint a special counsel. And if the circumstances dictate it, that'll happen.

Mr. CONYERS. All right, let me raise this with you, finally. Why have there been 40 percent decline in the Civil Rights Division prosecution of cases for racial discrimination and gender discrimination? Has that been brought to your attention?

Attorney General GONZALES. Well, I don't—my understanding is, is that overall there's been an increase in the Civil Rights Division with respect to prosecutions. And so I don't know about that specific, that specific number, but——

Mr. CONYERS. We're not talking about immigration cases. We're talking about——

Attorney General GONZALES. I understand that.

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentleman from California, Mr. Schiff.

Mr. SCHIFF. Mr. Attorney General, I wanted to follow up a bit on our earlier dialogue on the NSA issue. You mentioned both in

reference to my question and Representative Flake's on the issue of whether you have the authority to do purely domestic eavesdropping between two Americans, that where there was an al-Qaeda link you can't rule out the inherent authority to do that without going to court.

The question I have is, we're talking about between two Americans. Now, I realize that it's certainly possible that one of those Americans could be affiliated with al-Qaeda, much as I hate to think of the prospect. The question I have, though, is, where you have a call between two Americans on American soil, who outside the Executive branch would ever oversee the Executive branch's decision to use its inherent authority to eavesdrop on that call? Who would be able to provide any oversight of that?

Attorney General GONZALES. Well, of course, Congressman, we do—we do communicate with certain Members of Congress about what we're doing here. People at the NSA take very seriously their obligations and the limitations that have been imposed with respect to the collection of electronic surveillance.

Mr. SCHIFF. Mr. Attorney General, I don't doubt that. The problem is that they're not incapable of error any more than we are.

Attorney General GONZALES. Well, of course, even the fourth amendment doesn't expect perfection. So long as a mistake is made——

Mr. SCHIFF. No, but it does—but the Fourth——

Attorney General GONZALES [continuing]. That's reasonable, then that's permissible.

Mr. SCHIFF. The fourth amendment does expect that there is a system of checks and balances, where the courts have a role in overseeing the legitimate expectation of privacy of Americans. And in a situation where the Executive arrogates to itself the power to eavesdrop on a purely domestic call between two Americans without any court review before, without any court review after, or can't rule it out, there is no outside oversight of that. We can't do it.

You mentioned today the problem with FISA is, and you mentioned some problems with FISA—you said it could take days, it could take hours, take weeks or months to get approval. It may be the first time anyone has come before our Committee, other than minor changes to FISA, and said there was a problem with FISA. Indeed, as I mentioned earlier, in the Senate the testimony was there isn't a problem with FISA.

The question I have, you have to acknowledge that even in the best of circumstances, with the best white paper you've drafted, the legal questions are still very problematic. And if that's the case, why not come to the Congress? Why didn't the Justice Department come to the Congress and ask us to change FISA? If you couldn't do what needed to be done to protect the country, why not come to Congress, why not come to this Committee? We can have classified hearings just as the Intel Committee can have. We are no less bound by the oath to maintain the confidentiality of classified information than the Intel Committee is.

But we have a slightly different mission than the Intel Committee in that we have a primary responsibility to make sure that what the Executive does meets the requirements of the Constitu-

tion. That's a slightly different focus than the Intel Committee, which also has an obligation, but not in the same way we do.

Why didn't the Justice Department come to the Congress and ask us to amend FISA?

Attorney General GONZALES. Congressman, I think that I've already answered that question. There was some consideration about doing that and ultimately there was a collective agreement that that would not be possible without compromising the effectiveness of the program.

Now, the circumstances are different now. People now know——

Mr. SCHIFF. Does that mean because you couldn't trust Committee Members to keep the information classified? I mean, why—al-Qaeda shouldn't care whether you have to go to court or not. But we care whether there's some oversight. We all agree that the eavesdropping should take place if it's necessary to do so. The only question is whether there is some outside review of your decision-making to make sure that it's being done properly.

I still don't understand. Yes, you have answered the question, but I still don't really understand the answer. I don't understand why you couldn't have come to Congress and asked us to change the law, as you have—Why didn't it compromise our national security to ask for the changes you did as for in the PATRIOT bill?

Attorney General GONZALES. Well, but again, because what we asked for in terms of changes for the PATRIOT Act were changes that would apply not just to al-Qaeda, not just during a wartime situation. This was generally to respond to threats to our communities, to our neighborhoods around the country. And so to come into the Congress and say, okay, we need this change in the PATRIOT Act because we're doing this against an enemy we're at war with, I think it's a much different story.

Chairman SENSENBRENNER. The time of the gentleman has expired.

At this point, I'd like to ask unanimous consent that an article submitted by Mr. Conyers from the *Washington Post* of Sunday, November 13, 2005, entitled "Civil Rights Focus Shift Roils Staff at Justice," be inserted in the record. And without objection, so ordered.

[The information referred to follows in the Appendix]

Chairman SENSENBRENNER. The gentleman from California, Mr. Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

Mr. Attorney General, in the PATRIOT Act reauthorization that we had, there was a section in there dealing with habeas corpus reform under which States that qualify under the Powell Committee recommendations would receive what I would refer to as expedited review in Federal courts of their cases. In 1996, when Congress acted, the authority was within the courts, the Federal courts, to make that determination as to whether the State qualified under the Powell Commission recommendations.

In the absence of any Federal court finding any State system as consistent with the Powell Commission recommendation, Powell Committee recommendations, the change in the PATRIOT Act grants that responsibility to you. And my question is—in other words, for a State to receive that treatment, they must apply to the

U.S. Justice Department for your determination as to whether they can opt in to that program and receive expedited review. Your decision, then, would be subject to an appeal to the appellate court for the District of Columbia—or the circuit court.

Have you made any decisions with respect to the organization within your Department as to how that would be handled?

Attorney General GONZALES. I don't—I—quite frankly, I don't know, Congressman. But let me try to find out what we've done on that.

Mr. LUNGREN. Okay. That's extremely important, because when we drafted this—and I was not here, but my office in California helped in the drafting—and the idea was to try and create a balance. That is, we would encourage States to do a far better job of having competent counsel at the appellate level, including the habeas level. And in return for them doing that, there would be expedited proceedings. That is, there would be expedited timelines for consideration in habeas cases as considered by the Federal court.

We were doing that because of difficulty we were having with Federal courts making decisions within a reasonable time. We thought establishing those rules would have the Federal courts actually seriously look at it, but to this date, some decade later, not a single State has been able to opt in. And so the idea was to get someone who didn't have a dog in the fight. These are State cases, not Federal cases. And so the thought was that your office would be able to review those to see if in fact we'd met the standards established by the Congress pursuant to the Powell Committee recommendations.

And I would just hope that I can get an answer on that so that, when my home State does apply, there's not going to be a delay in the Department of Justice in reviewing that because you haven't geared up for that.

Attorney General GONZALES. Yes, sir.

Mr. LUNGREN. The second area of inquiry I'd like to pursue is in the area of sentencing. With the Supreme Court decisions on sentencing guidelines, we have waited for some period of time to see what would occur. And some of the things that we have found are truly bothersome.

We find lower prison sentences for criminals for whom Congress had sought higher sentences when it passed the PROTECT Act. The rate of imposition of below-range sentences for abusive sexual contact cases decreased following the PROTECT Act but increased after the *Booker* decision. And what that means in real terms is that the post-*Booker* defendants accused of abusive sexual contact are getting sentences below the recommended guidelines at an increasing rate, negating the very improvements that this Congress wished to occur. Although the post-*Booker* average length of prison sentences has increased incrementally from 57 months to 58 months, the average sentence imposed upon career offenders, that is the defendants who have the most serious criminal records, has decreased.

I think we've waited patiently to see what the courts would do, but these kinds of facts are somewhat concerning. There's also some analysis that we're having increased sentencing disparities based on race and geography. Now, that ought to concern all of us

no matter where we stand on the ideological spectrum. What is the position of your Department on that, and recommendation, if any, as to what we should do following up on those results that we've seen after substantial period of time?

Attorney General GONZALES. Thank you, Congressman. I think that this is a very good question. I think there are many—first of all, let me begin by saying many judges are doing a good job trying to stay within the guidelines that once existed. You're right. We have waited for a period of time to see how the judges do. And the report from the Sentencing Commission is not very encouraging. There are some very troubling trends with respect to certain crimes, particularly against children. Also I'm concerned about trends that appear to show the disparity based upon race and geography, as you indicated. And we're seeing disparities within districts and between circuits. And that is very troubling.

For that reason, we have proposed, at least as a—this is our proposal, is that we look at making the minimum guidelines mandatory, we keep—we have the maximum guidelines, we keep those as advisor. We believe that would be consistent with the sixth amendment and the Supreme Court jurisprudence. And we think that that would be a way to meet our obligations under the Constitution and would result in a sentencing regime that is fair and tough and determinate, which is what we were all looking for under the Sentencing Reform Act.

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

I want to thank the Attorney General for the time that you've shared with us. I think that you can detect from the questioning that Members are serious, that this is not a personal affront, if you will, but it is our responsibility in oversight.

Let me again state the fact from your opening statement that we're stewards of American democracy. We will present to you, before you leave, a letter from myself and Mr. Conyers that asks for a reconsideration *de novo* of the pre-clearance of the Katrina voting structure that will come about on April 22. And the reason is because your lawyer—and the letter is here—misrepresented the position of the State legislators, the Black State legislators who will be in your offices tomorrow to correct the fact that they did not consent or approve to the structure that was proposed by the State of Louisiana. And the unfortunate part of this is that the judge, that again, denied satellite voting, cited and included as part of his findings, unfortunately, the mischaracterization by the Justice Department of the statement and beliefs of the State Black legislators. So I will submit this letter, both to the record as unanimous consent——

Chairman SENSENBRENNER. Without objection.

[The letter follows:][1]

[1] At the time this transcript was printed, the Committee had not received Mr. Conyer's and Ms. Jackson Lee's letter that they had wished be entered into the record.

Ms. JACKSON LEE. And I will present you with a copy. But let me also—and I'm going to just ask a series of questions—so if you would respond to that mischaracterization.

But the other is that Members of Congress also wrote you and told you of the abuse that Katrina survivors suffered by local authorities, one, being refused to cross a certain bridge into a certain parish. I think the parish is run by Sheriff Lee, who tried to refuse marchers on April 1st from going over that same bridge. And I would ask again whether there is an investigation of the treatment of those survivors trying to evacuate. I never thought that any jurisdiction had the power of keeping evacuees running for their lives out of a jurisdiction really on the basis of race.

Then I want to follow up on the question that we asked, so many have asked, about the potential for domestic-domestic surveillance under FISA. I know you've asked—answered it maybe to the best of your knowledge, but the problem is, and the question is this: if mistakes have been made, are you prepared to tell us today that from this day you will be able to surveil this process—of course, I agree that we are not using FISA—and ensure the America people that there are no domestic to domestic—I know you mentioned al-Qaeda—but no domestic to domestic mistakes that could be made because we don't use FISA? And I'd appreciate your answer on that.

Let me finish these other questions. The Chairman led, and I joined him, in the passage of the No Fear Act in this Judiciary Committee. That is, I consider, the first civil rights act of the 21st century. We are hearing horrible stories. That is a bill that would prevent—not prevent, but try to stop the tide of discrimination in the Federal system. We understand that it has not been prosecuted enthusiastically and that many are suffering because the No Fear Act has not been properly implemented. I would appreciate any assessment you have on that.

I refer you to the case regarding the young Justin, who indicated in testimony that he gave documentation on 1,500 pornographers or child abusers, sex abusers. Unfortunately, one has been arrested, and we can't for the life of us understand why this horrific case has not had more attention and that more prosecutions have not been rendered. So, please, tell us what's happening to your sex prosecution area.

And then I would like to as the question regarding the immigration situation. I think you're aware of a report that came through that suggested that immigration judges are intemperate or even abusive. You received these memos from—in memos sent to you from immigration judges and the Board of Immigration Appeals. You said you were concerned about these reports, and we understand also that many of these judges didn't even have immigration experience. Can you tell us what you have done or what the Justice Department is prospectively doing to ensure a better response to the dignity of those immigrants who are in those courts seeking to do the right thing, and are subjected to inhuman, indecent and inappropriate behavior by judges?

Attorney General GONZALES. I don't know whether I got all your points, Congresswoman, but let me try to respond to what I have, going backwards on immigration judges.

I am aware that there has been criticism and concerns raised by Federal judges around the country about the treatment. And for that reason I have ordered a Department review. I have ordered the Deputy Attorney General and the Associate Attorney General to do review about what exactly is going on. Is there inadequate training? I mean we need to find out if there's a problem here, and to make recommendations to me about what we can do to address this issue. I am hopeful that we are about at the end of that review, and then the recommendations will be made to me as to what changes we can make to address that issue.

With respect to Justin Berry, let me just say this. We are committed to focusing on crimes against children. Mr. Berry is involved in a criminal prosecution. It is an ongoing investigation, and for that reason I'm not going to get into any more about that situation other than to assure you that I understand it's a serious problem for our parents. We need to do more to protect our children, and our prosecution rates are up. We do have special task forces looking at this problem, and so I am committing to you that we're going to stay focused on that.

Domestic to domestic, there is no technology that is perfect. I can't tell you that mistakes will never be made. What I can tell you is that we have trained professionals who understand what the President has authorized. We have minimization procedures in place, much like the minimization procedures that exist with respect to FISA, with respect to collection under Executive Order 12333, and those procedures are in place to ensure that to the extent that information is collected, it shouldn't be either collected or maintained or disseminated, that it's done so in a way that we protect the privacy rights of Americans.

I'll have to get back to you specifically about this situation involving—I think you said Sheriff Lee. I just don't have any information. I'll have to get back to you.

Chairman SENSENBRENNER. The time of the gentlewoman has expired. The gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman.

I know you love seeing me back over here, General.

But anyway, you know the President, I know the President. We know the President's heart. We know that nobody has done more than this President in fighting a war on terror abroad. We know it's hard. We know he wants to protect America. Some of us realize that he wasn't the first one to use this surveillance program, you know, nobody's screaming about Clinton, and nobody's screaming about people of the past. But we know that this President is doing enough to fight the war on terror that 30 years from now he's not going to be some embittered President that regrets subconsciously all he didn't do 30 years before, and therefore, feels the need to lash out at some nice President 30 years later at somebody's funeral instead of paying credit to the deceased. We know this President won't have to do that. He's got this battle ongoing.

But I would like to ask a few questions about the program itself, as a former judge and chief justice from Texas, and you've been there, you understand what goes on. I'm curious about the probable cause that's utilized in the surveillance program. Do you use a

probable cause standard in that program in deciding which ones to go after? If you could address that, please?

Attorney General GONZALES. Congressman, it is a probable cause standard. We refer to it as reasonable ground to believe. But it is the same kind of standard. The difference is there is no—it's not a probable cause to believe that someone is guilty or that someone has committed a crime. It is probable cause to believe that a party to the communication is a member of al-Qaeda or an agent of al-Qaeda or of an affiliated terrorist organization.

We use the words "reasonable grounds to believe" because that is a more layman's like term. Because the decision's made not by lawyer, it is made by career professionals out at NSA in connection with a military operation, and that's what we consider this. This is not a criminal law operation. This is a military operation against our enemy in a time of war, made by military professionals at NSA who experience dealing with al-Qaeda.

Mr. GOHMERT. Thank you. There appears to be, under the 1806(j), the FISA Court can have an ex parte process for disallowing the notice. I'm curious how effective that process is, if you could comment on that?

Attorney General GONZALES. I'm afraid I don't understand the question. I'm sorry.

Mr. GOHMERT. You know, when you're pursuing records, surveillance, and you're going before the FISA Court, there is a provision that—I mean the process allows you to do it ex parte rather than having the other party there. Well, in most of our jurisprudence history, you know, it's an adversary system where both are there. In this system you're going, just one side going there.

Attorney General GONZALES. The FISA process, that is correct. I mean, it is a process where it is the Federal Government that is appearing before the FISA Court. And we understand very much what our obligations ar under the FISA Act in terms of the standards that have to be met. And we have a good record before the Court. The reason that we have a good record before the Court in terms of getting our applications approved is not because the Court isn't doing its job, it's because we looked very carefully at the requirements of the FISA law, and that's why it takes us a little bit longer, quite frankly, in getting these applications ready to go, and for me to approve them and submit it to the FISA Court, is because we work very hard to know that when we submit that application, it is going to be approved.

There is discussion sometimes with the Court, a judge on the Court, about an application, and we can get an idea whether or not there may be problems in the application, so there may be modifications in the application, but it is an ongoing process of relationship——

Mr. GOHMERT. And these are district judges that are reviewing; is that correct?

Attorney General GONZALES. These are article III judges that are appointed by the Chief Justice of the United States to serve on the FISA Court.

Mr. GOHMERT. I think a lot of people do not understand that, and they hear that it's a one-side process and think, oh, this is wrong because it should be adversary, not realizing that whether it's in

State court, Federal court, FISA court, if you go for a warrant, you're looking for documents, you're looking for a warrant. It's always, nearly always an ex parte one-sided proceeding——

Chairman SENSENBRENNER. The——

Mr. GOHMERT [continuing]. As a judge—and I understand my time has expired, Mr. Chairman, and I appreciate it.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman.

I've had 5 minutes to vent, and now I would like 5 minutes to ask you a few questions. There's a fellow named Marko Boskic, who allegedly helped murder—and I don't expect you to have the answer to this, but I would like you to look into this if you would be willing to—who allegedly helped murder thousands of people in Bosnia, war crimes and torture in Bosnia. We have a Federal statute which we passed as part of ratifying the Convention Against Torture, that says it is—you are criminally liable for coming and living in the United States, having committed torture or war crimes abroad.

I am told that the U.S. Attorneys in Boston wanted to charge this person under this act, but that somewhere in Washington they said no, deport him. Deporting him back to Serbia and expecting there to be—I mean in a way it's the flip side of the charges about rendition—going to deport him to a country where he probably will not be held responsible for his conduct seems like a poor alternative. One person said it would be like picking up a Salvadorean general in Miami, who had committed human rights violations, and telling him he has to retire in Costa Rica. It's not punishment.

If you could just check out this decision of whether this is really the wise and just course, the deportation rather than prosecution.

Attorney General GONZALES. I presume he's not an American citizen?

Mr. BERMAN. That's right.

Attorney General GONZALES. I'd be happy to do that. I believe that we also, I think, have an office in the Department that focuses on this issue, but I'd be happy to look at——

Mr. BERMAN. I don't mean so much even you personally, but if the Justice Department could sort of get back to us about why we're pursuing it that way.

Now, turning to the most important issue America faces today, which is the protection of intellectual property. The October 2004 report of the Department of Justice's Task Force on Intellectual Property recommended that the FBI increase the number of special agents assigned to intellectual property investigations. Have the Department of Justice and the FBI implemented this recommendation from 2004? If not, why not? If so, how many special agents are now assigned exclusively to intellectual property investigation, and where are these special agents deployed?

Attorney General GONZALES. I believe all the recommendations have been adopted. Congressman, I don't know the specific numbers in terms of the increase in the FBI agents. Let me get that information for you.

Mr. BERMAN. Fine, I would appreciate that. Next in that area, the Department has stated there is concern over the growing emer-

gence of organized crime and intellectual property, especially domestic and overseas hard disc piracy involving counterfeit CDs, DVDs, computer software and video games. Does the Department have a comprehensive long-term plan for combatting the emergency of organized crime and intellectual property theft?

Attorney General GONZALES. Well, we're focused on, generally, on the issue of enforcement of intellectual property rights, the protection of those rights. And you are correct, there is a concern that it is a source of revenue for organized crime, and we have created, as you probably know, we have these CHIP units in various U.S. Attorney's Offices around the Country. I can't remember the exact number that we have today, but we are going to expand that number, and these are specially dedicated Assistant U.S. Attorneys focused on prosecution of those engaged in the violation of intellectual property laws.

We are also, of course, in constant communication with our counterparts overseas. As I indicated in response to an earlier question, this is the kind of issue, quite frankly, I cannot be successful dealing with without the assistance of my counterparts overseas, particularly in areas like China, and so we—this is a topic that is always on my agenda when I go overseas, is talking about what we're doing to protect intellectual property rights, asking what they're doing, seeing if there are ways that we can work together to deal with this issue. We've had success, we've had takedowns worldwide involving intellectual property theft, and so we've made progress, but clearly a lot more needs to be done.

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman.

President Bush instructed you to conduct an investigation into the disclosure of classified information that appeared in the *New York Times* story back in December regarding the NSA spy program. Is that accurate?

Attorney General GONZALES. There is an ongoing investigation.

Mr. DELAHUNT. How many investigations into the disclosure of classified information is the Department of Justice conducting now? If you don't know a specific number, do you have a range?

Attorney General GONZALES. I don't know the specific number, Congressman, and as you know, as a matter of policy, we normally would not confirm the existence of investigations.

Mr. DELAHUNT. Is it fair to say there's more than one ongoing?

Attorney General GONZALES. Unfortunately, there is leaking, unauthorized leaking of classified information that has occurred.

Mr. DELAHUNT. I'm in the process now of compiling a list of media reports that clearly include the disclosure of classified information, and I would like to forward them to you and receive some kind of response regarding what Justice is doing, because I don't think we want to leave an impression that the Administration is only interested in this specific case because of possible political concerns about embarrassment, if you will.

Attorney General GONZALES. Let me assure that if we can prosecute leaking classified information, we will do so. Those are typically hard to do, but they're important.

Mr. DELAHUNT. Great. And you indicated, I understand, earlier, to Mr. Weiner, that the President has the authority to disclose inherent in his presidential powers?

Attorney General GONZALES. That was my statement.

Mr. DELAHUNT. There's a story out today—and I'm not going to ask you to comment in terms of the specifics, but let me read into the record. This is from the *New York Sun*: "A former White House aide under indictment for obstructing a leak probe, I. Lewis Libby, testified to a grand jury that he gave information from a closely-guarded 'National Intelligence Estimate' on Iraq to a *New York Times* reporter [in 2003] with the specific permission of President Bush, according to a new court filing from the special prosecutor in the case."

"Mr. Libby is said to have testified that 'at first' he rebuffed Mr. Cheney's suggestion to release the information." Presumably there was a conversation between them. I'm not commenting on the veracity with the reporters. "Mr. Cheney subsequently said he got permission for the release directly from Mr. Bush. Defendant testified that the vice president later advised him that the president had authorized defendant to disclose the relevant portions. . ."

"Mr. Libby told the grand jury that he also sought the advice of the legal counsel to the vice president," Mr. Addington, "who indicated that Mr. Bush's permission to disclose the estimate "amounted to a declassification of the document,"" according to the new court filings.

This is, obviously, a piece of news that I find interesting, to say the least. Do you have authority to declassify, you in your role as Attorney General?

Attorney General GONZALES. It would depend on the information that we're talking about.

Mr. DELAHUNT. Does the Vice President have the authority, independently of the President, to declassify?

Attorney General GONZALES. He might have—again, depending on the circumstances, yes.

Mr. DELAHUNT. Is there any mechanism that's available that would inform the American people that classified information has been declassified by the President or by the Vice President?

Attorney General GONZALES. I don't know that there is or I don't know if there isn't, Congressman.

Mr. DELAHUNT. Because I would suggest that the American people ought to be informed that information can be disclosed to the media outlets by the President, and it does not violate any laws, but it certainly would improve their understanding of the news and the information, that if it was attributed to the President. So I would ask you to reflect on that, and I'd be interested in a list of those cabinet-level officials, who on their own authority, have the authority to declassify. I think it's an area that really needs some review.

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentlewoman from Florida, Ms. Wasserman Schultz.

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman.

Mr. Attorney General, my colleague from Florida, Congressman Wexler, engaged you in a line of questioning related to emergency

contraception, and I know you indicated that you didn't know the answer to his question and you'd have to get back to him. Do you just not have the information available to you, or do you have absolutely no knowledge of the omission of emergency contraception?

Attorney General GONZALES. I don't have the information available to me.

Ms. WASSERMAN SCHULTZ. Do you not even have any knowledge?

Attorney General GONZALES. I do have knowledge, yes.

Ms. WASSERMAN SCHULTZ. Not knowledge that you can share with the Committee here?

Attorney General GONZALES. Before responding to that question, I want to make sure I have the most current and accurate information. I think it's only fair to the Committee that I provide to you the most complete answer that I can.

Ms. WASSERMAN SCHULTZ. Okay. Well, if you could get that information to us, that would be extremely helpful.

My question is related to terrorist access to guns. The GAO report entitled Gun Control and Terrorism, FBI could better manager firearm-related background checks involving terrorist watch list records. That report indicated that a total of 47 firearms were purchased over a 9-month period in 2004 by individuals that were designated as suspected or known terrorists by the Federal Government, and the GAO went on to determine that with regard to such purchases, DOJ's information sharing procedures failed to "address the specific types of information from NICS's transaction that can or should be provided to Federal counterterrorism officials or the source from which such information can be obtained." In response to the GAO report you announced the formulation of a working group which began meeting in March of 2005.

My questions include: In your personal opinion, should individuals listed on the terrorist watch list be permitted to purchase firearms? And could you give us an update on the number of firearms that have been purchased by individuals that are included on the terrorist watch list since the conclusion of the GAO report?

Attorney General GONZALES. I don't know the answer to your last question. With respect to your first question, what I will say is I don't think terrorists should have access to weapons, and I think we can all agree on that.

Mr. LUNGREN. It's a breakthrough in this Committee.

Ms. WASSERMAN SCHULTZ. Well, it appears that you differ with the opinion of the other Members of the Committee on the other side of the aisle.

Chairman SENSENBRENNER. The Committee will be in order.

Mr. LUNGREN. Will the gentlelady yield on that?

Ms. WASSERMAN SCHULTZ. No. I only have 5 minutes.

Mr. LUNGREN. Well, you ascribe certain things to this side of the aisle. It would be nice to——

Ms. WASSERMAN SCHULTZ. Mr. Chairman, I think the floor is——

Chairman SENSENBRENNER. The floor belongs to the gentlewoman from Florida.

Mr. NADLER. Mr. Chairman, could she be credited with the time that was just taken from her?

Chairman SENSENBRENNER. She gets a bonus of 15 seconds.

Ms. WASSERMAN SCHULTZ. Thank you very much, Mr. Chairman.

Attorney General GONZALES. The issue, of course, is that Congress decides the disabilities as to what would prevent someone from having access to a firearm. We have been working on this issue to see what kind of legislation may be appropriate and helpful, and I'm told that that work has not yet been completed, I regret to say. But it's not yet been completed. In the interim——

Ms. WASSERMAN SCHULTZ. General Gonzales, the working group's been meeting since March 2005. It's now April 2006.

Attorney General GONZALES. Believe me, I understand that. I can say, however, we do have a procedure in place implemented by the Deputy Attorney General, whereby that if in fact there is an attempt to purchase a weapon, and someone appears on the violent gang or terrorist group list, that there is a slight delay of approval, so that gives Federal officials an opportunity to talk with State officials to see whether or not there's additional information that would satisfy one of the disabilities that Congress has placed into the law.

So we've tried to establish sort of a stopgap measure, but it's an issue we're still working on.

Ms. WASSERMAN SCHULTZ. General Gonzales, since you indicated that you don't think that terrorists or suspected terrorists should have access to firearms, would you support legislation that would specifically prohibit terrorists or suspected terrorists from having access to firearms? Because I know you previously said that you needed to get back to my colleague from Maryland on that, and we have not heard back from you on that.

Attorney General GONZALES. I would like to look at that. Let me——

Ms. WASSERMAN SCHULTZ. Are you still looking at it, General Gonzales, because you've already told that several months ago to my colleague.

Attorney General GONZALES. I'm waiting for the work of the working group within the Department of Justice. Now let me just——

Ms. WASSERMAN SCHULTZ. How long is too long, 13 months?

Attorney General GONZALES. Let me give you an—I agree, I'm frustrated as well. But let me give you an example of why that may be problematic. We may have information about someone that we honestly believe is a terrorist. We may think that they may be involved in some kind of terrorist plot. As part of that plot, they may be wanting to purchase a weapon. We may want them—we may have them under complete surveillance, and we may be okay with him purchasing that weapon because it may lead us to other——

Ms. WASSERMAN SCHULTZ. General Gonzales, can I just stop you for 1 second before you go on? Because under current law we prohibit firearm sales to anyone suffering from a drug addiction. They don't even have to have been convicted of anything, and we prohibit firearm sales to them. Also, limited on mere suspicion, we limit an individual's ability to even get on an airplane if they're on the no-fly list, so why wouldn't we pass along—why can't you unequivocally say that you support a law that prohibits suspected terrorists from possessing firearms? That seems like a no-brainer.

Attorney General GONZALES. Well, I'll stand by my earlier statement about terrorists shouldn't have access to weapons.

Chairman SENSENBRENNER. The time of the gentlewoman as extended has expired.

Gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Gonzales, did you not answer the question that you support or oppose legislation prohibiting those on the terrorist watch list from purchasing firearms?

Attorney General GONZALES. Again, Congressman, I would focus on not people on the list, per se, but terrorists. I mean I think we can all agree that if you're a terrorist, we ought to certainly make it as difficult as possible to have weapons.

Mr. SCOTT. Well, would you do that by legislation? Do you support legislation to actually do that?

Attorney General GONZALES. Be happy to consider the legislation.

Mr. SCOTT. Consider it, okay. Did I understand you to say that "reasonable cause to believe" and "probable cause" were essentially the same thing?

Attorney General GONZALES. From the way that this program has been operated, yes, that it is a probable cause standard that's being applied with respect to the terrorist surveillance program, consistent with the jurisprudence relating to probable cause in the normal criminal law context.

Mr. SCOTT. My question was "reasonable cause to believe" and "probable cause" are essentially the same standard; is that what you——

Attorney General GONZALES. Well, what I said was it that standard we use is "reasonable grounds to believe." That's the standard that is applied by the career professionals.

Mr. SCOTT. Is there a difference between "reasonable cause to believe" and "probable cause?"

Attorney General GONZALES. From my perspective, it is the same standard.

Mr. SCOTT. I asked you before, you know, we don't know what this NSA wiretap thing is, so we're kind of playing 20 questions here. We know there are no checks and balances. I asked you if the wiretap target was individually considered and individually selected. Would that rule out mass recording of calls where they may be law-abiding citizens who are tapped as part of the operation?

Attorney General GONZALES. Congressman, what I can say is there's a lot of misinformation and disinformation in the media about the scope of this program, and I'm only going to comment on what the President's confirmed is what this program includes, and I——

Mr. SCOTT. Well, we know it includes some things. We're trying to play 20 questions back and forth to figure out what it also might include. My question was, would it rule out mass recording of calls where there may be law-abiding citizens who are tapped as far as the operation, and you are not denying that that may be part of the possibility?

Attorney General GONZALES. There is not mass—there is not mass recording of phone calls.

Mr. SCOTT. Is it possible that whatever you've got going, that innocent law-abiding citizens, who if you individually considered the situation, you would not tap their phones?

Attorney General GONZALES. Well, each communication that is surveilled is considered on an individual basis, based upon information judged by a career professional out at NSA, that, again, who is an expert in al-Qaeda communications, aims and tactics, and believes that someone on this call is a member of an agent of al-Qaeda or an affiliate terrorist organization.

Mr. SCOTT. And why couldn't you get a wiretap warrant? Why couldn't you get a warrant through FISA if that was the situation?

Attorney General GONZALES. I didn't indicate that we couldn't get a warrant from FISA. What I indicated was, is that we may be interested in the communication that may be about to happen in a matter of hours, and it may not be possible, because of the strictures of FISA——

Mr. SCOTT. No, we've been through that, because you can get an after-the-fact warrant.

Attorney General GONZALES. But that's not—sir, that is a misconception that people have about FISA and the emergency authorization under FISA. It is true that I can authorize electronic surveillance for a period of 72 hours before we submit an application to the FISA Court. But I have to be satisfied, when I give that authorization, that every requirement under FISA is going to be satisfied, and is satisfied at the time I give my oral authorization.

Mr. SCOTT. Let met ask you another question. I got diverted to another Committee, and when I left you had said that in Los Angeles, that programs will be led by the U.S. Attorney, will work with each State, loan and community partners to implement all three pieces of this comprehensive anti-gang strategy. The first is prevention. Did I understand that you agreed with the statement that you should first bring down gang networks, deal with those who are here illegally, then implement prevention programs?

Attorney General GONZALES. No, that's not what I said. I think that's an important component of dealing with gangs. And it is my primary responsibility as the chief law enforcement officer of the country to focus on enforcement. I think one of the things——

Mr. SCOTT. I just have a couple of questions. I'm just——

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentleman from Maryland, Mr. Van Hollen.

Mr. SCOTT. Can he continue answering the question he was answering?

Chairman SENSENBRENNER. If you would like to continue answering the question.

Attorney General GONZALES. What was the question? [Laughter.]

Mr. SCOTT. I yield back.

Chairman SENSENBRENNER. Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman.

Let me just pick up very briefly on where my colleague from Florida, Ms. Debbie Wasserman Schultz, left off. We did have you, Mr. Attorney General, here I believe last summer, and I asked you a question about whether you'd support legislation that would prevent people who were on the watch list, terrorist watch list, from

obtaining a weapon. At that time you said you'd get back to us. I think you can understand why people up here get frustrated at times——

Attorney General GONZALES. I sure can.

Mr. VAN HOLLEN [continuing]. With the lack of cooperation with the Executive branch to hear that we—no, in this particular instance, in any event, we would welcome a response as soon as possible on that issue. After all, if you're on the terrorist watch list you can't get on an airplane right now, and it seems to me it doesn't make sense for you to be able to drive to your local gun store and buy a couple—a lot of weapons.

Let me just move on because I want to pursue Mr. Scott's line of questioning and what I asked you a little bit earlier, with respect to the standard that apply under the NSA electronic surveillance and the FISA Court, because as I understand what you're saying, is that the legal standard you apply, in your opinion, is the same.

Attorney General GONZALES. But we have to remember something. This is not probable cause that a crime has been committed or probable cause that someone is guilty. And, of course, even under FISA, that's not the standard. I mean the standard in FISA is that there's probable cause that the target is a foreign power or an agent of a foreign power, and probable cause to believe that the facility which is being used or about to be used, is being used or about to be used by a foreign power or an agent of a foreign power.

Mr. VAN HOLLEN. Right. I understand that. So FISA doesn't require showing probable cause about a crime to be committed. I understand that. That's why I'm saying you don't require that in electronic surveillance. You want to have probable cause or reasonable basis to believe that there's—that one party to the phone conversation is a member of al-Qaeda or affiliated with al-Qaeda, right?

Attorney General GONZALES. Yes.

Mr. VAN HOLLEN. And as I understood your statement, you know, the court is somewhat time consuming, you got to sign off and be 100 percent sure that you meet that standard in advance, and sometimes you need rapid response time. And my question is this: we know that before 9/11 there were communications between al-Qaeda agents here in this country. If the time is the question, if the rapid response is the question, then for the security of the American people, why wouldn't we want to capture those conversations? Why when it comes to conversations between two al-Qaeda folks in the United States are you willing to take the extra time required and the extra risk to the security of the country required, going to the court? If it's just a matter of time, why aren't you taking this action?

Attorney General GONZALES. Well, we do use FISA with respect to those kind of communications.

Mr. VAN HOLLEN. But that takes you—according to your testimony, that takes longer.

Attorney General GONZALES. Yes.

Mr. VAN HOLLEN. And the added time, as I understand it, the reason you've got to have this quick turnaround is for security reasons, to be able to act quickly. And so if security is the issue, why,

for God's sakes, would we want to take greater risks for communications within the United States than outside the United States?

Attorney General GONZALES. That's simply the decision that was made to limit this program to foreign communications, where we believe one party is a member of al-Qaeda, and that we would rely upon other authorities like FISA to surveil communications such as domestic communications here in the United States. I can't give you a better answer than that, sir.

Mr. VAN HOLLEN. Well, let me just say, because this gets back to the question of whether this program's been authorized, and I'm trying to figure out how, as you said earlier, it was this collective decision, how people came to the decision that Congress wouldn't authorize exactly what we're talking about? I mean what was the debate back and forth? I think on a bipartisan basis, you have a vote if people had reason to believe, probable cause to believe that one party of the phone conversation was al-Qaeda or a member of al-Qaeda, that we would allow an expedited process?

Attorney General GONZALES. What I said was, is that it wouldn't be approved—we wouldn't be successful in that effort without compromising the effectiveness of the program. The very fact that we're talking about this, and have been talking about this for months, the intelligence experts say that al-Qaeda, they can already see the way—changes in the way they communicate with each other, because they now know we have this capability. And so we can all agree this is a great program and we need to be doing it, but because we're now talking about it, and because the legislative process is such that people are going to be talking about what the legislation should or should not be, it informs our enemy about the tactics that we use to engage in surveillance.

Mr. VAN HOLLEN. If I might, Mr. Attorney General, as I understood your testimony here, there's not additional communications that we're now able to intercept, because that was just a question of a timing on the FISA Court. But now, in other words, they're not different in nature, and so it seems to me that anyone operating as an al-Qaeda member had to presume, prior to the disclosure of this information, that their phone conversations were being recorded.

Attorney General GONZALES. You can assume. This is a——

Mr. GOHMERT [Presiding]. The gentleman's time has expired. You can answer the question.

Attorney General GONZALES. This is a very patient and very smart enemy. However, we know that from their conversations that they sometimes get lazy and they sometimes get careless. They're less likely to be careless and less likely to be lazy if every day they are hammered by the fact in the press that we're doing this.

Mr. GOHMERT. The Chair recognizes the gentleman from North Carolina, Mr. Coble, for 5 minutes.

Mr. COBLE. I thank the Chairman.

Good to see you again, Mr. Attorney General. The gentleman from California, I yield to you.

Mr. LUNGREN. Thank you very much. Just to set the record straight, so that people understand what we're talking about, the Attorney General, in response to the question, mentioned that we could all agree that terrorists ought not to have weapons, and then

people took a leap of faith to suggest that if you don't suppoPrt prohibiting that from people who are on the terrorist watch list, you therefore are supportive of people who can't have—people who are terrorists having weapons. And the statement was made if you're on the terrorist watch list you can't get on an airplane. Those are factually inaccurate. There is a no-fly list, and there is a terrorist watch list. One is much more exclusive than the other. One does not allow you to fly. The other one allows for secondary searches and also informs people, presumably within the Government, of an identification if an individual may be on that list.

So let's not play fast and loose——

Mr. VAN HOLLEN. Would the gentleman yield on that point?

Mr. LUNGREN. No. I was refused an opportunity to yield.

Mr. VAN HOLLEN. Well, you're suggesting—now you're suggesting people are playing fast and loose, but you're not willing to yield. That's fine.

Mr. COBLE. I still control the time.

Mr. LUNGREN. One of the things that really surprises me is the lack of comity in this place in the absence of 16 years. If one is going to make statements with respect to other Members about what they say or how they voted, it ought to be presumed the Committee would allow a person to respond to that. I'm now setting a record straight based on what was misstated on the other side about positions held here. The fact of the matter is, if you want to act in the absence of information or act out of ignorance, you are certainly welcome to do that. But to mischaracterize what facts are on a record, it seems to me to be inappropriate, and we ought not to allow the American people to believe that certain things are being done that subject them to more threat from terrorists because of unreasonable positions, when that in fact is not the case.

So a little attention to detail, and a little attention to the facts, presumably might help us to reach on occasion more bipartisan responses to very difficult issues that we're all, I hope, dedicated to dealing with. With that, I yield back to the gentleman from North Carolina, and I thank him for the time.

Mr. COBLE. And I yield back my time.

Mr. GOHMERT. The gentlewoman from California, Ms. Sánchez.

Ms. SÁNCHEZ. Thank you.

Mr. Attorney General, I have a deep concern about several issues with the DOJ, but one is regarding a series of articles last fall in the *Washington Post*, detailing the politicization of decisionmaking in the Civil Rights Division, in the voting section in particular, and this series of articles detailed how the Republican political appointees overruled decisions that were made by career attorneys when it came to authorizing the pre-clearance of election procedures, specifically two cases, the voter ID law in Georgia, and the redistricting map drawn by Representative Tom DeLay in Texas, even though those changes discriminated against minority voters in violation of the Voting Rights Act.

In the Georgia ID case, for example, four of five lawyers and analysts working on that case made a recommendation to deny preclearance of a law, and in the Texas redistricting case, six career attorneys, two career analysts, and Joseph Rich, the Voting Section

Chief at the time, made a recommendation to deny pre-clearance of the law.

My question to you is, are there guidelines for making an ultimate decision on a particular case of pre-clearance at the DOJ, because I'd like to know what guidelines exist at the DOJ that would allow a political appointee to overrule a unanimous or near-unanimous recommendation made by Civil Rights Division experts in those two cases?

Attorney General GONZALES. Congresswoman, first of all, let me respectfully disagree with your characterization that we have authorized conduct that would discriminate against minority voters in violation of the law. Quite the contrary, in Texas, this matter has been litigated, and certainly, at least to the Circuit Court level——

Ms. SÁNCHEZ. I was going to say, is it not pending before the Supreme Court?

Attorney General GONZALES. But the latest word on this matter is, is that the decisions by the Texas officials is in fact lawful, so, obviously, the Supreme Court is going to have the final say on that.

With respect to Georgia, respectfully, the top career person in the Civil Rights Division pre-cleared that case. And I visited with Congresswoman Waters about this. There may have been disagreement amongst other members of the career staff, but the top career lawyer in the Civil Rights Division pre-cleared that. And at the end of day, of course, political appointees are nominated by the President and confirmed by the U.S. Senate to exercise their own independent judgment.

There have been stories which have troubled me about the politicization of the Civil Rights Division. This is something that troubles me as a Hispanic in particular. I've had numerous conversations with Wan Kim, the Assistant Attorney General for Civil Rights. I believe he's dedicated to ensuring that the guidelines that we follow is the law. Those are the guidelines that we follow.

Ms. SÁNCHEZ. I want to take issue with you about one thing. Number one, the redistricting case is currently pending decision in the Supreme Court. But if I'm not mistaken, the Georgia District Court likened the ID case requirement to a poll tax, and if that's—a poll tax is not a violation of civil rights, then educate me, because I was under the impression that it was.

Attorney General GONZALES. Well, except what was considered in that litigation is different than what we have to consider as a Department in terms of pre-clearance under section 5. So it's like comparing apples and oranges.

Ms. SÁNCHEZ. But your statement was that it wasn't in violation. In terms of pre-clearance—what I'm really trying to get at is what are the guidelines? Who makes the ultimate decision? I mean are the career attorneys and the analysts with the most number of years of experience allowed to make those decisions, or can they be overridden by political appointees?

Attorney General GONZALES. We—you know, I am ultimately responsible for all the decisions within the Department of Justice, and——

Ms. SÁNCHEZ. So you agree with the two decisions in the pre-clearance.

Attorney General GONZALES. I stand behind the decisions coming out of the Civil Rights Division, because I'm the Attorney General and I stand behind those decisions.

Obviously, we take very seriously, and value—we take seriously the advice of career officials. We value their input. We value their experience and their role in making recommendations, but we are charged, we're the ones, with making the ultimate decision. Now, and the fact that there may be disagreement, as I indicated before, doesn't mean that the decision was the wrong decision. Sometimes these can be complicated issues. They're highly politically charged. They can be emotional issues. People may disagree as lawyers. That's what lawyers do, as you know, we disagree. But ultimately someone has to be responsible for that ultimate decision.

Ms. SÁNCHEZ. And so you're assuming the responsibility and you're standing by those two decision to go——

Attorney General GONZALES. Stand by those two decisions, yes, ma'am.

Chairman SENSENBRENNER [Presiding]. The time of the gentlewoman has expired.

The gentlewoman from California, Ms. Waters.

Ms. WATERS. Thank you very much.

There have been several attempts to talk with you about the Civil Rights Division, and I'd like to continue with that, just read you something that was prepared for me.

The past year, 20 percent of the Civil Rights Division's career lawyers have resigned, many in protest over what they allege to be the Administration's neglect of civil and voting rights enforcement. Their claims are supported by the Justice Department's own statistics. In the past 5 years, the Division's racial and gender discrimination caseload had dropped 40 percent. During that same period the Division has filed only 3 cases under section 2 of the Voting Rights Act, the provision that prohibits States and municipalities from enacting voting practices or procedures that discriminate on the basis of race, color or membership in a covered language minority group, all of them in 2005.

This drop in section 2 enforcement comes at a time when there are conservative voter integrity initiatives aimed at purging African Americans from the voter rolls and intimidating Blacks at the polls are on the rise.

I took a look at the three cases that were filed, and found some information. The Bush administration has filed only three lawsuits, all of them this year, on this section of the Voting Rights Act that prohibits discrimination against minority votes, and none of them involves discrimination against Blacks. The initial case was the Justice Department's first reverse discrimination lawsuit, accusing a majority Black county in Mississippi of discriminating against White voters.

Now, Mr. Attorney General, the stories are rampant about the Division that's going on between the Civil Rights Division and the appointees. November 13th, an article in the *Washington Post*; November 17, December 2nd, and February 2005. It's something going on. What do you have to say for what I just read?

Attorney General GONZALES. I don't know whether or not all these stories were written by the same reporter for the same paper. Were they, if I may ask the question?

Ms. WATERS. I don't know.

Attorney General GONZALES. Well, let me give you a few numbers of my own. The Department's Civil Rights Division prosecuted a record number of criminal civil rights cases in the last 2-year period. We have doubled the number of trafficking defendants charged, increasing the number of trafficking lawsuits filed by over 30 percent, and we've secured more convictions against human trafficking defendants from '04 to '05. We've created 12,000 new housing opportunities for people with disabilities in——

Ms. WATERS. Excuse me. May I interrupt you? Is it true that you have filed only three lawsuits, all of them this year, on the section of the Voting Rights Act that prohibits discrimination against minority voters, and that none of them were against Blacks, discrimination against Blacks, and did you have one case that was a reverse discrimination case in a Black county against White voters? Is that statement true?

Attorney General GONZALES. I think the last statement is true. I don't know the answer to the first——

Ms. WATERS. You don't know how many lawsuits you have filed under this section of the Voting Rights Act?

Attorney General GONZALES. No, ma'am, I don't, but we can certainly——

Ms. WATERS. You have some people here with you. Turn around and ask them.

Attorney General GONZALES. We'll find out.

Ms. WATERS. Nobody knows. That's a lot of personnel years over there for none of you to know——

Attorney General GONZALES. We can provide you the information, Congresswoman.

Ms. WATERS. Well, you know, that's why we want you here. I mean I don't want it in secret. I want it in public. You know, I want everybody to know that you——

Attorney General GONZALES. Well, can I finish my numbers?

Ms. WATERS. Yes.

Attorney General GONZALES. We filed more cases under the minority language provisions of the Voting Rights——

Ms. WATERS. Well, I know you did, but I didn't ask you about that.

Attorney General GONZALES. No, ma'am, but I think——

Ms. WATERS. No, no, no, this is my dime.

Attorney General GONZALES. Yes, ma'am.

Ms. WATERS. All right. So, having asked you that, what about these lawyers that have quit in the Civil Rights Division, and some of them wanting to go public because they think what you are doing is not right? Have you heard about that?

Attorney General GONZALES. I'm aware of these stories, which I think were written by one reporter for one paper. I do know that there was a—I was asked a similar question in another hearing, whether or not there was a concerted effort within the Department to remove people from the Division. And I advised that Member of Congress that there was an effort, as a personnel move, to offer

sort of buy-outs for everyone within the Department meeting certain qualifications, certain criteria——

Ms. WATERS. Okay, I got that. Let me tell you what the *Post* said. The *Post* has also reported that conflict between career attorneys and political appointees extend to issues of enforcement. Recent revelations about a series of voting rights cases demonstrate that the appointees have redirected VRA enforcement away from protecting Black voters and toward advancing the interests of White Republicans.

What do you have to say about that?

Attorney General GONZALES. Disagree with that.

Chairman SENSENBRENNER. The time of the gentlewoman has expired.

The gentleman from New York, Mr. Weiner.

Mr. WEINER. Thank you.

Mr. Attorney General, earlier today you said the President has—and there's a quote—"inherent authority" to decide who in fact should have classified information. In your view of the law, does he need to go through a declassification procedure or simply giving out the information is an act sufficient under his authority? Does he have to go through the formal process of a declassification——

Attorney General GONZALES. As a general matter, I think the President could decide to declassify information.

Mr. WEINER. Does he have to go through a process of declassification? He can, by giving it to someone, in your view, de facto, declassify it?

Attorney General GONZALES. I think the President could decide what would be the appropriate method of declassifying information.

Mr. WEINER. Is it your view that, as you describe, the President has the inherent authority, does that extend to the Vice President, in your view?

Attorney General GONZALES. I think I was asked that question, and I'm not sure, and given my position of recusal in this case, which I know these questions are related solely to this matter that came out today, I'm not going to answer the question.

Mr. WEINER. What troubles me though, Mr. Attorney General, is this sounds vaguely evocative to someone who said when the President does it, that means it is not illegal. That was President Richard Nixon in explaining his behavior. And his argument was that Executive authority essentially said anything the President does de facto makes it legal.

And I'm concerned that by your explanation, the President could theoretically see no limits on his ability to declassify a document if he saw it was in the national interest. Is that your view, even if it was not related to national security, he just thought it would be a good thing for people to know? Is it your view that he has the authority to take classified information that he has access to, and theoretically you have access to—you earlier said you have the highest authority, the highest classification—is it your view that he has unfettered authority under Executive privilege to release any document he sees fit?

Attorney General GONZALES. Congressman, I've already answered that question. I've got nothing to add on this.

Mr. WEINER. If you would humor me, I forget the answer to it. Is your view that he has the authority to—you said earlier that he could do it if he decided there was a national security interest. Is that the only circumstance under which he can do it?

Attorney General GONZALES. I've answered this question as far as I can go, Congressman.

Mr. WEINER. Would you try it again for me? Would you humor me by repeating the answer?

Attorney General GONZALES. I've answered the question.

Mr. WEINER. I don't recall the answer to the question. I'm asking you again. Would you be so kind as to repeat your answer?

Attorney General GONZALES. I've answered the question, Congressman.

Mr. WEINER. Mr. Attorney General, I'm asking you a fairly straightforward question. If you've already answered it, then it's already on the record.

Attorney General GONZALES. Congressman, I stand by my earlier answer.

Mr. WEINER. Okay. Your earlier answer seems to be, when the President does it, that means it is not illegal. That is exactly what President Richard Nixon said.

Attorney General GONZALES. I stand by my earlier answer.

Mr. WEINER. You have taken a position that essentially says the President has the right to leak information whenever he sees fit. He has the right, under your explanation, to give it to the Vice President, and to have the Vice President hand it off to his chief of staff to then leak it to a newspaper.

And I would say to you, you know, earlier today you also said, in a question that I do have the answer records, is the President covered under the same law that you and I are? Attorney General Gonzales said, "No, he's not." That was from earlier today. That was an answer I did take note of. And I think it's most troubling, and I think, frankly, that the crux of the issue about so many of the cases that we deal today, is the sense that you, on behalf of the Administration, and the Administration itself, has a sense just like Richard Nixon did, that if the President does it, it must make it legal. You're not disputing that today. You've even gone on to repeat it a couple of times. You said the President has inherent authority to decide who in fact should have classified information. You've said that he's not covered under the same law that you and I are.

Indeed, Mr. Attorney General, he is covered under those laws. He does not have the right to simply say, "This is information I think should be in the public domain for any reason I see fit."

Mr. ISSA. Would the gentleman yield?

Mr. WEINER. It's my authority.

Mr. ISSA. Would the gentleman yield?

Mr. WEINER. I will yield under only the circumstance that the Attorney General repeats his answer to the question that I missed.

[No response.]

Mr. WEINER. In that case, I will not yield.

This is the problem with the Administration today. And if you think it's not cause for concern, I would just urge you, Mr. Attorney General, to realize that I understand your allegiance to the Presi-

dent, understand your allegiance to the Administration, I understand your role here. But there's a higher question that is at play here, and it is whether or not the President is accountable to the same laws. The answer to the earlier question, is the President covered under the same law that you and I are, is, "Yes, Congressman," not "No." The answer is not the President has inherent authority to leak classified information, it's "Of course, he does not." The answer is not, as Richard Nixon said, "When the President does it, that means it is not illegal." That is not correct. That is an incorrect view not only of your job, not only of the Constitution, but it's an incorrect understanding of the fundamental underpinnings of our Constitution. That is why you've heard so many concerns here today.

And, frankly, you know, to say as you have, that is the President covered under the same law that you and I are? No, he's not. The President has inherent authority to decide who in fact should have classified information. And Richard Nixon, who said, on May 20th of 1977, "When the President does it, that means it is not illegal." Mr. Attorney General, you are incorrect.

Chairman SENSENBRENNER. Time of the gentleman has expired.

Mr. Issa would like 5 minutes.

Mr. ISSA. General Gonzales, I appreciate your staying with us throughout the afternoon. I would have answered for the gentleman from New York, the question, happily, except I'm not any different than the gentleman from New York. I'm a Member of Congress, a separate body, one that makes its rules irregardless-if that's a word—of what the rules for the judiciary may be, and regardless of what the rules for the Executive branch is, and I certainly appreciate your longstanding understanding of the separation of branches and why we can make something classified or declassified, the President can issue Executive Orders and he can change Executive Orders, and I appreciate that.

Would you please enlighten me, since I wasn't able to hear the rest of your statement of prosecutions and how this year has gone in the enforcement of civil rights and other matters?

Attorney General GONZALES. I need to find it.

Mr. ISSA. While you're finding that, I'd also like to thank you for quickly recusing yourself and taking the lead on making sure that there is a fair and impartial answer to the gentleman's questions, because I think that sort of leadership, and quickly, is very non-Nixonian. In the Nixon period in which I enjoyed my youth, there was just the opposite. There was a statement that nobody would answer, and everyone was above the law, and I think this Administration, you in particular, have never implied that in any way, shape or form.

Please continue.

Attorney General GONZALES. Thank you. Just three final points and that is—and I may have made this first one—the Civil Rights Division has filed more cases under the minority language provisions of the Voting Rights Act in 2005, than in any previous year. We've undertaken the most vigorous enforcement of the language minority provisions of the Voting Rights Act, its history, and the Civil Rights Division has significantly increased the number of

criminal lawsuits filed against defendants charged with damage to religious property in 2005.

Thank you.

Mr. ISSA. I'm not going to ask you to excessively comment on this, but I have a copy of a piece from today related to what Mr. Weiner was talking about, and I note that it says "Vice President Dick Cheney's former top aide told prosecutors"—and there's no parentheses, no quote—"President Bush authorized the leak of sensitive intelligence information about Iraq."

Without accepting those words since they're not in quotations, isn't it the obligation of the President, as the Chief Executive and as the Commander-in-Chief, to make determinations about what should or should not be made available in order to create fear by our enemies, misinformation, et cetera, and doesn't the President hold the sole responsibility of deciding when to take those risks for whatever purpose, and when to, for example, withhold information for the same reason, that lives are at stake? Isn't that inherently within the President's power?

Attorney General GONZALES. Well, of course, the President does—he is the Chief Executive Officer of the United States. He does have—he is the Commander-in-Chief. As part of that responsibility also, as the inherent authority, he is the sole organ for the United States with respect to foreign relations. There are many responsibilities and obligations that stem from those responsibilities, and, obviously, one of those is to protect this country against our enemies.

This Congress, when it passed the authorization to use military force, recognized that the President does have the inherent authority under the Constitution—it is in the preamble—and the authorization to use military force. The President does have the authority—let me just quote from it—"The President has the authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Now, those words must mean something.

We take the position that the President does have the inherent authority, has been recognized by every court that's looked at this issue to authorize electronic surveillance of the enemy during a time of war.

Mr. ISSA. Thank you. And I notice that my colleague from California, Mrs. Waters, used the term "reverse discrimination." Isn't it fairer to say that the civil rights statutes don't recognize reverse discrimination, only discrimination regardless of the source?

Attorney General GONZALES. I would hope that Americans would expect the Department of Justice to apply the laws equally. If someone is being discriminated on the basis of their color, that we should enforce the civil rights laws.

And let me just make one final point. Talking about the rate of attrition, the rate of attorney attrition during this Administration is almost identical. Less than 1 percent different than during a comparable period of the prior Administration. And so attrition does occur. It is part of the normal life of an Administration.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman, and Mr. Attorney General.

I'd like to return to the NSA discussion. Well, before I do, let me just make an observation, something you said earlier in response to a question, that the PATRIOT Act wasn't just about our fight against terrorism and the war, it was even in times not a war. And I couldn't help but remember being in this very room in the days after the 9/11 attack, sitting at the table where you're sitting now, with the Viet Dinh, and working through this. And I'll tell you, everything we were told at that time and everything we've been told since was that the motivation and the reason for the PATRIOT Act was to fight against terrorism, not a general crime statute. So I just think that statement struck me as extremely odd.

But I want to talk also about the rule of construction. We passed the authorization for the invasion of Afghanistan. I voted for it. But the FISA statute has a specific provision that discusses how to proceed after the Congress has declared war. And it seems to me, as an ordinary rule of statutory interpretation, that the specific takes precedence over the general. I don't want to get sidetracked on that because I have some specific questions.

First, under CALEA, communications providers are required to provide standard interfaces to law enforcement agencies for wiretapping. Are these the same interfaces NSA is using to conduct surveillance under this program? What other interfaces or accesses has the NSA been provided by communications providers? Or if that is a classified matter, could you just say so and we'll pursue it in proper format.

Attorney General GONZALES. Respectfully, Congresswoman, that is an operational detail that I cannot discuss.

Ms. LOFGREN. All right. Let me talk about—it's my understanding, and all the Committee really knows is what we read in the newspapers, which I think is actually a pretty sad commentary on the lack of the partnership that we should have on this fight, the legislative and the Executive branch together on this. But in any case, it's my understanding from press reports that in 2004 the FISA Court insisted on a process where information from warrantless NSA intercepts would be tagged, so as to not leak into the FISA warrant process. The press reports further indicate that because of problems with this tagging process, some intelligence, nonetheless, did lead through to the FISA Courts warrant process.

What processes do you have in place to sequester information gathered under this program and to keep it from being used to develop warrant requests?

Attorney General GONZALES. Again, Congresswoman, that is information that I'm not at liberty to discuss, certainly not in this setting. But I can say——

Ms. LOFGREN. That strikes me as very odd.

Attorney General GONZALES. Let me just say this. We have a very good relationship with the FISA Court, and it is important for us that the FISA Court have confidence in what we're doing, that they have confidence in the applications that we submit, that they have confidence in the representations that we make to the Court, and so, despite all the revelations that have occurred—and of course, now I'm speaking on behalf of the Court and maybe I

shouldn't be doing that—but to my knowledge, I think the Court is comfortable with what the Department is doing.

Ms. LOFGREN. Well, I don't know, and apparently we can't discuss that. But I'd like to know, if you're able to tell us this, how many prosecutions have involved intelligence gathered under this program, either directly or indirectly?

Attorney General GONZALES. I'm sorry. I can't——

Ms. LOFGREN. You won't tell us that either?

Attorney General GONZALES. But let me just—but let say this, and I think this is important, and hopefully, it will be helpful to you. Let me just quote for you——

Ms. LOFGREN. My time is almost up, so you can give me what you would quote, and I promise I'll read it. I just would like to mention that under—you said that whatever is incident to conducting war, the President can do under his war powers authority without regard to statutes, is essentially what you've said.

Attorney General GONZALES. That's what the Supreme Court said.

Ms. LOFGREN. And in your 43. So which of the following things would be incident to conducting war? Shooting people, taxing them in their homes or on the street, putting them in POW camps; are all of those things incident to war?

Attorney General GONZALES. I think we'd have to look at what has occurred in the past in connection with conflicts. Let me just says—well——

Ms. LOFGREN. Just a final thing. I do appreciate you being here. This is a long day for you as well as for us, but I have a great deal of frustration. You have a job to do, but the Congress has a job to do, and we have been denied the opportunity to do it, and I thank you.

Chairman SENSENBRENNER. The gentlewoman's time has expired. The gentleman from Iowa, Mr. King.

Mr. KING. Thank you, Mr. Chairman.

And, again, General Gonzales, I thank you for your due diligence and patience before this Committee and the time that you've committed to this cause that we have. I wonder if we could return for a moment to section 203 of the Voting Rights Act, and maybe explore another aspect of the Voting Rights Act that we didn't get to earlier today. And that would be—and I'm speaking off the top of my head without notes with regard to the language that's in there—but as I recall, that when a language-deficient population is identified within a voting district, and I believe in one of those definitions it's a universe of 10,000 language deficient—-then that would be the trigger that would set up the requirement for bilingual or multilingual ballots——

Attorney General GONZALES. I think it's 10,000 or 5 percent or something like—I too don't have the exact language in front of me.

Mr. KING. Conceptually we're on the same page, I'm confident. So I would submit then that if there were 9,999 in that universe, or 5,000 or 1,000 or 500 or 1, are those people—are they afforded equal protection under the law, under the 14th amendment, or how do we ever provide for equal protection under the law if we set numerical standards for preferences in that regard?

Attorney General GONZALES. That's an interesting question, Congressman. It's not one that I have thought about, and it's the kind of question that before providing you an answer as to whether or not we've got an equal protection problem on a statute that's been passed by Congress, it would be one that I would like to talk to others in the Department about.

Mr. KING. Well, thank you, and I will submit that question in writing. And as I listen to this discussion——

Chairman SENSENBRENNER. Without objection, the question and the written response will appear in the record, and all Members may, without objection, submit questions of the Attorney General for a written response. In order to get this record to the printer, I would ask that this all get wrapped up by the 1st of May, however, which means the questions should come within the next 4 or 5 days.

Continue.

Mr. KING. Thank you, Mr. Chairman.

And as I listened to this discussion here, and particularly the remarks made by the gentlelady from California, Ms. Sánchez—and I believe the number that she gave was almost half of the people that applied to register to vote were denied, and I believe the number she gave was 43 percent. And as I listen to that, I speculate as to what percentage of those people might be illegal that are applying to vote and being denied in that fashion. I won't ask you to speculate on that, but I just, if I could read from the, actually read from the 14th amendment. And there is a provision in here that we don't discuss very much in this Congress: Representatives shall be apportioned among the several States according to their respective numbers, counting the whole numbers of persons in each State. And I'll paraphrase a little bit. And for the elections—and it lists mostly Federal election but also included the State legislature—if that right to vote is denied to any of the male inhabitants of such State—and I suspect that has been corrected by a subsequent amendment so that it is male and female, and those of age—the basis of representation therein shall be reduced in the proportion of which the number of such citizens shall bear to the whole number of citizens in the respective district. That's a paraphrase of section 2 of the 14th amendment.

So I would submit this question. As I look at the polls that come back across the 435 congressional districts in America, and I see that I need to be able to garner one more than about 240,000 votes in order to win an election, there are a couple of seats in California that don't garner perhaps even 25,000 votes in order to win an election. I speculate partly on that testimony, or partly on the question oft gentlelady from California, that there are quite a lot of illegals in those districts. They are counted for redistricting purposes, and the representation of the illegals within those districts are voiced here in Congress by people who only need 25,000 votes to win a seat. And I'd ask you, is that section 2 of the 14th amendment then, would that apply so we could correct that by an interpretation of the Constitution, or do you believe we need a constitutional amendment to correct that huge inequity that we have?

Attorney General GONZALES. Honestly, Congressman, I don't know. But I mean you've raised, obviously, some thoughtful questions, and I'd be happy to look at it and give you my views.

Mr. KING. Thank you, General Gonzales, and I will reserve the balance of my questions and put those in print as well, as directed by the Chairman. And I thank you, and I yield back the balance of my time.

Chairman SENSENBRENNER. Gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you.

Mr. Attorney General, the President has stated repeatedly, and you have too, that we are using warrantless wiretaps only to wiretap the conversation where one party is a terrorist or suspected to be a terrorist abroad. Given that, can you assure us that no warrantless surveillance is being done in cases where if you had all the time in the world, you could not get a—in your opinion, you could not get a warrant from a FISA Court?

Attorney General GONZALES. I don't have that information.

Mr. NADLER. Thank you. Number 2. Can you assure us that there is no warrantless surveillance of calls between two Americans within the United States?

Attorney General GONZALES. That is not what the President has authorized.

Mr. NADLER. Can you assure that it is not being done?

Attorney General GONZALES. As I indicated in response to an earlier question, no technology is perfect.

Mr. NADLER. Okay.

Attorney General GONZALES. We do have minimization procedures in place——

Mr. NADLER. But you're not doing that deliberately.

Attorney General GONZALES. That is correct.

Mr. NADLER. Thank you. Now, despite the efforts of many Members of Congress, as you know, there is no public reporting requirement on the number of national security letters issued every year, and there has not been a official accounting from your Department on their use. In November of last year we learned from the *Washington Post*, they said that about 30,000 national security letters are issued every year. Are they within the ballpark; is this approximately true?

Attorney General GONZALES. Quite frankly, sir, I don't know. We do send classified reports to Congress regarding our use of——

Mr. NADLER. Can you get back to us in unclassified as to roughly how many are issued?

Attorney General GONZALES. I'd be happy to consider your request, sir.

Mr. NADLER. Is there any reason why you couldn't make public the number of NSLs that have been issued every year or two?

Attorney General GONZALES. I can't think of a reason off the top of my head, but, there's a reason they're classified and——

Mr. NADLER. Well, if you can't back to us with those numbers, could you get back to us with a reason why you can't?

Attorney General GONZALES. That's fair enough.

Mr. NADLER. Thank you. Secondly, I have a question about the practice of extraordinary rendition, particularly rendition to repres-

sive countries we know practice torture. There's one widely publicized case that illustrates the issue. A Canadian citizen, Mr. Arar, was detained in 2002 at JFK Airport in New York as a suspected terrorist. He was on his way home to Canada, changing planes at Kennedy. He was grabbed by CIA agents, I gather, secretly deported to Syria where he endured 10 months of torture in a Syrian prison.

After the Syrians determined that he didn't know anything about terror, they released him. Upon his release, he declared at a news conference that he had pleaded with U.S. authorities to let him continue on to Canada, where he has lived for over 15 years, and his family, but instead, he was flown under U.S. guard to Jordan, and handed over to Syria, where he had been born, and where he was then tortured.

Does the United States Government claim the authority to kidnap anybody at a U.S. airport, and without any administrative or judicial process of any sort, put that person on a plane to a torture-practicing nation? We do not claim that authority or we do?

Attorney General GONZALES. We have international agreements, which we are a party to, where the United States has agreed, has committed, that it will not render someone to another country, where we believe it's more likely than not——

Mr. NADLER. Well, do we claim the authority to render someone to another country—let's assume we believe they're not going to use torture—by what right do we—legal right, do we pick someone up at an airport and deny him the right to continue to Canada which is where he's a citizen of, and send them to Syria without any kind of administrative or judicial process?

Attorney General GONZALES. Well, I'm not comment as to what actually may have happened or may not have——

Mr. NADLER. Do we claim the right to do that? Whatever happened in that case, is that something we claim the right to do?

Attorney General GONZALES. I don't know, but I would be happy to get back to you on that.

Mr. NADLER. You don't know if we claim the right to do that because the Government defended that in court, your Department defended that in court.

Attorney General GONZALES. Before I comment any further on that, Congressman, I'd like the opportunity to get back to you.

Mr. NADLER. Okay. And let me further ask, since we have done this, and since your Department has defended this in court, specifically in the Eastern District, is this practice limited only to airports, or do we claim the right to take people going about their business, walking on the street, grocery shopping, window shopping, at the mall, suddenly and unexpectedly to grab them and to deport them to places like Syria without any evidence, without any due process? Do we claim that right? And if we don't claim that right, why do we claim it at airports?

Attorney General GONZALES. Mr. Congressman, I'm not going to get into specific, what we do, what we don't do. What I can say is that we understand what our legal obligations are, we follow the law.

Mr. NADLER. Let me ask you the last question then. Can you assure this Committee that the United States Government will not

grab anybody at an airport or anyplace in U.S. territory, and send them to another country without some sort of due process?

Attorney General GONZALES. Well, what I can tell you is that we're going to follow the law in terms of what——

Mr. NADLER. Well, does the law permit us to send someone to another country without any due process, without a hearing before an administrative, an immigration judge or somebody? Just grab them off the street and put them on a plane, goodbye without—we've done that. Does the law permit us to do that? Do we claim that right?

Attorney General GONZALES. I'm not going to confirm that we've done that——

Mr. NADLER. Well, wait a minute. That was confirmed in court. There's no question it was done.

Chairman SENSENBRENNER. The gentleman's time——

Mr. NADLER. Do we claim the right to do it?

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. NADLER. Could he answer the question, please?

Chairman SENSENBRENNER. The gentleman's time has expired. I yield myself the last 5 minutes.

General Gonzales, I'd like to ask some follow-up questions relative to the timeline on the NSA terrorist surveillance program that I talked about at the beginning of the Q&A period when I yielded myself some time. The response that you gave to the oversight letter, which I sent, indicated that the program was first authorized and implemented in October of 2001. My recollection indicates to me that the first time that the leadership and the Chair and Ranking Members of both Intelligence Committees were briefed, was sometime in 2003. And Senator Rockefeller sent a handwritten letter expressing his concern to the Vice President. Were there briefings before 2003?

Attorney General GONZALES. I believe—I'm fairly certain, Mr. Chairman, that there were briefings that began in early or the spring of 2002, but I'm not 100 percent certain, but I'm fairly certain, certainly well before 2003.

Chairman SENSENBRENNER. Well, you know, according to your recollection, the program was authorized and implemented well before the first briefing took place with the leadership and the leadership of the two Intelligence Committees.

Attorney General GONZALES. I don't want to quibble with you over the word "well," but certainly the program was initiated before there was a briefing with congressional leadership.

Chairman SENSENBRENNER. The problem is, is that this Committee has been completely in the dark, even though this Committee has got jurisdiction over the FISA law, and maybe the problems that exist today would not have occurred had we been brought into the loop, and an amendment to the FISA law would have been advisable.

I would like to ask another question. Also from press reports that indicated that somebody from the Administration went to former Attorney General Ashcroft while he was in the hospital to obtain his sign-off on something, after then-Deputy Attorney General James Comey refused to do so. My question is, is this a program

that is significantly different than that which was previously authorized and implemented on October 2001?

Attorney General GONZALES. That is a difficult question for me to answer, Mr. Chairman, and I can't answer that question. What I can say is that the members of the Intell. Committee know the answer to that question.

Chairman SENSENBRENNER. Why was a new sign-off required?

Attorney General GONZALES. Well, there's a new sign-off required every 45 days or so, Mr. Chairman, because—and the reason for that is because we are limited by the fourth amendment, and that this search has to be reasonable, which requires an examination of the totality of the circumstances, and so within 45 days there is an analysis of the intelligence community about the threat to America, and so there is a periodic sign-off.

Chairman SENSENBRENNER. I'm fully aware of the 45-day requirement, and that is a reasonable requirement. But it seems to me if the circumstances had not significantly changed, then the position of the Justice Department in the sign-off should not have required someone who had previously signed off to change their mind.

Attorney General GONZALES. Mr. Chairman, what I can say—and I'm sure this will not be acceptable, but let me say it anyway—is that I have testified before that the disagreement that existed does not relate to the program the President confirmed in December to the American people.

Chairman SENSENBRENNER. Unfortunately, General Gonzales, I'm afraid that you have caused more questions to be put out for debate within the Congress and in the American public as a result of your answers that you've just given, as well as the answers to my questions this morning.

Now, that concerns me, and I think I can speak in a bipartisan manner that we're your partners in this area. We have not been treated as partners for whatever reason. I think that that's been a mistake, and a lot of future problems in this area could be eliminated if you bring us into your trust and confidence. We all strongly support the war against terrorism. It was this Committee that worked twice to enact the PATRIOT Act and then to extend the PATRIOT Act. Both of those were on a bipartisan vote.

I am really concerned that the Judiciary Committee has been kind of put in the trash heap after we had been able to pass some really significant legislation. And if this continues, the debate is going to continue on the NSA program.

You had a chance today to put some of these questions to rest, and I am afraid that there are more questions that will be posed out there because of the answers that you have not given.

Having said that, let me thank you for coming——

Ms. JACKSON LEE. Mr. Chairman. Mr. Chairman, could I make an inquiry?

Chairman SENSENBRENNER. No. I would like to close the hearing down.

Having said that, let me thank you for appearing. I have noted from my score card here that you answered 48 5-minute questions from both sides of the aisle, 28 from the Democratic side and 20 from the Republican side. You put in an honest day's work for an

honest day's pay. We appreciate you coming here. This has been a very wide-ranging hearing, and let me say that you're always welcome to come back.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from New York seek recognition?

Mr. NADLER. I seek recognition to point out that if a Member of the Committee seeks recognition, you can only close the hearing by a majority vote; otherwise, she must be recognized.

Chairman SENSENBRENNER. I was planning on recognizing her.

Mr. NADLER. Okay.

Chairman SENSENBRENNER. I haven't been interrupting people except when their time is expired. I would kind of like to have the same courtesy.

For what purpose does the gentlewoman from Texas seek recognition?

Ms. JACKSON LEE. I thank you, Mr. Chairman. My understanding was that you were closing the hearing and that your 5 minutes had ended, but I thank you very much.

I wanted to inquire whether or not——

Chairman SENSENBRENNER. For what purposes does the gentlewoman seek recognition?

Ms. JACKSON LEE. To make a point of inquiry, Mr. Chairman.

Chairman SENSENBRENNER. State your point of inquiry.

Ms. JACKSON LEE. The point of inquiry is, can this Committee go into classified—go into a classified session for the Attorney General to provide us with the answers to some of the questions that were not answered today, prospectively?

Chairman SENSENBRENNER. The answer to your inquiry is yes, but both Mr. Conyers and I have concerns about the effect of doing so, and this matter will be discussed with the minority, and a decision will be reached sometime——

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The purpose for which this hearing, having been called without objection, the Committee stands adjourned.

[Whereupon, at 3:03 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

RESPONSES TO POST-HEARING QUESTIONS FOR THE RECORD POSED TO ATTORNEY GENERAL GONZALES

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 6, 2006

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

With this letter we are pleased to transmit responses to a majority of the questions for the record posed to Attorney General Alberto Gonzales following his appearance before the Committee on April 6, 2006. The title of the hearing was, "Oversight of the Department of Justice." The Department is working expeditiously to provide the remaining responses, and we will forward them to the Committee as soon as possible.

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

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosures

cc: The Honorable John Conyers
Ranking Minority Member

House Judiciary Committee Hearing: "DOJ Oversight" April 6, 2006 Questions for the Record Attorney General Alberto Gonzales

QUESTIONS FROM CHAIRMAN SENSENBRENNER

1. **If Congress had not passed the Authorization for the Use Military Force on September 18, 2001, do you still think you would have the authority to carry out the Terrorism Surveillance Program?**

ANSWER: The terrorist surveillance program described by the President targets for interception communications where at least one party is outside the United States and there is probable cause ("reasonable grounds") to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization (hereinafter, the "Terrorist Surveillance Program"). As the Department has explained, the September 18, 2001 Authorization for Use of Military Force (hereinafter "Force Resolution") provides statutory authorization for the Terrorist Surveillance Program. The Force Resolution is framed in broad and powerful terms, and a majority of the Justices of the Supreme Court concluded in *Hamdi v. Rumsfeld* that the Force Resolution authorizes the "fundamental and accepted" incidents of the use of military force. As set forth at length in the Department's paper of January 19, 2006, signals intelligence is a fundamental and accepted incident of the use of military force. Moreover, when it enacted the Force Resolution, Congress was legislating in light of the fact that past Presidents (including Woodrow Wilson and Franklin Roosevelt) had interpreted similarly broad resolutions to authorize much broader warrantless interception of international communications.

Even if there were some ambiguity regarding whether FISA and the Force Resolution may be read in harmony to allow the President to authorize the Terrorist Surveillance Program, the President's inherent powers as Commander in Chief and as chief representative of the Nation in foreign affairs to undertake electronic surveillance against the declared enemy of the United States during an armed conflict would require resolving such ambiguity in favor of the President's

authority. Under the canon of constitutional avoidance, courts generally interpret statutes to avoid serious constitutional questions where "fairly possible." *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations omitted); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). The canon of constitutional avoidance has particular importance in the realm of national security, where the President's constitutional authority is at its highest. *See Department of the Navy v. Egan*, 484 U.S. 518, 527, 530 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 325 (1994) (describing "[s]uper-strong rule against congressional interference with the President's authority over foreign affairs and national security"). Thus, we need not confront the question whether the President's inherent powers in this area would authorize conduct otherwise prohibited by statute.

Even if the Force Resolution were determined not to provide the legal authority for the Program, it is the view of the Department of Justice, consistent with positions taken historically by both Democratic and Republican administrations, that the President's inherent authority to authorize foreign-intelligence surveillance would permit him to authorize the Terrorist Surveillance Program. President Carter's Attorney General, Griffin Bell, testified at a hearing on FISA as follows: "[T]he current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power of the President under the Constitution*." Hearing Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence (Jan. 10, 1978) (emphasis added). Thus, in saying that President Carter agreed to follow the procedures of FISA, Attorney General Bell made clear that FISA could not take away the President's Article II authority. More recently, the Foreign Intelligence Surveillance Court of Review, the specialized court of appeals that Congress established to review the decisions of the Foreign Intelligence Surveillance Court, discussed whether the President has inherent constitutional authority to gather foreign intelligence that cannot be intruded upon by Congress. The court explained that all courts to have addressed the issue of the President's inherent authority have "held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." *In re Seated Case*, 310 F.3d 717, 742 (2002). On the basis of that unbroken line of precedent, the court "[took] for granted that the President does have that authority," and concluded that, assuming that is so, "*FISA could not encroach on the President's constitutional power*." *Id.* (emphasis added).

4. **At a February 6, 2006 hearing before the Senate Judiciary Committee, you stated in a response to Senator DeWine that "It still takes too long, in my judgment, to get FISAs approved." Do you still agree that the FISA process needs streamlining and improving? Will improving the FISA process alleviate the need for the Terrorist Surveillance Program?**

   ANSWER: For the reasons explained in the Department's January 19th paper, the Terrorist Surveillance Program is lawful and fully consistent with FISA, and the Administration therefore believes that it is unnecessary to amend FISA to accommodate the Program. However, FISA can undoubtedly be improved, and the Department and the Intelligence Community are continually reviewing the FISA process to improve the process and remove any points of unnecessary friction. As part of this effort, the Administration will, of course, work with the Congress and evaluate any proposals for improving FISA.

5. **At the February Senate Judiciary Committee hearing you (also) stated that you expect the process to be streamlined by the creation of the National Security Division within the Department of Justice. Could you explain how you expect this Division to streamline the process and when you expect to see improvement?**

   ANSWER: The National Security Division (NSD) will bring the Department's three legal elements focusing on national security, namely, the Office of Intelligence Policy and Review (OIPR), the Counterterrorism Section, and the Counterespionage Section into a new division, under the leadership of the Assistant Attorney General for National Security (AAG). OIPR is responsible for the preparation of all applications for orders to the Foreign Intelligence Surveillance Court. The AAG will be responsible for overseeing the day-to-day operations of this national security infrastructure and coordinating the variety of national security matters that arise each day. This re-organization should result in additional management support for all our national security operations. The Department is always exploring ways in which it can manage its national security work more efficiently, and the new AAG will bring a fresh perspective to this task. The AAG will have the opportunity to examine the approval process for all our national security work, including the process by which FISA applications are reviewed and approved, and identify any points of unnecessary friction. In addition, the NSD structure will more closely align the Department's national security lawyers with the Intelligence Community, and this may lead to greater efficiencies in the Department's operations related to the Intelligence Community. The Department has no timeline for improvements that may flow from the commencement of NSD operations. We look forward to the prompt confirmation of Kenneth Wainstein as AAG so we can commence operations and begin undertaking these improvements.

7. **In Assistant Attorney General Moschella's February 28, 2006 letter responding to a letter from the Committee requesting the status of the Department's HAVA enforcement, he described efforts by the Department of Justice to reach out to all of the chief elections officials in January 2006 to inquire about the status of compliance.**

   a. **What were the results of that the survey?**

      ANSWER: As set forth in more detail below, information which we received from the states in response to our January 2006 letter to chief state elections officials, combined with information which we had been gathering since early 2004, indicates that the status of states' compliance with HAVA is constantly changing and will continue to do so as states approach the time for primary elections and the general election for federal office in 2006.

   b. **Have you heard back from all 50 State elections officials?**

      ANSWER: As of this date, we have received full or partial responses from all states and are continuing to follow up as appropriate to gather all information necessary for determining the changing status of each state's HAVA compliance.

   c. **How many States are in compliance?**

      ANSWER: The status of HAVA compliance by states is in a constant state of flux and has been so since well before the HAVA deadline of January 1, 2006, for voting systems and statewide voter registration systems. While there are many states that in our view are at least in partial compliance with HAVA, a significant number of states at this point are not in full compliance with the voting systems and voter registration list mandates. Several states that appeared to be in, or well on their way toward, full compliance with HAVA have suffered recent setbacks in their efforts to comply. In many cases, these setbacks have been the result of problems with private vendors that have been unable to deliver on contract promises and/or unexpected and extensive technological glitches that have arisen as set-up of voting systems and voter registration systems has approached finalization. In such cases, jurisdictions continue to struggle to put all systems into operation in time for upcoming federal elections.

   d. **Near compliance?**

      ANSWER: See answer to 7c, above.

e. What are the barriers preventing full compliance?

ANSWER: For the most part, states have taken their HAVA obligations seriously and have made and are making great efforts to achieve compliance pursuant to HAVA's schedule. Some, however, were much less diligent during the first couple of years after passage of HAVA to initiate compliance efforts. Due to HAVA's very rapid deadlines for compliance on the voter registration database and voting systems requirements, failure of jurisdictions to begin planning and implementation on an expedited basis after HAVA's passage is the most prevalent reason for the current failures in full compliance. Most recently, in the area of voting systems compliance, some problems have arisen across the country due to an apparent inability on the part of some voting systems vendors to deliver in full, or in some cases even in part, on voting systems orders placed by some states. It appears that this has only occurred when orders have been placed in the past six months or so, and is due to the exceedingly high number of jurisdictions that delayed until late to determine what to order. Because the vendors could not anticipate the likely demand for their particular brand of voting equipment, and because the vendors have confronted serious financial challenges over the past few years as a result of uncertainty over what would be required after the 2000 presidential election, the vendors have apparently had trouble getting manufacturer cooperation in ramping up production to meet the very late demand. In some cases it also appears that there may have been some misunderstandings or miscommunications between jurisdictions and vendors about availability and certification of systems that jurisdictions were contracting to purchase. In some cases, states have had to try alternative means of securing voting equipment for local jurisdictions, if at all possible. In addition, some states that have switched to new voting equipment have experienced technological problems in the rollout of new equipment, which has exacerbated the states' difficulties in achieving full HAVA compliance in time for the 2006 federal elections. With regard to statewide voter registration systems, while most states appear to be in compliance with this HAVA requirement, a number of states have also encountered vendor and/or technological problems in developing and implementing the systems. Several states have experienced alleged breach of contract by registration system vendors at a late stage of system development, requiring substantial delay in implementation, and in some cases where states have been dilatory, a need to begin system development all over again. As is also true for the required agreement with the Social Security Administration (SSA) for registrant verification purposes, the Department has put such states on notice of their obligations and has initiated or will initiate enforcement action as appropriate.

f. Will these States be in full compliance in time for the first scheduled election?

ANSWER: States experiencing difficulties at this late date with regard to HAVA compliance are continuing to make efforts to resolve problems and secure compliance to the greatest extent possible by the time of their upcoming federal elections. As indicated above, this process is a fluid one, and the Department is in continuous contact with states to determine compliance status, discuss possible resolution of HAVA issues and give assistance as appropriate.

g. Why did you wait until after the January 1, 2006 deadline to seek information about compliance?

ANSWER: The Department's actions to determine the status of the states' compliance with HAVA began long before January 2006. Since HAVA's enactment in late 2003, the Civil Rights Division has closely monitored the constantly evolving actions of each of the states and territories to comply with HAVA's mandates. First, beginning in early 2004, the Voting Section of the Division began gathering information from a variety of sources concerning states' HAVA activities, including those to develop and implement statewide voter registration lists and to ensure that voting systems for use in federal elections in 2006 meet the Act's voting system standards. In August 2005, we sent a letter to the chief election official of each state and territory, requesting detailed information concerning each state's actions to comply with the voting system and registration list requirements. We followed up on the responses we received to these letters to gather further information, or to engage in discussions with states over specific compliance issues. In October 2005, we sent letters to each state and territory inquiring about the states' actions to enter into an agreement with the SSA, as required by HAVA, for purposes of verifying the identification of new applicants for voter registration. In January 2006, we sent letters to all state chief elections officials, requesting further information concerning compliance with HAVA's voting systems and voter registration list requirements. In March 2006, we sent letters to certain states requesting updates concerning the HAVA-required state agreements with the SSA.

Attorneys from the Voting Section also have made numerous on-site visits to states to gather information about HAVA compliance activities, in some instances observing the operation of voter registration systems completed or under development. We have also taken formal enforcement action under HAVA. In October 2005, following months of meetings and negotiations, the Division reached agreement with the State of California on a Memorandum of

Agreement concerning development and implementation of their new statewide voter registration database system. On March 1, 2006, we filed suit against the state of New York based on allegations of non-compliance with HAVA's voting systems and voter registration list requirements. On March 23, 2006, a federal court in New York found the New York State Board of Elections in non-compliance with HAVA, and the state has recently submitted a HAVA compliance plan to the court for review and approval. On May 1, 2006, we filed suit against the state of Alabama based on allegations of non-compliance with HAVA's voter registration list requirements. We are currently talking with other states to determine possible legal action or necessary agreements on certain aspects of HAVA compliance, and intend to continue to work with states to the extent possible to achieve maximum HAVA compliance. We will continue to make HAVA enforcement decisions, as appropriate, taking into account a variety of factors including the extent of HAVA non-compliance and the history of a state's compliance efforts.

8. **Over the last few years, the Department has undertaken a strong effort to enforce the bilingual election assistance requirements in Section 203 of the Voting Rights Act (VRA). However, concerns have been raised by jurisdictions that they have limited opportunity to correct or work with the Department to correct any inadequacies in compliance before an enforcement action is filed. For example, it has been brought to our attention that the Department engages or requires the local election officials to engage in a "sur-name" analysis of registered voters to identify potential recipients of bilingual assistance.**

   a. **Would you describe the approach that the Department follows when working with a jurisdiction covered by Section 203 to comply with its requirements?**

      ANSWER: The Department follows an approach of (1) vigorous outreach and education of state and local authorities, (2) investigation, and (3) enforcement actions, where necessary and appropriate.

      During this Administration the Department has significantly expanded both written notice and in-person outreach to state and local election officials to inform them fully of their obligations under Section 203, and to answer any questions they may have.

      The Department formally notified by letter each jurisdiction covered under Section 203 of the Voting Rights Act upon the announcement by the Director of the Census in July 2002 of the Census coverage. That notice letter was, for the first time, expanded to include extensive practical guidance on achieving compliance. In addition to our formal Guidelines, we developed a brochure

that identified best practices, and Civil Rights Division attorneys traveled to newly-covered jurisdictions and met face to face with local officials and minority language community members. In these meetings they explained the requirements of the law, offered guidance, provided Census data, answered questions, and encouraged cooperation. We provided an attorney point of contact for each covered jurisdiction. The Department continued outreach through national and regional associations of election officials. For example, the Chief of the Voting Section has regularly spoken on Section 203 at conferences for election officials organized by the Texas Secretary of State. On August 31, 2004, the Assistant Attorney General for the Civil Rights Division sent an additional letter to each covered jurisdiction to remind them of their obligations under Section 203 and again offer best practices in advance of the fall elections. The letter again invited questions and provided a point of contact.

Many state and local election officials have taken advantage of this assistance, and the Department has achieved unprecedented levels of voluntary compliance during this Administration. Other officials, however, have not voluntarily complied, including some localities where the requirements have applied since the original passage of the minority language assistance provisions in 1975. The Department, having given repeated and detailed notice to each covered jurisdiction, has not hesitated to enforce the law.

In enforcing the law, and in fostering voluntary compliance, the Department has found surname data to be a useful tool both for our investigations and for local election officials who wish to comply with the law as effectively and efficiently as possible. We allow and encourage local officials to target services to those who need them rather than wasting resources on non-citizens or persons who can, in fact, speak and read English. The Census does not make available the key Section 203 data – the number of voting age citizens who speak a particular covered language and who have limited English proficiency – at the precinct level, the level used by local election officials. The Census suppresses such localized information with that combination of detail for privacy reasons.

The most convenient tool for identifying areas of possible need for language services is the current voter registration list, which is the foundation for local election administration, and which includes those persons actually eligible to vote and eligible for the Section 203 language services. The voter registration lists do not indicate language ability, of course, so local officials must turn to other devices, such as any ethnicity data that may be on the registration record, place of birth data, or, most commonly, surname data. These data do not, of course, mean that all citizens flagged need language assistance; far

from it. The presence, however, of a significant number of persons with, for example, Spanish surnames is a helpful indicator that there may be a need for language assistance in that precinct. Where we find precincts with over 1,000 Spanish surnamed voters and no bilingual personnel, for example, we take that as a strong indication that the precinct contains voters with an unmet need for Spanish language services. We then investigate further by interviewing local election officials and members of the minority language community to determine whether that is, in fact, the case. Local knowledge and inquiry can quickly and efficiently identify areas where the projected need is illusory or where the need is greater than surname or other analysis suggests. Surname analysis accordingly is a useful, but not dispositive, tool for assuring that citizens are served effectively and efficiently.

b. How does the Department determine the type of assistance necessary to help language minority citizens in a jurisdiction?

ANSWER: The Department evaluates each jurisdiction individually and seeks to assist local communities to find means of compliance that are both effective and efficient. To this end we rely heavily on information from local members of minority language communities and local election officials, and we seek to identify existing channels of communication that can be used with minimal cost and maximum impact. Just as Congress recognized the need for oral assistance to serve Native American voters whose languages have historically been unwritten, we have recognized the need to tailor programs by seeking practical solutions that serve the individual and highly diverse circumstances that exist in the covered jurisdictions. We encourage local officials to advertise in newspapers, newsletters, and other media geared to serving minority language voters. We also encourage local officials to adopt practices such as building extensive databases of fax numbers and e-mail addresses (for example, of voters in businesses, churches, unions, social and fraternal organizations, and service providers that serve their minority language community) and sending election information in a way that penetrates the community at essentially no cost.

c. Does the Department work with local minority organizations to determine how best to reach language minority citizens?

ANSWER: As set forth in our minority language brochure, "The cornerstone of every successful program is a vigorous outreach program to identify the needs and communication channels of the minority community." The Department contacts language minority organizations and community members in each jurisdiction we monitor. We gather key facts from them and encourage their cooperation with local election officials. The Department also

is in frequent contact with national organizations on Section 203 issues. The Department regards close contact with the communities we serve as essential to effective law enforcement.

d. **What does the Department do to promote cooperation between local election officials and language minority residents?**

ANSWER: The Department makes every effort to encourage cooperation between local election officials and language minority residents from our first outreach to the community to our resolution of cases through enforcement actions. Indeed, the final order in each of our lawsuits specifically includes an Advisory Group open to all interested persons that provides a vehicle for ongoing cooperation and consultation.

9. **In 2004 FBI Director Mueller instituted a five-year term limit for supervisors in the FBI field offices. The purpose of this change, as I understand it, was to fill vacancies in the Washington headquarters, and to provide managers with opportunities to broaden their expertise and gain an understanding of how the FBI operates as a unit. These goals are laudable, however, I understand that this plan is also having a negative effect as senior FBI agents are choosing to resign, rather than moving their families to Washington, DC, and those who do choose to relocate take with them local institutional knowledge that can't be replaced. How are you working to ensure that rigid rules do not have the unintended consequences of costing the FBI the ability to be as effective as possible?**

ANSWER: The Field Office Supervisory Term Limit Policy (FOSTLP) was initially implemented in June 2004 as a way to better position the Bureau for the challenges of the future. As the FBI evolves toward a global, intelligence-driven agency focusing on terrorist organizations, hostile intelligence services, and international criminal enterprises, we must ensure that our front-line leaders develop a broad base of experience as they acquire leadership skills. The FOSTLP will promote a diversification of experiences among the supervisory ranks through a strong emphasis on continued career development.

Because the Supervisory Special Agents affected by this policy are among the FBI's most experienced mid-level managers, the program affords a grace period ranging from two to three years (based on tenure) during which Supervisory Special Agents can exercise the following available options:

- Compete for Assistant Special Agent in Charge (ASAC) positions in the field.

- Compete for Unit Chief and Assistant Section Chief positions at FBIHQ.
- Compete for Term GS-15 Team Leader positions in the Inspection Division.
- Compete for Assistant Legal Attaché or Legal Attaché positions.
- Participate in the Alternate FBIHQ Credit Plan Pilot Project, which allows accelerated opportunities to obtain FBIHQ credit and acquire eligibility to compete for ASAC positions.
- Compete for additional five-year SSA terms in positions designated as "hard to staff."
- Compete for positions in the FBIHQ Term Temporary Duty (TDY) Pilot Program, which allows SSAs to compete for GS-14 and GS-15 SSA positions at FBIHQ and obtain full FBIHQ credit upon completion of an 18-month TDY assignment.

Those SSAs who ultimately decide to remain in the current office of assignment and return to investigative duties will benefit from the FBI's Highest Previous Rate (HPR) policy, pursuant to which GS-14 SSAs returning to investigative duties will be placed in the GS-13 "step" comparable to the GS-14 salary. Only those whose pay conversions exceed a GS-13, Step 10 salary will experience a pay reduction (pay set according to HPR cannot exceed step 10).

While we understand that some SSAs are disappointed in the changes brought about by the FOSTLP and we are aware that some have publicly indicated that they do not intend to seek advancement, this stated intent is contradicted by results obtained through tracking those SSAs affected by the FOSTLP. As of 4/17/06, 77 out of 162 SSAs facing term limits in calendar year (CY) 2006 have already made career decisions, with 86% securing promotions in career-advancing positions. For those SSAs affected by the policy in CY 2007, 93 out of 255 SSAs have already made career decisions, with 85% pursuing career advancement. These career advancements have included the selections of 39 ASACs, 18 Unit Chiefs, 17 Legal Attachés or Assistant Legal Attachés, and 10 Assistant Inspectors.

QUESTIONS FROM REPRESENTATIVE COBLE

12. During the hearing, I asked what steps are being taken to address concerns raised by the Inspector General (IG) in a recently issued report on Port Security. You testified that your office was reviewing the report and would be developing recommendations. My greatest fear is that the next terrorist attack on our homeland will come through one of our great seaports. What actions are being taken to address the IG's concerns, when will they occur, and when can we expect another report or evaluation of security measures at our ports?

ANSWER: In its March 2006 report entitled, *The Federal Bureau of Investigation's Efforts to Prevent and Respond to Maritime Terrorism*, DOJ's Office of the Inspector General (OIG) made several findings and recommendations regarding the FBI's Maritime Security Program (MSP). In a 3/17/06 letter to Inspector General Fine from Mr. Willie T. Hulon, Assistant Director, Counterterrorism Division, the FBI identified the steps taken in response to each of these findings and recommendations (a copy of the letter is attached). The FBI is preparing a formal reply to the report that documents these and subsequent steps taken, and this process will be repeated every 90 days until the FBI has completed its response to all report findings and recommendations.

Many of the OIG's findings and recommendations were developed prior to the President's approval of the Maritime Operational Threat Response (MOTR) Plan in October 2005. The MOTR Plan is one of eight plans supporting the National Strategy for Maritime Security, the development of which is mandated by National Security Presidential Directive 41/Homeland Security Presidential Directive 13 (12/21/04). The MOTR Plan, which was developed under the joint leadership of the Departments of Defense and Homeland Security with DOJ and FBI participation, provides a framework for interagency communication and coordination in response to maritime threats and incidents. This framework, which uses the existing network of federal command centers, has been used to successfully resolve several incidents in the past few months and has dramatically improved the operational response to maritime threats and incidents.

The mission of the FBI's MSP, which was initiated in July 2005 (and not fully addressed in the OIG's audit, which began in May 2005), is to prevent, disrupt, and defeat criminal acts of terrorism directed against maritime assets and to provide counterterrorism preparedness leadership and assistance to Federal, state, and local agencies responsible for maritime security. The MSP will complement the efforts of other U.S. Government entities, focusing on core FBI competencies that include the establishment of a human intelligence base, the collection and distribution of relevant information and intelligence, the

preparation of threat and vulnerability analyses, and the provision of investigative support. The MSP emphasizes the importance of its liaison relationships with the U.S. Coast Guard (USCG) and other agencies, participating with the USCG, the Coast Guard Investigative Service (CGIS), and others in formal and informal interagency working groups. Recently, both the USCG and Naval Criminal Investigative Service (NCIS) have assigned full time representatives to the MSP.

The MSP also provides guidance to approximately 80 Maritime Liaison Agents (MLAs), who are assigned to the FBI's Joint Terrorism Task Forces (JTTFs) throughout the United States. MLAs include FBI Special Agents as well as JTTF Officers from the CGIS, NCIS, state and local port authorities and police departments, and others. The FBI recently hosted an MLA training conference that included representatives and presentations from the FBI, DOJ, USCG Headquarters, USCG field operations, CGIS, NCIS, and other Federal and local law enforcement agencies. Conference training included the authorities and capabilities of these agencies as well as best practices and guidelines for operational responses to maritime terrorism threats and incidents.

13. I am concerned by reports of organized crime syndicates linked to intellectual property theft and counterfeiting. The ability to steal intellectual property and counterfeit American made goods and then market those goods around the world is deeply troubling. What is the Department of Justice's comprehensive, long-term plan to combat intellectual property theft and counterfeiting by organized crime syndicates?

ANSWER: The Department shares your deep concern over the increasing involvement of organized crime in the commission of IP offenses. Given the high profits and low risks involved in such crimes, it is not surprising that organized crime groups are capitalizing on the opportunity to earn substantial illicit proceeds from trafficking in counterfeit goods.

The Department has conducted a number of recent investigations and prosecutions of organized crime groups engaged in IP theft and counterfeiting. For instance, in April 2006, two Chinese nationals pleaded guilty to charges arising from a federal crackdown against a violent criminal organization in New York known as the "Yi Ging Organization." These defendants had been charged along with 39 others in a September 2005 indictment charging racketeering offenses, including extortion, witness tampering, trafficking in counterfeit DVDs and CDs, money laundering, operating a large-scale illegal gambling business, and drug trafficking. The Yi Ging Organization allegedly generated millions of dollars in profits from their counterfeit DVD and CD business. Gang members traveled to China to obtain illegal copies of American and Chinese DVDs, which

they then smuggled into the United States, copied, and sold along with pirated music CDs at stores the gang controlled in Manhattan and other parts of New York City. According to the indictment, leaders of the Yi Ging Organization ordered associates to use force against groups and individuals who were perceived as threats to the Organization, including competitors in the counterfeit DVD and CD business.

Another example of an organized crime prosecution occurred in November 2004, when federal agents in New York arrested 28 individuals as part of the takedown of organized criminal organizations allegedly engaged in attempted murder, loan sharking, alien smuggling, narcotics distribution, gambling, and trafficking in counterfeit clothing accessories. The arrests included members of two Asian criminal enterprises operating in Manhattan's Chinatown and in Flushing, Queens, and twelve of the gangs' members were charged federally with criminal racketeering. These criminal organizations' alleged illegal activities included selling counterfeit Chanel, Gucci, and Coach accessories at stores they owned in Midtown Manhattan, as well as distributing the counterfeit apparel to other retail outlets. Twenty-four individuals connected with these criminal enterprises have already pled guilty.

Although these and other cases show some success in combating organized crime groups engaged in IP theft and counterfeiting, the Department is committed to doing more. We have implemented a multi-front enforcement approach to combating intellectual property crime, in particular large-scale intellectual property crime committed by organized criminal groups and syndicates.

First, within the Criminal Division, the Computer Crime and Intellectual Property Section ("CCIPS") devotes 14 of its 35 attorneys to intellectual property enforcement issues, including prosecution, legislative reform, and international training and technical assistance. CCIPS' prosecution strategy stresses the development of undercover investigations that, in turn, lead to multi-district and international prosecutions of organized criminal groups. CCIPS' investigations and prosecutions of intellectual property offenses continue to increase, with nearly an 800% increase in its pending IP criminal workload in the past four years -- from 23 pending cases and investigations at the beginning of FY2002, to 203 pending cases and investigations at the beginning of FY2006. CCIPS also provides training and on-call, 24/7 legal guidance to agents and prosecutors in the field; provides technical assistance on relevant legislative issues; and assists in the development of Department and Administration policy on intellectual property issues.

Second, the Department has designated at least one Computer Hacking and Intellectual Property ("CHIP") coordinator in every U.S. Attorney's Office in the country. As with all federal crime, primary responsibility for prosecution of federal intellectual property offenses falls to the 94 U.S. Attorneys' Offices across the United States and its territories. CHIP Coordinators are Assistant U.S. Attorneys with specialized training in intellectual property and computer crime, and who serve as subject-matter experts within their districts. Identifying a CHIP Coordinator in each District ensures that a prosecutor with training and experience in intellectual property crimes is available wherever and whenever an offense occurs. Like CCIPS, U.S. Attorneys' Offices have also seen increases in their intellectual property cases, with prosecutions increasing 70% from FY2004 to FY2005, and the number of defendants charged more than doubling (from 141 to 352).

Third, the Department has created CHIP Units in districts where the incidence of intellectual property and hi-tech crimes is higher and is more likely to significantly impact the national economy. There are now 18 CHIP Units across the United States. "The Department has created 12 new CHIPS Units in the past two years, well above the five Units recommended in the Department's IP Task Force Report, issued in October 2004." CHIP Units consist of a concentrated number of trained prosecutors in the same U.S. Attorney's Office. These Units have been successful in increasing the enforcement of criminal intellectual property laws. The most recent data shows an increase of 46% in the number of defendants charged in districts with CHIP Units as compared to the year before these Units were activated.

Finally, the Organized Crime and Racketeering Section (OCRS) of the Criminal Division works closely with the FBI to coordinate the Department's Organized Crime Program, which has a long history of proven success. In recent years, the Program has broadened its focus from the traditional LCN ("La Cosa Nostra") syndicates to encompass new and evolving forms of organized crime threats. Enforcement efforts are currently directed against several transnational organized crime groups believed to engage in or otherwise support intellectual property theft and counterfeiting, including the Chinese Triads, the Sicilian Mafia, and Russian criminal networks. The Organized Crime Program applies a comprehensive approach to these cases, designed to disrupt and dismantle a criminal enterprise through the use of wide-ranging investigative strategies and the powerful RICO (Racketeer Influenced and Corrupt Organizations) statute.

OCRS supervises the investigation and prosecution of these cases by specialized Organized Crime Strike Force Units within U.S. Attorneys' Offices in 21 federal districts. In addition, OCRS maintains a cadre of experienced

prosecutors trained in multi-defendant RICO cases and available to assist in the prosecution of a broad spectrum of organized crime activities

The combined prosecution efforts of the CHIP network, CHIP Units, CCIPS, and OCRS create a formidable multi-front enforcement attack against intellectual property thieves and the organized crime element. While the challenge before us is great, and growing, I believe that this enforcement strategy will continue to yield improved results.

QUESTIONS FROM REPRESENTATIVE KING

14. The Crime Subcommittee has heard extensive testimony concerning enforcement practices by BATFE at gun shows. Do you believe BATFE was justified in shadowing customers at gun shows, "discouraging" sales, stopping some customers for roadside questioning and gun seizure on their way home, and sending local police to gun buyers' homes for "residency checks"? If not, will you adopt clear investigative guidelines to avoid such excesses in the future?

ANSWER: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) provided extensive testimony and other responsive information to the Subcommittee with regard to the gun show operations conducted in Richmond, Virginia and across the country. That information indicated that ATF conducts investigations at 2% of the 5,000 gun shows that take place each year. The operations that took place in the Richmond area in 2004-2005 were a focused effort designed in partnership with state and local law enforcement authorities to reduce violent crime and prevent diversion of firearms. ATF provided examples and statistics demonstrating the success of these efforts and explained the law enforcement techniques that were employed at the gun shows to accomplish their goals.

ATF is aware that concerns have been raised with regard to one of the gun show operations that took place in August 2005. ATF has addressed those concerns, both before the Subcommittee and with its personnel in the field. ATF has taken the appropriate steps to adapt its operations to avoid similar concerns in the future.

15. Also in the Crime Subcommittee, we heard considerable testimony about BATFE's practices in cases involving revocation of federal firearms licenses. There seemed to be agreement on all sides that BATFE should have enforcement options short of revocation. Do you agree with that as well?

ANSWER: ATF is willing to explore the use of alternate sanctions as another tool and means of enforcement options.

16. There also was some very disturbing testimony that BATFE demands an almost impossible level of perfection among licensees - for instance, that BATFE revoked a gun store's license where the store's records were 99.96% accurate and the BATFE's ability to trace firearms was in no way impaired by the

4/100% inaccuracies, and the government then argued in the Court of Appeals that "no errors are permissible." Do you think this is a reasonable approach to administrative enforcement? If not, what changes do you plan to make regarding BATFE's enforcement standards?

ANSWER: ATF has issued national guidelines to field personnel to ensure Federal Firearm Liscensee (FFL) violations are addressed consistently across the country. These guidelines do *not* reflect a "zero tolerance" policy. ATF does not ordinarily revoke licenses solely on the basis of a few minor record keeping violations and this policy is reflected in both our national guidelines and inspection results. Moreover, the fact that ATF typically inspects over 5,000 FFLs each year and revokes approximately 100 licenses per year, which is less than one-tenth of one percent of the total FFL population, clearly indicates that the agency is not abusing its discretion in regulating the firearms industry.

ATF has discretion whether to use its resources to pursue revocation and the vast majority of record keeping violations result in no penalties being imposed on an FFL. Even where violations are clearly willful, we generally seek license revocation only where it appears that voluntary compliance is unlikely or that continued operation of a firearms business poses a threat to public safety.

Testimony given before the Crime Subcommittee brought allegations of an instance where ATF supposedly revoked a FFL's license simply because of the FFL's failure to complete 12 blocks on Forms 4473. It was noted that the case was appealed to the Seventh Circuit Court of Appeals. ATF disagrees with the characterization of this case as presented at the hearing. The case referenced may be found at Article II Gun Shop, Inc. v. Gonzales, 2006 U.S. App. LEXIS 6818 (7th Cir., March 20, 2006). The court's opinion correctly states that the Notice of Revocation was issued after an inspection in 2000 in which the FFL was cited for 2 alleged straw sales, 15 violations on ATF Forms 4473, 49 transfers of firearms to aliens without required documentation, and 14 failures to timely record information in the acquisition and disposition record. The District Court decided the case on a motion for summary judgment that raised only the 15 violations on the Forms 4473. This does not mean that the other violations cited in the notice were not supported by evidence. In granting the government's motion for summary judgment for 15 violations on ATF forms 4473, the District Court found that these violations were willful as a matter of law. The Seventh Circuit upheld the granting of the motion.

The Article II Gun Shop case does not support the assertion that ATF revokes FFLs for inconsequential and trivial violations of the law and regulations. The original Notice of Revocation included numerous significant violations that, combined with the previous compliance record, established a plain indifference to

the requirements of the law and showed no desire on behalf of the FFL to voluntarily comply with the law.

Again, the fact that ATF revokes less than 100 licenses per year speaks volumes on how infrequently our revocation authority is used, hardly coming up to the threshold of abuse.

It should be noted that ATF has been criticized in the past for not revoking enough licenses and now it is the subject of oversight hearings for allegedly revoking too many licenses.

17. When Congress enacted the Firearms Owners Protection Act in 1986, the Senate Judiciary Committee Report stated that the purpose of adding "willfully" to the license revocation procedure "is to ensure that licenses are not revoked for inadvertent errors or technical mistakes." S.Rep. No. 98-583 at 88. But BATFE continues to argue against this interpretation. In fact, in one case, ATF argued to the court that Congress' addition of the word "willfully" to the license revocation statute was "without practical significance." Do you think this is an appropriate position for the Government to take concerning an act of Congress? If not, what changes do you plan to make regarding the Government's position?

ANSWER: Willfulness is not defined in the Gun Control Act (GCA), but Federal courts have consistently defined the term as requiring evidence the FFL knew of the legal requirements at issue and disregarded or was plainly indifferent to the requirements. This interpretation is not unusual in the civil context. It is consistent with that used in other administrative proceedings, such as Occupational Safety and Health Administration civil proceedings for workplace safety violations and securities fraud cases administered by the Securities and Exchange Commission.

Amending the GCA to provide a statutory definition of willfulness that narrows FFL revocations to those violations undertaken with the intent to violate the law would dramatically narrow the scope of the sanction. It would mean that negligent serious violations, even those that recur year after year, could not be cited as a basis for revocation. Moreover, adoption of this standard for revocation would provide no incentive for FFL's to comply with the vast majority of their obligations under the law and regulations.

18. Last week in the Crime Subcommittee, Mayor Bloomberg of New York testified against a proposal to codify an appropriations rider that prohibits BATFE from disclosing firearms trace data, except for disclosure to law enforcement during a bona fide criminal investigation. Over the past several years, BATFE has supported this language in order to protect confidential law enforcement information, and with DOJ's support has opposed such disclosures in court. Do you continue to support legislation that maintains the confidentiality of this information?

ANSWER: The Consolidated Appropriations Act of 2005, PL 108-447 (the Act), provides restrictions related to the disclosure of part or all of the contents of the Firearms Tracing System (FTS) or any information required to be kept by Federal Firearms Licensees (FFL) pursuant to 18 USC 923(g), or required to be reported pursuant to 923(g)(3) and 923(g)(7). While the Act does not completely prohibit ATF from sharing trace data, it does provide limitations on disclosure, as follows:

1. No part of the above-specified information can be disclosed to anyone except as follows:
    a. A Federal, State, or local law enforcement agency (LEA)
        i. Solely in connection with a bona fide criminal investigation or prosecution; and
        ii. Where such information pertains to the geographic jurisdiction of the LEA
2. The information is not subject to subpoena or other discovery in any civil action

ATF traces firearms for more than 17,000 Federal, State and local law enforcement agencies, each of which uses such information in connection with law enforcement investigations. Under the Act, requesting law enforcement agencies can receive complete trace result reports from ATF as long as they meet the criteria defined above.

Firearms trace requests are submitted during the course of bona fide criminal investigations. Premature release of the covered information could compromise an investigation and, indeed, could pose a risk to the safety of undercover officers, confidential informants, or witnesses. As such, the Department of Justice and ATF continue to believe that the disclosure of this information should be restricted.

19. Because the Immigration Judges and Immigration Board Members exercise the Attorney General's authority over immigration, you can currently issue decisions that overturn their findings. Senator Specter, however, recently introduced a bill that would take this authority away from you and require you to appeal administrative immigration decisions with which you disagreed to the Courts of Appeal.

a. How would this proposed legislation affect the national security?

ANSWER: As you probably know, the provision mentioned above is not included in the version of the Comprehensive Immigration Reform Act of 2006 that passed the Senate. Senator Specter has been sensitive to the Department's concerns about altering the structure of administrative adjudication of immigration cases (although a few provisions in the Senate bill would still reduce the Attorney General's power to supervise Immigration Judges and the Board of Immigration Appeals). The Department's longstanding view is that the Attorney General is the Executive Branch official ultimately responsible for the administrative adjudication of immigration cases. Although he has delegated his authority to the Board of Immigration Appeals, it is essential for the Attorney General to retain the power to overturn its findings and conclusions. Immigration cases can involve matters of national security, and so any proposal that diminishes the Attorney General's authority over immigration cases necessarily undermines national security.

b. How would this affect the Executive Branch's ability to ensure that the immigration laws that Congress passes are enforced?

ANSWER: As noted above, the Department's longstanding view is that it is essential that the Attorney General have responsibility and control over immigration adjudications that are delegated to the Board and Immigration Judges to ensure that the laws of this country are enforced and enforced consistently. The adjudication of cases is one of the principal means for interpreting this country's immigration laws. As the chief law enforcement officer in the Executive Branch, the Attorney General is uniquely positioned to ensure that the immigration laws that Congress passes are properly interpreted by the Board and Immigration Judges. However, the Attorney General can fulfill this obligation only if he has authority over the immigration cases that are adjudicated administratively as well as authority over the adjudicators.

c. **How would this affect the President's ability to control foreign relations with other nations?**

ANSWER: Delegating the powers traditionally held by the Attorney General regarding the adjudication of administrative immigration removal cases to an "independent agency" would undermine the President's ability to control foreign relations with other nations. The Supreme Court has consistently recognized that immigration adjudications can implicate sensitive issues relating to foreign relations. See e.g., INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999). Accordingly, the Attorney General must retain the ultimate authority in immigration cases in order to preserve the President's ability to control foreign relations with other nations.

d. **How would this affect Congress's oversight of immigration?**

ANSWER: Traditionally Congress has exercised its oversight relating to the adjudication of immigration removal cases by turning to one official, the Attorney General, to explain, justify, or correct the actions of the Board or Immigration Judges. Any legal modifications that diminish the Attorney General's authority over the cases adjudicated by the Board and Immigration Judges will necessarily undermine the traditional oversight process. Furthermore, to the extent that immigration adjudication authority is exercised by a large group (*i.e.*, Board members and Immigration Judges) oversight becomes more resource intensive and less responsive.

20. **I believe that the Voting Rights Act does not require or allow surname analysis by the Department of Justice to make statistical determinations that they use to require voter outreach to LEP (limited English proficient) populations. I believe that in our diverse society a person's last name is not a good indicator of whether he or she speaks English well. Our nation has a rich history of immigrants working hard to learn English. I believe that the VRA requires the DOJ to rely on more accurate census data where people describe their own language ability. Are you aware of this practice of surname analysis at the DOJ and do you believe it is appropriate when there is more accurate data available?**

ANSWER: In enforcing the law, and in fostering voluntary compliance, the Department has found surname data to be a useful tool both for our investigations and for local election officials who wish to comply with the law as effectively and efficiently as possible. We allow and encourage local officials to target services to those who need them rather than wasting resources on non-citizens or persons, who can, in fact, speak and read English. The Census does not make available the key Section 203 data – the number of voting age citizens who speak a particular

covered language and who have limited English proficiency – at the precinct level, the level used by local election officials. The Census suppresses such localized information with that combination of detail for privacy reasons.

The most convenient tool for identifying areas of possible need for language services is the current voter registration list, which is the foundation for local election administration, and which includes those persons actually eligible to vote and eligible for the Section 203 language services. The voter registration lists do not indicate language ability, of course, so local officials must turn to other devices, such as any ethnicity data that may be on the registration record, place of birth data, or, most commonly, surname data. These data do not, of course, mean that all citizens flagged need language assistance; far from it. The presence, however, of a significant number of persons with, for example, Spanish surnames is a helpful indicator that there may be a need for language assistance in that precinct. Where we find precincts with over 1,000 Spanish surnamed voters and no bilingual personnel, for example, we take that as a strong indication that the precinct contains voters with an unmet need for Spanish language services. We then investigate further by interviewing local election officials and members of the minority language community to determine whether that is, in fact, the case. Local knowledge and inquiry can quickly and efficiently identify areas where the projected need is illusory or where the need is greater than surname or other analysis suggests. Surname analysis accordingly is a useful, but not dispositive, tool for assuring that citizens are served effectively and efficiently.

21. Concerning the Voting Rights Act, do you believe Section 203 encourages assimilation? Do we still need Section 203? Do you believe Section 203 increases the likelihood of voting errors or voter fraud in the electoral process?

ANSWER: In passing Section 203, both as originally passed in 1982 and as reauthorized this year, Congress found that English language acquisition is extremely important for all Americans. The cases that DOJ has brought under Section 203 have uncovered the ill treatment of voters in some non-compliant jurisdictions. For example, in United States v. Westchester County, New York, poll workers refused to offer Hispanic voters provisional ballots; demanded identification from Hispanic voters that was not demanded from other voters; improperly directed Hispanic voters to other polling places; denied voters assistance by persons of the voter's choice; and treated voters with such hostility that at least one voter left the polls in tears. Likewise, in United States v. Ector County, Texas, poll workers demanded identification from Hispanic voters that was not demanded from other voters; improperly directed Hispanic voters to other polling places; denied voters assistance by persons of the voter's choice; and treated Hispanic voters with disrespect and impatience not shown to white voters.

Section 203 may also reduce voting errors and combat voter fraud. Where citizens have access to ballots they can understand and bilingual individuals to help them through the election process, there may be a natural reduction in voting errors. Similarly, where citizens have access to ballots that they can read and understand, they are far less vulnerable to voter fraud. Our recent lawsuit against the City of Boston, for example, was brought in part on evidence that individuals had, on election day, taken English language ballots from Chinese-speaking voters and marked those ballots regardless of the voters' wishes.

QUESTIONS FROM REPRESENTATIVE CONYERS

24. In response to questions on the NSA program posed by House Judiciary Democrats, the Department indicated that an advantage of the NSA warrantless surveillance program as compared to electronic surveillance under FISA is that an NSA analyst rather than a judge makes the probable cause decision before an electronic communication is intercepted. Is it the Administration's position that there is no need for judicial check on the NSA warrantless wiretapping program?

ANSWER: The President authorized the Terrorist Surveillance Program because it offers the speed and agility required to help defend the United States against further terrorist attacks by al Qaeda and affiliated terrorist organizations. Under the Program, professional intelligence officers, who are experts on al Qaeda and its tactics (including its use of communications systems), with appropriate and rigorous oversight, make the decisions about which international communications should be intercepted. In the narrow context of defending the Nation in this congressionally authorized armed conflict with al Qaeda, we must allow these highly trained intelligence professionals to use their skills and knowledge to protect us.

25. Are there any safeguards in place to assure that privileged communications between attorneys and their clients or doctors and their patients are not captured in the NSA program?

ANSWER: The Terrorist Surveillance Program targets communications for interception only when one party is outside the United States and there is probable cause to believe that at least one party is a member or agent of al Qaeda or an affiliated terrorist organization. The Program does not specifically target the communications of attorneys or physicians, and procedures are in place to protect privacy rights, including applicable minimization procedures and other applicable procedures required by Executive Order 12333 and approved by the Attorney General, that govern acquisition, retention, and dissemination of information relating to U.S. persons.

30. In your February 28, 2006 letter to Senator Arlen Specter clarifying your testimony before the Senate Judiciary Committee on February 6, 2006, you included a strained explanation that your testimony was confined to only the program that President had previously described. Do other programs of

warrantless electronic surveillance exist? Do other programs of warrantless physical searches or mail searches exist? Which agencies run these programs and how long have they been in operation? What legal standards apply to these other programs?

ANSWER: It would be inappropriate in this setting to discuss the existence (or non-existence) of specific intelligence activities or the operations of any such activities other than the Terrorist Surveillance Program publicly confirmed by the President. Our answer should not be read to suggest the existence or non-existence of specific intelligence activities. Consistent with longstanding practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the intelligence committees and congressional leadership.

37. The Inspector General's report indicates that the vast majority of reports from the FBI to the IOB in FY2004-FY2005 involved the improper use of investigative authority under the Foreign Intelligence Surveillance Act. Did any of these matters involve provisions of law affected by the USA PATRIOT Act?

ANSWER: The USA PATRIOT Act made changes to the legal standard required under FISA. As amended by the USA PATRIOT Act, FISA requires a certification that foreign intelligence is "a significant purpose" of the authority sought rather than "the" purpose or the "primary purpose." If the question is asking whether any IOB violations have arisen from this certification, we note that none have.

If, instead, this question is asking whether any of the IOB violations referenced in the Inspector General's report related to other changes to FISA enacted as part of the PATRIOT Act, such as: (1) "roving" electronic surveillance; (2) the pen register/trap and trace (PR/TT) standard; (3) FISA business records authority; or (4) information sharing provisions, we note that for fiscal years 2004-2005, approximately 8 percent of the 108 violations reportable to the IOB were related in some way to these provisions. Many such violations were third-party errors, such as telecommunications carriers' mistakes. All but one of these violations were errors in the implementation of PR/TTs.

49. Please explain the criteria used for adding an individual's name to the terrorist watchlist.

ANSWER: Homeland Security Presidential Directive 6 (HSPD-6) (9/16/03) provides the minimum substantive criteria for placing an individual's name on the

consolidated terrorist watchlist. In accordance with HSPD-6, an individual may only be included in the Terrorist Screening Data Base (TSDB) if the person is "known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism."

Domestic terrorism investigations opened pursuant to the Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations (5/30/02). For international terrorists, the National Counterterrorism Center forwards nominations to the TSC based on intelligence assessments from throughout the Intelligence Community that an individual meets the standard for inclusion.

50. Beyond establishing a working group in March 2005, what steps if any has the Administration taken in response to the January 2005 GAO report?

ANSWER: The FBI has taken the administrative steps described in the answer to question 49 above.

51. Who are the members of the working group, and how many times have they met since its formation? (please include specific dates, if possible)

ANSWER: The working group has been led by the Office of Legal Policy and has representatives from the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and the Office of Legislative Affairs. The working group has also consulted with the Office of Legal Counsel, the Civil Division, and the Office of the Deputy Attorney General on its recommendations. The working group has met in person a number of times and has communicated frequently over the last year.

53. According to the Bureau of Justice Statistics, the states imposed about 340,000 felony convictions for drug offenses in the most recent year, and they imprison about 500,000 persons for drug offenses. Hundreds of thousands of additional lower level offenders are on probation or parole. The states have an extensive capacity to investigate and prosecute drug offenders, wouldn't you agree?

ANSWER: Yes. Many states have established systems to handle a large volume of criminal offenders. It should also be noted, however, some states and cities lack the capacity to investigate and prosecute violate gangs that are involved in drug trafficking. They lack the expertise to formulate major conspiracy cases against local violent drug gangs, and to protect witnesses that are needed to testify

against the major offenders. Accordingly, simply because some states and cities have in place mechanisms to handle large numbers of defendants should not be the basis to conclude that those states or cities are capable of prosecuting major violent drug organizations.

54. The Department of Justice prosecuted about 26,000 drug cases in FY 2003. Those drug cases should be the most important of the nation's drug cases, do you agree?

ANSWER: The Department of Justice has a responsibility to prosecute individuals and organizations that have violated federal law, and not all of these cases would be described as the "most important of the nation's drug cases." Drug cases are brought by federal law enforcement agencies to the Department for prosecution for a variety of reasons, and therefore, all of the cases are not necessarily major trafficking cases. For instance, drugs (sometimes in relatively small quantities) may be interdicted at the border or at airports during security screenings and referred by Customs and Border Protection for prosecution. In addition, seizures may take place in Federal parks or on Federal lands and referred by the National Park Police for prosecution.

Accordingly, the Department of Justice prosecutes a wide variety of cases, and drug prosecutions, similar to other offenses, fall along a wide spectrum in terms of the severity of the offense.

55. Two weeks ago, on March 22, you announced the indictment of a number of Colombians for their role in conspiring to manufacture and distribute large quantities of cocaine. Your press release said of one of those indicted, just for example,"Erminso Cuevas Cabrera, a.k.a "Mincho," was . . . managed cocaine laboratories . . . Cuevas Cabrera allegedly supervised the production and distribution of hundreds of thousands of kilograms of cocaine." Would you agree that this is the level of drug trafficker that should be a prime example of what the federal government's cocaine enforcement should be about - traffickers responsible for hundreds of millions of grams of cocaine?

ANSWER: The indictment is an example of the Administration's goal, as set forth in the National Drug Control Strategy, of disrupting the availability of illicit drugs by attacking the distribution of drugs at the source country level. While this is an important part of the Administration's effort, we also must focus on reducing the supply of illicit drugs at the regional and local level as well.

56. There were almost 10,000 federal cocaine prosecutions in FY 2000. Almost half of all federal cocaine prosecutions in 2000 were crack prosecutions. Of the 4,706 crack cases prosecuted by the Justice Department, what fraction do you think were of national or international scope?

ANSWER: In one sense, all cocaine prosecutions are "national or international" in scope because the cocaine originated in a country outside the United States, such as Columbia or Peru. Notwithstanding this caveat, if, by "national or international" in scope, the question asks whether the offender was distributing to customers across state lines or international borders, then the Department does not maintain such data.

The U.S. Sentencing Commission completed a report in May 2002, which examined some of these issues. In its May 2002 monograph, entitled "Report to Congress: Cocaine and Federal Sentencing Policy," the Sentencing Commission concluded that in 2000, 11.6 percent of offenses were "national" (9.0 percent) or "international" (2.6 percent) in scope.

57. What fraction do you think were interstate involving a region or section of the country?

ANSWER: The Department does not maintain statistics to respond to this question. However, the U.S. Sentencing Commission study reflects that in 2000, 9.7 percent of offenders were categorized as "regional" and 3.4 percent were categorized as "section of country."

59. You recently indicted some Colombians for their alleged role in manufacturing hundreds of millions of grams of cocaine. What do you think the average quantity of cocaine was for international level traffickers in powder cocaine in 2000?

ANSWER: The Department does not maintain data to respond directly to this question. Complicating the matter is that seizures on the Mexican border might be included with the phrase "international level traffickers" even though they could include low-level smugglers. Nevertheless, in its 2000 Sourcebook of Federal Sentencing Statistics, the Sentencing Commission reported there were 243 powder cocaine offenders who were sentenced at base offense level 38 (at least 150 kilograms), and the average quantity of powder cocaine for which offenders at this level were held responsible was 1,039 kilograms.

In its Report of Congress (May 2002), the Sentencing Commission found that offenders categorized as "importers/high level suppliers" and "leader/grower/manufacturer" were responsible for a median quantity of 16 kilograms and 16.2 kilograms, respectively, of powder cocaine in 2000.

60. Can you tell us what percentage of the federal cases [sic] are brought against crack defendants are against the high level traffickers: importers, organizers, wholesalers?

ANSWER: The Department of Justice does not maintain this data. The Sentencing Commission's study in May 2002 suggests that in 2000, 0.5 percent of crack cocaine offenders were "importers," 5.6 percent were "organizers" and 9.1 percent "wholesalers."

61. What percentage of all of all federal crack cases do you think are simply street level dealers, according to the Sentencing Commission?

ANSWER: The Department of Justice does not maintain this data. The Sentencing Commission's study in May 2002 suggests that in 2000, 66.5 percent of crack cocaine offenders are categorized as "street-level dealers."

62. What is the average weight of crack cocaine sold in the entire course of the conspiracy that those street level defendants were involved in?

ANSWER: The Department of Justice does not maintain this data. According to the Sentencing Commission, "street-level dealers" were responsible for a median quantity of 52 grams in 2000.

63. In recent years, hundreds of thousands of immigrants have crossed the borders into the U.S. to undertake work in our economy - despite their lack of authorization to do so. The Senate is currently engrossed with the issue of how to resolve our unlawful immigration problems - yet we are not doing anything to eliminate the pull factor - namely, the availability of jobs to undocumented immigrants. In 2005, the Department of Justice only instituted sanctions against 3 companies in the entire country for their use of undocumented labor. How can we be trying to fix the problems with new legislation if we are not even going to enforce the laws against hiring illegal labor by applying employer sanctions against those who violate those laws?

ANSWER: The Department of Homeland Security is responsible for initiating employer sanctions cases. The Department of Justice, through the Office of the Chief Administrative Hearing Officer, is responsible for adjudicating those cases once they have been initiated.

64. It appears that the Department, and maybe the Administration by implication, does not think it needs to enforce these laws - is that the case?

ANSWER: No. The Department of Justice—and the Administration as a whole—is committed to protecting our borders and enforcing the immigration laws. The employer-sanction cases cited above do not tell the whole story. For instance, on April 20 we announced the charging of seven current and former managers of IFCO Systems North America in New York, Texas, and Ohio for criminal acts relating to the employment of hundreds of illegal aliens. Although the case was not technically an employer-sanction case, it represents a major enforcement action, conducted with the close cooperation and significant efforts of the Department of Homeland Security, against what is (assuming the charges are proven) a large-scale employer of unauthorized workers. The Department of Justice will continue to cooperate with the Department of Homeland Security in investigating and prosecuting employers for criminal immigration offenses.

66. I understand that you have ordered a review of the immigration courts and Board of Immigration Appeals. How is that review progressing? What reforms are being recommended as a result of that review?

ANSWER: On August 9, 2006, the Department announced the completion of the review, together with 22 measures directed as a result of the review that are designed to improve the performance and quality of work of the Immigration Courts and the Board of Immigration Appeals. That day, Assistant Attorney General Moschella sent the Committee a letter summarizing the results of the review and attaching a description of the 22 measures. The Department believes those documents answer these questions and is pleased to provide a copy of them for inclusion in the record of this hearing.

67. In light of the review, is the Department considering revision of its affirmance without opinion system? Are the three-judge panels being restored at the BIA in more cases or is any oversight being added to ensure that single-judge decisions are issued after full consideration of the facts and law?

ANSWER: All these matters, including the quality and completeness of BIA decisions and the distribution of cases between three-judge and single-judge panels, were raised during the review and were carefully considered. A number of measures in the attached correspondence aim to enhance the quality of BIA decisions, including improved training for BIA members and BIA staff attorneys, an increase in the size of the BIA, and new mechanisms to detect poor BIA quality.

As noted in the enclosed correspondence, the Department instituted in 1999 and then expanded in 2002 reforms to streamline the BIA's procedures for hearing appeals. With regard to these streamlining reforms, the Department considered the feedback received during the review and the competing needs inherent in the BIA's task and concluded that affording a full and fair review of claims and providing those who appeal with a final decision in a timely fashion need not be mutually exclusive. The Department concluded that, now that the BIA has resolved its backlog, streamlining should be adjusted to improve the quality of the Board's review of complex or problematic cases, while at the same time retaining the fundamentals of streamlining. To this end, as described in the attached correspondence, EOIR has been directed to draft proposed adjustments to the BIA's rules: Adjustments to encourage the increased use of one-member written opinions rather than affirmances without opinion in certain cases; to allow the limited use of three-member written opinions in an additional, small class of particularly complex cases; and to encourage the publication of more precedents to provide guidance to immigration judges and litigants

68. What measures are being taken to correct those judges who have demonstrated inappropriate behavior in the immigration court?

ANSWER: The Department takes seriously complaints of inappropriate conduct by immigration judges. Procedures currently exist to investigate and discipline immigration judges for such conduct. Allegations of professional misconduct by Department attorneys, including immigration judges, are referred either to the Office of Professional Responsibility (OPR) or the Office of the Inspector General (OIG) for review and, when warranted, investigation. Findings of misconduct by OPR or OIG can lead to discipline ranging from a reprimand to termination, and may include notification to bar disciplinary authorities in the jurisdictions in which the immigration judge is licensed.

EOIR can also investigate matters of inappropriate conduct that are not investigated by OPR or OIG, or that are referred by OPR or OIG to EOIR for management review. EOIR can take disciplinary action against immigration judges based on substantiated findings of inappropriate behavior. OPR, OIG, and

EOIR coordinate their handling of complaints against immigration judges to determine which entity will review the allegations.

The new measures described in the attached correspondence include steps to improve this process further. As described in the attached correspondence, the Director of EOIR, in consultation with the Counsel for Professional Responsibility and the Inspector General, has been directed to conduct a review of EOIR's current procedures for handling complaints against its adjudicators, and will develop a plan based on that review to (i) standardize complaint intake procedures; (ii) create a clearance process that will clearly define the roles of EOIR, OPR, and OIG in the handling of any particular complaint; and (iii) ensure a timely and proportionate response. Other measures detailed in the attached correspondence, including periodic performance evaluations, new mechanisms to detect poor conduct, and the drafting of a Code of Conduct specifically applicable to immigration judges and BIA members, aim to ensure consistently professional and courteous conduct by immigration judges.

69. What is the Department's plan for revising how it recruits immigration judges and BIA members?

ANSWER: In recruiting immigration judges and BIA members, the Department considers a number of factors, including a candidate's education, bar membership, years of professional legal experience, knowledge of immigration law and procedure, litigation experience, experience handling complex legal issues, judicial temperament, analytical, decision making, and writing ability, and, when appropriate, ability to conduct administrative hearings and knowledge of judicial practice and procedures. Candidates are required to submit a resume or the equivalent and, after initial selection, to undergo a full field FBI background investigation (BI) unless they have a current and adequate BI. Each candidate is evaluated by the Department's Office of Attorney Recruitment and Management and the Executive Office for Immigration Review for employee suitability. Each BI is reviewed by the Security and Emergency Planning Staff of the Department's Justice Management Division for security clearance purposes.

The new measures include steps to improve the recruitment process. As explained in the attached correspondence, to ensure that immigration judges and Board members are proficient in the principles of immigration law, all immigration judges and Board members appointed after December 31, 2006, will have to pass a written examination demonstrating familiarity with key principles of immigration law before they begin to adjudicate matters. In addition, EOIR has been directed to employ the two-year trial period of employment applicable to newly appointed immigration judges and Board members both to assess whether a

new appointee possesses the appropriate judicial temperament and skills for the job and to take steps to improve that performance if needed, while fully respecting the adjudicator's role.

70. Please tell us about the Justice Department's $11.5 million dollar settlement of a class action suit alleging discriminatory hiring practices in selecting immigration judges (see Notice of Resolution of Class Action).

ANSWER: Durnford v. Ashcroft was a case brought before the Equal Employment Opportunity Commission (EEOC) in 1995 by a class of unsuccessful white male applicants for Immigration Judge (IJ) positions during 1994 and 1995. The class, which was estimated to include approximately 440 members, alleged that the Executive Office for Immigration Review discriminated against white male applicants during this period. During the summer of 2003, after almost a decade of litigation and as the parties prepared for a scheduled administrative hearing, the parties voluntarily entered into mediation with the assistance of a private mediator. Given the vintage of the case and the significant time expenditures expected for the impending administrative hearing, the parties agreed to resolve the matter for a lump sum payment "in the interests of avoiding the expense, delay, and inconvenience of further litigation of the issues raised in th[e] administrative class complaint . . . . " Settlement Agreement § I.

Under the settlement, the Department agreed to make to the class a lump sum payment of $11.5 million. This lump sum payment resolved all possible claims by class members for monetary relief, as well as the costs of administering the payments and all attorneys' and experts' fees and expenses. The Department's share of FICA and Medicare taxes was also included in this total amount. No IJ positions were provided under the settlement, and the Attorney General was left with full hiring discretion for these important positions. The agreement did not admit any liability or fault by the Department.

On December 23, 2004, the EEOC Administrative Judge approved the settlement agreement as fair, adequate and reasonable. Pursuant to a joint stipulation by the parties, this case was dismissed with prejudice in its entirety effective July 5, 2005.

71. Several months ago, you called for a review of Immigration Court proceedings across the United States, voicing concern about intemperate or even abusive conduct. In two memos you sent to immigration judges and the Board of Immigration Appeals, you explained that you were concerned about reports that some immigration judges had failed to treat aliens with respect and that the

conduct of some of them could aptly be described as intemperate or even abusive. You instructed Acting Deputy Attorney General Paul McNulty and the associate attorney general to conduct a comprehensive review of the immigration court system. Please tell us the results of that review.

ANSWER: On August 9, 2006, the Department announced the completion of the review, together with 22 measures directed as a result of the review that are designed to improve the performance and quality of work of the Immigration Courts and the Board of Immigration Appeals. That day, Assistant Attorney General Moschella sent the Committee a letter summarizing the results of the review and attaching a description of the 22 measures. The Department believes those documents answer this question and is pleased to provide a copy of them for inclusion in the record of this hearing.

72. I have heard that a substantial number of immigration judges did not have any immigration law experience when they were hired. Is this true, and, if so, how often has it happened?

ANSWER: In recruiting immigration judges and BIA members, the Department considers a number of factors, including a candidate's education, bar membership, years of professional legal experience, knowledge of immigration law and procedure, litigation experience, experience handling complex legal issues, judicial temperament, analytical, decision making, and writing ability, and, when appropriate, ability to conduct administrative hearings and knowledge of judicial practice and procedures.

Immigration law experience is certainly a relevant consideration in selecting immigration judges, but it is not the only one. Immigration cases raise a wide variety of issues under laws other than the immigration laws (such as State and federal criminal laws, State marriage and domestic relations laws, and State and federal domestic violence and violence against women laws) and have inter-relationships with federal labor programs and foreign relations. In addition, while immigration law experience is certainly useful for a new adjudicator, other qualities, such as judicial temperament and legal reasoning ability, may be just as important to his or her long-term success. Many of the most distinguished adjudicators in this field come from other backgrounds.

As a result of the recently completed review of the immigration courts, I have directed a variety of measures designed to enhance the professionalism of those courts. The new measures include steps to improve the recruitment process. As explained in the attached correspondence, to ensure that immigration judges and Board members are proficient in the principles of immigration law, all

immigration judges and Board members appointed after December 31, 2006, will have to pass a written examination demonstrating familiarity with key principles of immigration law before they begin to adjudicate matters. In addition, EOIR has been directed to employ the two-year trial period of employment applicable to newly appointed immigration judges and Board members both to assess whether a new appointee possesses the appropriate judicial temperament and skills for the job and to take steps to improve that performance if needed, while fully respecting the adjudicator's role.

73. Please comment on the Board's streamlining practice, particularly the one member decisions. In view of the fact that single member decisions are not reviewed by other Board members, please tell us about the backgrounds of the members who have worked on the streamlining panel. Do they all have strong backgrounds in immigration law?

ANSWER: All Board Members may sign decisions as single Board Members. The 11 permanent and three temporary Board Members come from a variety of distinguished legal backgrounds. As we have noted regarding immigration judges, immigration experience is a relevant factor in becoming a Board Member, but is not the only factor. Because immigration law encompasses a wide area of other laws, a Board Member's entire legal and professional background is considered when selecting members.

Furthermore, although a single Board Member may sign a decision, all of the BIA's resources are available to that Board Member, including his or her colleagues, with their areas of expertise, and the corps of expert staff attorneys who assist them.

74. Unfortunately, our law intended to protect against terrorists is actually barring refugees who are fleeing persecution, including Burmese ethnic and religious minorities, Cubans, and Hmong. It also includes others who are actually victims of terrorism – such as Colombian farmers who choose to flee rather than continue to pay taxes extorted at gunpoint by leftist guerrillas, and Sierra Leonean and Liberian women who are forced under extreme duress to provide labor to rebel forces. The material support ground of inadmissibility is keeping all of those people out - based on the very same oppressive circumstances that made them refugees in the first place. There appear to be three unintended consequences of the material support policy. First, deserving refugees are not being rescued. Second, the refugee resettlement program, a long-standing commitment of the President, is threatened. Some 10,000 deserving Burmese refugees in Thailand and Malaysia remain in peril, and their resettlement is

looking less and less likely this year due to this policy. Third, the overreach of this law puts U.S. refugee policy at odds with our foreign policy. Do you share these concerns about unintended consequences of the material support law?

ANSWER: The material support statute provides a mechanism for dealing with situations like the ones described in the question. By way of example, on May 4, 2006, the Secretary of State, in consultation with the Secretary of Homeland Security and the Attorney General, exercised her authority under section 212(d)(3)(B)(I) of the Immigration and Nationality Act with respect to Karen refugees from Burma in Tham Hin Camp in Thailand. Refugees from this camp who have been found to meet all other requirements for access to and eligibility for the United States Refugee Admissions Program but who would otherwise be inadmissible because of the material support bar will be allowed entry into the United States as applicants for resettlement.

The Department of Justice shares the concerns of others throughout the U.S. Government that certain deserving refugees have not immediately been resettled in the United States through the United States Refugee Admissions Program. DOJ is also concerned about the risks associated with admitting individuals into the United States who have provided material support to terrorist organizations. DOJ has been unwavering in its zero-tolerance approach to prosecuting terrorists or their supporters in the United States. To allow individuals to give food, money, or other assistance to a terrorist organization allows the terrorist organization to make available other funds for weapons and other essentials for the commission of terrorist acts. Allowing into the United States refugees who have performed acts for which individuals in the United States may be prosecuted under U.S. law has the potential to undermine the ability of the U.S. Government to enforce this country's terrorism laws fairly, effectively, and uniformly. For these reasons, DOJ has been working closely with DOS and DHS to ensure that the United States is helping deserving refugees while at the same time protecting its ability to prosecute individuals in the United States for material support to terrorism.

75. How are you working with DOS and DHS to ensure that the material support ground of inadmissibility does not bar deserving refugees such as these, or, failing that, how is DOJ working with DOS and DHS to implement the exception to the material support bar, which was authorized by Congress?

ANSWER: As discussed above, DOJ has been working closely with DOS and DHS to exercise the authority to find the material support bar inapplicable in a way that protects our ability to prosecute terrorists under the law, while at the same time permits deserving refugees admission into the United States under the

United States Refugee Admissions Program. DOS, after consultation with DHS and DOJ, has exercised its authority to find the material support bar inapplicable with respect to the Karen refugees from Burma in Tham Hin Camp in Thailand. Refugees who are determined to pose no danger to the safety and the security of the United States and meet all other requirements will be allowed entry into the United States as applicants of the United States Refugee Program.

76. Given its urgency, why is there such a delay in resolving this issue?

ANSWER: There has been timely and thoughtful interagency discussion of this issue. We do not agree that considered deliberation regarding this matter constitutes "delay."

77. How will you as Attorney General help to break the impasse and use your office to assure a resolution to the material support issue that is consistent with the President's commitment to refugee protection?

ANSWER: DOJ worked closely with DOS and DHS to resolve issues relating to the implementation of the inapplicability provision of the Immigration and Nationality Act for the Karen refugees from Burma in Tham Hin Camp in Thailand. DOJ will continue to work with DOS and DHS to address issues associated with providing admission to deserving refugees who have not had the opportunity to enter the United States through the United States Refugee Admissions Program, but who are determined to pose no danger to the safety and the security of the United States and meet all other requirements to become applicants.

79. What if any, commitment does the administration have to ensuring equal opportunities for women and minorities?

ANSWER: The Civil Rights Division exists to protect all Americans. It is my understanding that the Civil Rights Division has never tracked or categorized its investigations and enforcement actions by the race of the victims. Nonetheless, the Division has been active in protecting the civil rights of all Americans, including minorities and women. Indeed, the Division has brought dozens of cases, and reached numerous consent decrees directly benefiting minorities and women. Listed below are some of the more significant actions taken during this Administration that might be of interest:

- In July 2006, DOJ filed suit against the City of Chesapeake, VA., alleging that the City was engaged in a pattern or practice of discrimination on the basis of race and national origin, in violation of §707 of Title VII, by using a mathematics test to screen applicants for entry-level police officer positions in a manner that had an unlawful disparate impact against African-American and Hispanic applicants.

- In July 2006, the Court entered a consent decree resolving our suit (brought the same month) against the City of Virginia Beach, VA., alleging that the City was engaged in a pattern or practice of employment discrimination against African-Americans and Hispanics, in violation of Section 707 of Title VII, through its use of a mathematics test that disproportionately excluded African-American and Hispanic applicants for the position of entry-level police officer. The decree brought by DOJ, alters the City's method for selecting entry-level police officers in a way that would eliminate the disparate impact of certain portions of that process. In addition, the decree requires the City to provide remedial relief (including $160,000 in back pay, priority job offers and retroactive seniority to identifiable African-American and Hispanic victims of the challenged test.

- In April 2006, the Division filed a complaint against First National Bank ("bank") of Pontotoc in Mississippi, the first sexual harassment lawsuit filed by the Justice Department under the Equal Credit Opportunity Act. The complaint alleges that a former vice president of the bank used his position to sexually harass female borrowers and applicants for credit. The complaint alleges that his conduct included making offensive comments of a sexual nature, engaging in unwanted sexual touching, and requesting or demanding sexual favors from female customers over a period of years before his employment with the Bank ended in May 2004.

- In December 2005, the Division filed a complaint against a Wisconsin nightclub alleging that the nightclub violated Title II by discriminating against African Americans. According to our complaint, nightclub employees falsely told African Americans they could not enter because a private party was underway, while at the same time whites were admitted. On other occasions, the complaint alleges, nightclub employees falsely told African Americans that the club was at capacity, while at the same time admitting whites.

- In December 2005, the Division filed a complaint alleging that the owner of numerous rental properties in Hastings, Minnesota, has subjected female tenants to severe and pervasive sexual harassment, including

making unwelcome sexual advances; touching female tenants without their consent; entering the apartments of female tenants without permission or notice; and threatening to or taking steps to evict female tenants when they refused or objected to his sexual advances.

- In September 2005, the Court entered a consent decree resolving a suit filed by DOJ against the State of Delaware, alleging that the State was engaged in a pattern or practice of discrimination against African-Americans, in violation of Title VII of the Civil Rights Act of 1964, as amended, by using an arbitrarily high cut-off score on its written examination for entry-level trooper. Under the terms of the consent decree, the State must provide $1,425,000 to qualified African-Americans who applied for entry-level state trooper positions between 1992 and 1998 and scored at least 66% on the written examination, but were denied employment as a result of the State's unlawful use of that examination. The State also must provide priority job offers, with retroactive seniority and pension relief, to up to twelve African-American applicants who were the victims of the State's unlawful use of the examination.

- In 2004, the Division entered a consent decree with Cracker Barrel resolving allegations that Cracker Barrel accommodated a severe and pervasive pattern of racial discrimination at its restaurants, including allowing its servers to refuse to serve African American customers, and treating such customers differently in terms of seating, service, and responsiveness to complaints. Cracker Barrel agreed to implement far-reaching policy changes and training programs to remedy these violations.

- In 2004, the Division announced that federal assistance would be provided to local state officials conducting a renewed investigation into the 1955 murder of Emmett Till, a 14-year old African-American boy from Chicago. Till was brutally murdered while visiting relatives in Mississippi, after he purportedly whistled at a white woman. Two defendants, who subsequently admitted guilt, were acquitted in state court four weeks after the murder. Both men are now deceased. Although the investigation showed that there was no federal jurisdiction, on March 16, 2006, the Justice Department reported the results of that investigation to the District Attorney for Greenville, Mississippi, Joyce Chiles, for her to consider whether to pursue state charges. Federal and state officials are investigating the murder in order to determine whether a local criminal prosecution of any surviving perpetrator is warranted, as the statute of limitations has long since expired on any possible federal crime.

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

- In 2004, the Division alleged that the City of Gallup, New Mexico, engaged in a pattern or practice of hiring discrimination on the basis of race against Native American applicants for jobs in various City departments. The Division obtained a very favorable consent decree and is currently engaged in determining appropriate remedial relief for individual victims of discrimination.

- In 2004, the Division obtained the largest verdict it has ever obtained in a Fair Housing Act case. In United States v. Veal (E.D. Mo.), a sex discrimination case, the jury returned a verdict of over one million dollars. In the case, the Division proved a pattern or practice of sex discrimination by the defendants, and in particular that Mr. Veal systematically sought sexual favors from female tenants. The victims included a 19-year old single mother, a mentally challenged female tenant, and one victim who considered committing suicide after several instances of fondling by the defendant.

- On June 22, 2004, the Division filed the first lawsuit since 1990 alleging racial discrimination in education under Title IV of the Civil Rights Act against Lafayette High School in New York City. The complaint alleged that Asian students were severely harassed by other students and the school district was deliberately indifferent to the harassment. The suit was resolved by consent decree filed simultaneously with the complaint.

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

- In 2003, the Division successfully settled a racial discrimination and retaliation lawsuit against the city of Fort Lauderdale, Florida, for a total of $455,000 in victim's compensatory damages. The lawsuit, consolidated with a private lawsuit, alleged that the city of Fort Lauderdale violated Title VII of the Civil Rights Act of 1964, by denying an African American

employee promotion because of his race. The lawsuit further alleged that the city retaliated against the employee when he complained that he had been denied promotion for discriminatory reasons.

- In 2002, the Division filed a lawsuit under Section 208 of the Voting Rights Act that was the first ever to protect Haitian Americans.

- In 2002, the Division filed and resolved United States v. Fidelity Federal Bank, a case involving a pattern or practice of discriminatory abusive credit collection practices on the basis of national origin against Hispanics in violation of Equal Credit Opportunity Act. Under the terms of the Settlement Agreement and Order, Fidelity paid $1.6 million to both compensate the victims and fund a Consumer Education Program.

- Since 2001, the Division has brought 29 cross-burning prosecutions, charging a total of 46 defendants. On April 13, 2004, one defendant pleaded guilty to building and burning a cross in the front yard of an African American couple. On February 19, 2004, three defendants were charged with conspiring to interfere with the housing rights of an African American family by carrying out a series of racially-motivated threats of violence against the victims. Two of the three defendants recently pleaded guilty. And, on March 4, 2004, in a case personally argued by the former Assistant Attorney General, the United States Court of Appeals for the Fourth Circuit agreed with the Division that the district court should have imposed a stiffer sentence for the perpetrator of a cross burning in Gastonia, North Carolina.

- Since 2001, the Division has obtained three consent decrees involving the redlining of predominantly African American neighborhoods by major banking institutions. The first involved a major bank in Chicago that will invest more than $10 million and open two new branches in minority neighborhoods to settle a lawsuit alleging that it engaged in mortgage redlining on the basis of race and national origin. In May 2004, the Division obtained a consent decree requiring a bank to invest $3.2 million in small business and residential loan programs in the City of Detroit and to open three new branches in the City of Detroit. This was the first redlining case the Division has ever brought alleging discrimination in business lending. In July 2004, the Justice Department filed and resolved a lawsuit against another bank in Chicago. The suit alleged that the bank intentionally avoided serving the credit needs of residents and small businesses located in minority neighborhoods. The bank has agreed to invest $5.7 million and open new branches in these neighborhoods.

- The Civil Rights Division has filed more than five times the number of human trafficking cases in the last five fiscal years than it did from FY1996 through FY2000. Many trafficking victims, of course, are women and minorities.

- During this Administration, the Civil Rights Division has filed 13 lawsuits in seven states (California, Kansas, Minnesota, Missouri, Nebraska, New Mexico and Tennessee) alleging that landlords have sexually harassed their female tenants. Eight of these lawsuits have been resolved, and five are pending. Of the eight resolved lawsuits, the Division received favorable verdicts in two of them and obtained consent decrees in the others.

80. Given the history of Title VII and the work of the Civil Rights Division, is it prudent for DOJ to use its limited resources to go after SIU's lawful affirmative action program?

ANSWER: The United States did not challenge a lawful affirmative action program. As explained above, SIU maintained several race and sex-exclusive paid fellowship programs that are subject to the requirements of Title VII of the Civil Rights Act of 1964. Under Title VII, SIU is prohibited from discriminating against an employee or applicant for employment on the basis of race, sex, national origin, or religion. DOJ is committed to vigorously enforcing the requirements of Title VII.

81. There is concern about the drop off in pattern and practice cases and disparate impact cases in all areas including race and gender. For example, with respect to police accountability in particular, it appears that no new pattern and practice investigations have been initiated in that area by the Department in either 2005 or 2006. Can you explain this alarming record?

ANSWER: The Civil Rights Division has been active in pattern or practice enforcement across the breadth of the Division through investigations, lawsuits and settlement agreements. For example, during the current Administration we have ensured the integrity of law enforcement by more than tripling the number of settlements negotiated with police departments across the country compared with the previous five years. And, from January 2001 to date, we have initiated more police department investigations than during the comparable time period of the previous Administration. More specifically, we are currently conducting nine Section 14141 pattern or practice investigations of police departments and

monitoring ten agreements between the United States and police departments. In 2005 alone, the Division initiated four pattern or practice investigations against police departments. We are on pace to continue this success.

Overall the Division has obtained significant relief under its police misconduct authority to prevent excessive uses of force, unconstitutional uses of canines, biased policing, and unconstitutional searches and seizures. The Division works with police departments to implement widespread reforms, including training, supervising, and disciplining officers and implementing systems to receive, investigate, and respond to civilian complaints of misconduct. The reforms instituted by large and small police departments pursuant to settlements with various departments have had a widespread impact and are being used as models by other police departments. The Division also cooperatively works with departments large and small to provide valuable expert technical assistance and guidance from experts with years of police management experience. Some recent examples of this work include providing technical assistance to the Miami, Florida Police Department and Warren, Ohio Police Department.

The Division has also been extremely successful in its pattern or practice enforcement of the Civil Rights of Institutionalized Persons Act (CRIPA), authorizing 25 percent more investigations than during the comparable period for the previous Administration. CRIPA authorizes the Attorney General to conduct pattern or practice investigations of conditions in institutions run by or on behalf of a government. Under CRIPA, we investigate nursing homes, psychiatric hospitals, facilities for persons with developmental disabilities, residential treatment facilities for children, juvenile justice facilities, jails, and prisons. In FY 2004, the Division favorably resolved a record number of these matters, ensuring the constitutional and statutory rights of thousands of persons. And, in matters involving children committed to juvenile justice facilities, this Administration has increased the number of settlement agreements, doubled the number of investigations and tripled the number of findings letters issued. We currently have 51 open CRIPA investigations of 67 facilities. We also are monitoring CRIPA settlements in 36 filed cases involving 96 facilities. We are in contested litigation in one CRIPA case involving the Terrell County Jail in Georgia.

Thus far in fiscal year 2006 alone, we have commenced pattern or practice investigations of 12 facilities regarding conditions of care and confinement, initiated five uncontested lawsuits involving nine facilities, and reached eight agreements resolving pattern or practice investigations of conditions of care and confinement at 15 facilities. Examples of this work include:

- On May 2, 2006, the Division filed a complaint and an agreed consent decree with the State of California regarding conditions at four state hospitals serving individuals with mental disabilities from around the State. The four hospitals - Metropolitan State Hospital in Los Angeles, Napa State Hospital in Napa, Patton State Hospital in San Bernardino, and Atascadero State Hospital in San Luis Obispo - provide inpatient psychiatric care to nearly 5,000 people. The extensive reforms required by the consent decree will ensure that individuals in the hospitals are adequately protected from harm and are provided adequate services to support their recovery and mental health. Our four-year CRIPA investigation revealed a pattern or practice of preventable suicides and serious, life-threatening assaults on residents by staff and other residents.

- On January 27, 2006, the Division entered a settlement agreement with the Nassau Health Care Corporation ("NHCC"), a New York public benefit corporation, resolving our investigation of conditions and services at A. Holly Patterson Extended Care Facility, an 889-bed nursing home operated by NHCC in Uniondale, New York. The agreement requires NHCC to protect facility residents from harm and to improve constitutionally-required services in the areas of mental health care, use of restraints, general medical and clinical care, and nutritional care. In addition, the agreement ensures that each resident is served in the most integrated setting appropriate to his or her needs, as required by the Supreme Court's 1999 decision in Olmstead v. L.C. In Olmstead the Court held that segregation of persons with disabilities may constitute illegal discrimination when those persons can live in a more integrated setting. The Division found in its investigation that A. Holly Patterson exposed residents to a pattern or practice of unsafe living conditions and undue restraints, failed to provide adequate medical and mental health care, failed to provide residents with adequate nutrition and hydration, and failed to protect residents from unnecessary institutionalization.

- On February 8, 2006, the Division reached a settlement agreement with the State of Indiana regarding civil rights violations in two juvenile justice facilities operated by Indiana: Logansport Juvenile Intake/Diagnostic Facility in Logansport and South Bend Juvenile Correctional Facility in South Bend. The agreement, filed in the United States District Court for the Southern District of Indiana, requires the State to implement reforms to ensure that juveniles in the facilities are adequately protected from harm and provided adequate services including mental health care and special education. Our investigation, which was conducted pursuant to CRIPA and the Violent Crime Control and Law Enforcement Act of 1994, revealed a pattern or practice of numerous civil rights violations, including

many instances of youth violence and inadequate supervision by staff, inadequate special education services, and deficiencies in mental health care. Under the terms of the agreement, the State will address and correct all of the violations we identified.

During this Administration, the Housing and Civil Enforcement Section has filed 112 pattern or practice cases and has entered into 103 consent decrees resolving pattern or practice cases. The large majority of these pattern or practice cases arise under the Fair Housing Act, with the remainder arising under the Equal Credit Opportunity Act, Title II of the Civil Rights Act of 1964, and the Religious Land Use and Institutionalized Persons Act (RLUIPA). The number of pattern or practice filings in this administration is consistent with the number filed in the previous five years. Further, within the last six months, we have filed four pattern or practice cases alleging discrimination on the basis of sex and two alleging discrimination on the basis of race. Examples of this work include:

- On December 29, 2005, the Division filed a complaint in United States v. Candy II, d/b/a Eve (E.D. Wis.), alleging that a Milwaukee nightclub violated Title II of the Civil Rights Act of 1964 by discriminating against African Americans. The complaint alleges Eve employees falsely told African Americans that they could not enter because a private party was underway, at the same time that the employees admitted whites. On other occasions, the complaint alleges, Eve employees told African-Americans that Eve was at capacity, at the same time that the employees admitted whites.
- In December 19, 2005, the Division filed a complaint in United States v. Bathrick (D. Minn.) alleging that Ronald Bathrick, the owner of numerous rental properties in Hastings, Minnesota, has subjected female tenants to severe and pervasive sexual harassment, including making unwelcome sexual advances; touching female tenants without their consent; entering the apartments of female tenants without permission or notice; and threatening to or taking steps to evict female tenants when they refused or objected to his sexual advances.

In addition, in FY 2005 alone, the Division brought lawsuits under the Fair Housing Act that created 12,000 new housing opportunities for people with disabilities - a figure that is almost four times greater than the entire eight year output of the previous Administration.

The number of complaints filed by the Civil Rights Division in calendar years 2004, 2005 and 2006 that alleged a pattern or practice of employment discrimination has been consistent with the number of such cases filed yearly by the previous administration. Indeed, in 2004 the Civil Rights Division filed four such complaints, the largest number filed in one year since the mid 1990s. The Division also filed two such complaints in 2005, as it has to date in 2006. All of the pattern or practice complaints filed by the Department since 2004 have resulted in either a decision from the Court in favor of the United States, or the entry of a consent decree implementing terms that were favorable to the United States. Examples of this work include:

- On July 24, 2006, we filed a complaint in *U.S. v. City of Chesapeake, Virginia* (E.D. Va.). Our complaint alleges that the City of Chesapeake ("City") has engaged in a pattern or practice of discrimination on the basis of race and national origin, in violation of §707 of Title VII, by using a mathematics test to screen applicants for entry-level police officer positions in a manner that has an unlawful disparate impact against African-American and Hispanic applicants.

- On April 3, 2006, in United States v. City of Virginia Beach, the Division challenged the City's use of a test that disproportionately and, we alleged, illegally screened out African-American and Hispanic applicants for the position of entry-level police officer. On July 24, 2006, the Court entered a consent decree in resolution of our suit. The Decree alters the City's method for selecting entry-level police officers in a way that would eliminate the disparate impact of certain portions of that process. In addition, the decree requires the City to provide remedial relief (including $160,000 in back pay, priority job offers and retroactive seniority to identifiable African-American and Hispanic victims of the challenged test.

- On February 8, 2006, the Division filed a complaint in United States v. Southern Illinois University ("SIU") alleging that SIU was engaged in a pattern or practice of unlawful discrimination in the selection and hiring of paid fellowship recipients in violation of Title VII. Specifically, the suit alleged that SIU maintained three paid fellowship programs that were open only to students who either were of a specified race and/or national origin or were female. Accordingly, the Division alleged that SIU was engaged in a pattern or practice of discrimination in violation of Title VII. On the same day the Division filed the complaint against SIU, we also filed a consent decree negotiated with SIU that was intended to resolve the suit. The following day, the court approved and entered the consent decree. In the consent decree, SIU admitted the fact allegations of the

United States concerning the restrictive ethnic, racial, and gender eligibility criteria of the three paid fellowship programs.

- On August 26, 2005, the Division filed a complaint in United States v. Ohio EPA alleging both a pattern or practice of discrimination, and a separate claim of discrimination against an individual charging party. In the suit, we allege that the State of Ohio allows public employees whose religions historically have held conscientious objections to joining the state employee union to redirect their representation service fees from the employee organization to nonreligious charities. The State, however, will not provide this religious accommodation to public employees who are not members and adherents of such religions, even if the employees hold sincere religious objections to associating with and financially supporting such a union.

- On July 26, 2005, the Division filed a complaint in United States v. City of Pontiac alleging a pattern or practice of discrimination on the basis of race and gender in the City's fire department hiring. The City of Pontiac signed a collective bargaining agreement that requires the City's fire department to maintain separate hiring and promotion lists that are segregated on the basis of race and sex. Under the agreement, every third hire and every third promotion must go to a minority or a woman, regardless of whether or not that individual is the best qualified. There is no evidence that this one-for-three ratio addresses any specific shortfalls of minorities or women in the fire department, nor is there any evidence that this formula was the result of any sort of detailed analysis of the fire department.

- On September 30, 2004, the Division filed a complaint in United States v. New York City Transit Authority alleging that the MTA has engaged in a "pattern or practice" of discrimination against Muslim, Sikh, and similarly situated employees who wear religious head coverings by not reasonably accommodating their religious observances, practices, and beliefs, and by selectively enforcing its uniform policies.

- On September 29, 2004, the Division filed a complaint in United States v. City of Gallup, New Mexico alleging that the City engaged in a pattern or practice of hiring discrimination on the basis of race against Native American applicants for jobs in various City departments. The United States obtained a very favorable consent decree and is currently engaged in determining appropriate remedial relief for individual victims of discrimination.

- On September 16, 2004, the Division filed a complaint in United States v. Los Angeles Metropolitan Transit Authority alleging that the MTA engaged in a "pattern or practice" of religious discrimination by not reasonably accommodating employees and applicants for employment as bus operators who, in accordance with their religious observances, practices and beliefs, are unable to work weekends and on any shift. The lawsuit was successfully resolved through entry of a consent decree.

- On January 8, 2004, the Division filed a complaint in United States v. City of Erie, Pennsylvania (W.D. Pa.), alleging that the City violated Title VII by using a particular physical ability test as a pass/fail device for screening applicants for the job of entry-level police officer. The complaint alleged that the City's use of the test had a disparate impact against female applicants and was not job related and consistent with business necessity. On December 13, 2005, the District Court entered judgment for the United States and found the City liable under Title VII.

83. During a March 10, 2006, briefing for Judiciary Committee staff, John E. Lewis, Deputy Assistant Director of the FBI's Counterterrorism Division indicated that the FBI is forced to work in a hostile work environment in Puerto Rico. According to Mr. Lewis, the FBI believes that involving the Puerto Rico authorities in its activities poses a security problem and raises the level of compromise for FBI agents. Can you please describe the instances in which Puerto Rico authorities compromised FBI activities in Puerto Rico?

ANSWER: The unauthorized release of information in law enforcement operations poses a risk not only to the safety and security of law enforcement officers, but to the subjects under investigation, the media, and the general public. The FBI is extremely cautious with respect to how information regarding pending investigations is handled and controlled. We have taken appropriate precautions in Puerto Rico, where the FBI's San Juan field office has initiated 43 corruption investigations of current or former officers of the Police of Puerto Rico (POPR), the Municipal Police, and the Puerto Rico Department of Corrections since 2000. These investigations resulted in 165 arrests, 132 indictments, and 137 convictions. The convictions are for such offenses as murder, protecting drug shipments, introducing drugs to correctional facilities, and using weapons and other police equipment during the commission of crimes.

The FBI enjoys an excellent relationship with the POPR and with other Puerto Rico law enforcement agencies. This is evidenced by the current complement of 65 local officers on the four FBI-led Federal task forces. While the number of cases, indictments, and convictions of law enforcement personnel

is significant enough to impact the manner in which certain information is shared, it does not mitigate the FBI's efforts to engage our local law enforcement partners on all possible occasions in an ongoing effort to improve the productivity of these important relationships.

84. On October 5, 2005, Members asked DOJ to investigate allegations of misconduct by local law enforcement and correctional officials during the aftermath of Hurricane Katrina. Members were concerned that the civil rights of evacuees were evacuated when individuals were not permitted to cross the Greater New Orleans Bridge and when detainees were not transferred from the Orleans Parish Prison. In its November 28, 2005, letter, DOJ indicated that it would determine if federal civil rights investigations were warranted. Can you please provide me with the status of DOJ's inquiry into these possible civil rights violations during the aftermath of Hurricane Katrina?

ANSWER: As you may know, the Louisiana Attorney General's Office has been conducting an exhaustive inquiry into allegations that New Orleans residents were not permitted by law enforcement officials to cross the Greater New Orleans Bridge to Gretna, Louisiana. The Civil Rights Division will review the state's factual investigation once it is completed to determine whether additional investigation is necessary and whether the facts implicate a violation of any federal statutes. We are in contact with the Louisiana Attorney General's Office and intend to review its report as soon as it becomes available.

The Civil Rights Division requested that the FBI conduct an investigation into allegations that correctional officers did not properly transfer inmates from the Orleans Parish Prison during the aftermath of Hurricane Katrina. The FBI forwarded the report of its investigation to the Division. The Division reviewed that report and determined that it did not reveal sufficient evidence to establish a violation of any inmate's constitutional rights. Thereafter, the FBI informed the Division that it was investigating additional complaints from inmates formerly housed at the Orleans Parish Prison. The FBI and the Division will continue to coordinate regarding the ongoing investigation of those complaints.

In addition to these allegations, the Civil Rights Division is reviewing two other matters in relation to the Orleans Parish Prison. On May 9, 2006, the Civil Rights Division received a referral from the Department of Homeland Security Office of the Inspector General regarding a complaint from an alien detainee who alleges that he was abused at the Orleans Parish Prison during Hurricane Katrina. The Civil Rights Division has opened an investigation into this complaint and is coordinating with the Office of the Inspector General regarding the investigation. On May 9, 2006, the Juvenile Justice Project of Louisiana, a juvenile justice

advocacy organization, issued a report alleging that juveniles housed at Orleans Parish at the time of Hurricane Katrina endured horrible conditions in the storm's aftermath. The Civil Rights Division has reviewed the report and asked the FBI to open an investigation.

85. In September 2005, the *New York Times* and the *Washington Post* reported that alleging that the Director of the Bureau of Justice Statistics (BJS), Lawrence A. Greenfeld, was demoted for insisting that data on aggressive police treatment of blacks and Hispanics be included in a press release announcing the results of the most recent Public-Police Contact Survey. Can you describe the civil service disciplinary, whistleblower and transfer regulations governing BJS and whether they were appropriately applied to Lawrence Greenfeld's removal as BJS Director?

ANSWER: The Director's position in the Bureau of Justice Statistics is a Presidential appointment. Due to the confidential nature of such matters, the Department does not comment on personnel decisions.

86. There have been reports of political appointees overruling staff recommendations. For example, in January 2005, the *Washington Post* reported that political appointees overruled a staff recommendation that the Texas congressional redistricting plan of 2003 be rejected as retrogressive under Section 5 of the Voting Rights Act. How will you eliminate this type of undue political influence that permits political appointees to overrule staff recommendations?

ANSWER: Partisan considerations should not play a role in the Justice Department's decisions. Both the Attorney General and the Assistant Attorney General of the Civil Rights Division believe strongly in this principle. The Division's successful record in the courts demonstrates that its decisions are based on the facts and the law.

Your question suggests that an internal staff memorandum that appeared in the press represented the only legal analysis on the Texas submission. That is not true. The memo that was leaked to the media in no way represented the sum total of the analysis (written or otherwise) that the Civil Rights Division considered in reaching the final pre-clearance decision in the Texas redistricting case. Candid conversations and vigorous discussions are a healthy and necessary part of the deliberative process. A disagreement hardly suggests that improper political considerations motivated the final decision. In this case, the final

decision reflected a careful and dispassionate consideration of the applicable law and facts.

Turning to the specific facts of the Texas case, it is important to bear in mind that the applicable standard in the Justice Department's evaluation of any voting change under Section 5 of the Voting Rights Act is whether there will be retrogression in the position of racial minorities in their effective exercise of the electoral franchise when compared to the existing or benchmark plan. *See Beer v. United States*, 425 U.S. 130 (1976). That standard was faithfully applied in the preclearance of the Texas plan.

The benchmark redistricting plan in Texas at the time the new plan was submitted for review was the plan that had been drawn by a three-judge federal panel in the case of *Balderas v. Texas*, Case No. 6:01-158 (E.D. Tex. 2001). The court drew a congressional plan when the Texas legislature was unable to redraw the congressional districts after the 2000 Census. The three-judge panel in *Balderas* found that eight of the 32 congressional districts allocated to Texas had to be minority districts protected by the Voting Rights Act – six districts for Hispanic voters and two districts for African American voters. The congressional plan submitted to the Justice Department in 2003 by the Texas Attorney General preserved, without question, eight minority districts. In fact, as the election of Congressman Al Green from the 9th District in 2004 after preclearance of the redistricting plan showed, the plan actually created an additional minority district where African American voters were able to elect their candidate of choice. Far from being *retrogressive*, the plan that DOJ properly precleared was actually *progressive* as to minority voting rights.

As you may be aware, a group of plaintiffs filed suit in 2003 under Section 2 of the Voting Rights Act against the State of Texas alleging that the legislature had not created a sufficient number of minority districts, *i.e.*, that eight districts were not enough districts given the demographics and other factors present in the state. This claim was denied by a three-judge panel on January 6, 2004. *See Session v. Perry*, 298 F. Supp.2d 451 (E.D. Tex. 2004). The essence of this particular Section 2 lawsuit was a claim that the new congressional redistricting plan should have created more than eight minority districts. Thus, the court's denial of that claim supports the Department's decision to preclear that same plan. Under established Supreme Court precedent, Texas had only to preserve the number of *existing* districts in the benchmark plan under Section 5's retrogression standard. As the Court's ruling confirmed, that standard was satisfied. A second decision was issued by the same court on June 5, 2005, holding that there was no valid constitutional claim in this redistricting. On December 12, 2005, the Supreme Court issued an Order scheduling its review of this case. We welcome this review of a matter that is better litigated in the courts than the media.

In the Supreme Court's recent decision regarding the Texas congressional redistricting plan, LULAC v. Perry, the only challenge to the precleared plan sustained by the Court was brought under Section 2 of the Voting Rights Act. There, a majority of the Court held that new District 23 violated Section 2, and that the new District 25, despite being majority-minority, did not make up for the loss of minority voting strength in District 23 because the new District 25 was not a compact remedial district. This does not suggest that the Department's decision to preclear the Texas congressional plan under Section 5 was in any way erroneous. What we were judging under Section 5 was whether the new districts retrogressed minority voting strength (not whether the new districts were compact). A lack of compactness would not give us a basis to object under Section 5. Under Section 5, once a plan is precleared, the Supreme Court has said that Section 5 provides no further remedy, so no Section 5 issue was before the Court in the LULAC case.

In sum, the Texas redistricting submission involved a deliberate and careful review of every relevant fact. Subsequent events – including the Supreme Court's recent decision – indicate that the pre-clearance decision was correct.

87. Do career staff attorneys have a role in offering recommendations in major voting rights cases?

ANSWER: There is no policy in the Civil Rights Division that prevents staff attorneys from making recommendations. Voting Section (and other Civil Rights Division) attorneys are in fact required to prepare detailed memoranda setting forth the facts and law on each proposed enforcement matter. There is always a full opportunity for lively debate. The Section Chief -- a veteran career attorney with 30 years experience in the Civil Rights Division -- expects and encourages thoughtful and aggressive recommendations from Section staff, and this career official has decisional responsibility for many matters. When the Assistant Attorney General for the Civil Rights Division makes a decision, he also welcomes opposing views, and is always available for responsible, productive discussion.

88. There are a number of concerns with respect to the Civil Rights Division at the Department of Justice, including morale of career attorneys and the direction in which this administration is driving the Civil Rights Division. An example of this is the reported politicizing of the Voting Rights Section. Additionally, career attorneys are reportedly being assigned to immigration enforcement actions rather than bringing valid discrimination claims. To what do you owe this

broad sweeping problem and how do you propose to move forward in your administration of the Civil Rights Division to address these concerns?

ANSWER: The reports of politicization of the Voting Rights Section are inaccurate. And most of the suggestions of low staff morale rely on the claim that there are, allegedly, record numbers of attorneys leaving the Division. The facts show, however, that the rate of attorney attrition in the Division is not out of the ordinary. A number of attorneys accepted a retirement package offered to multiple Justice Department components by the Office of Personnel Management in FY 2005. Even considering those who left under this incentive package, attorneys have left the Civil Rights Division during this Administration in roughly the same numbers as during a comparable period of the previous Administration (12.65% versus 11.8%). This slight difference of less than one percent hardly suggests an unusual degree of unhappiness, nor will it have a serious impact on the experience level in the Division. The Division has been – and remains – strong, with each section chief, for example, having on average about two decades of experience in the Civil Rights Division. This experience, dedication, and practical knowledge continue to serve the Division well.

Regarding your question about the immigration briefs, attorneys in all of the Department's litigating Divisions and every United States Attorney's Office are assisting in handling the extraordinary caseload of immigration briefs, and that practice extends to the Civil Rights Division as well. Despite this extra work, Voting Section attorneys have set a number of records in terms of the initiation of cases. Please consider the following:

- This Administration has filed or litigated nine Section 2 lawsuits, including suits on behalf of African American, Hispanic, Asian American, and Native American voters. Two of these Section 2 cases were successfully won on appeal: one on behalf of African American voters and another on behalf of Native American voters. A tenth Section 2 matter was settled out of court without the necessity of filing suit; two other Section 2 vote dilution cases were authorized on behalf of African American voters but not pursued after African American candidates were elected to offices in those jurisdictions.

- We have undertaken the most vigorous enforcement of the language minority provisions of the Voting Rights Act in its history. The Division has filed more enforcement actions under Sections 4(e), 4(f)(4), and 203 since 2001 than in the previous 26 years of the Act's history combined. We have filed more cases in 2005 than in any previous year – breaking the previous record set in 2004. The 15 lawsuits filed by this Administration have provided comprehensive minority language programs to more

citizens than all previous lawsuits combined and have included the first lawsuits ever to protect Filipino and Vietnamese voters.

- Of the six lawsuits that have been filed under Section 208 of the Voting Rights Act in the entire history of the Act, four were filed by this Administration, including cases filed on behalf of Hispanic voters and Haitian American voters.

- During 2004, the Division conducted its largest election-monitoring program ever. We sent a total of 1,996 individuals (533 Department personnel and 1,463 federal observers from OPM) to monitor 163 elections in 105 political subdivisions in 29 states, which included the largest number of federal observers ever for any election on November 2, 2004 – 822 federal observers and 251 Division personnel in 86 political subdivisions in 25 states. This compares with the 743 individuals (103 Department personnel and 640 federal observers from OPM) sent to monitor 46 elections in 31 political subdivisions in 13 states during all of CY 2000. During 2005, the Division sent a total of 831 individuals (191 Department personnel and 640 federal observers from OPM) to monitor 47 elections in 36 political subdivisions in 14 states.

- The Division's responsibility to enforce several other federal voting rights statutes likewise has been successful. Under the National Voter Registration Act of 1993, this Administration has filed five lawsuits and resolved out of court compliance problems in two other jurisdictions. To vindicate the voting rights of citizens and soldiers serving abroad, the Division filed six enforcement actions in the first four years of this Administration under the Uniformed and Overseas Citizens Absentee Voting Act, and two other federal enforcement lawsuits were only averted by jurisdictions when they took immediate measures to grant relief to affected voters. Our efforts to enforce both of these important voting laws have outpaced a comparable period of the prior Administration.

- The Division also has already filed four federal lawsuits to enforce compliance with the new Help America Vote Act (HAVA) of 2002, and last fall entered into an out of court agreement with the State of California to ensure its compliance with HAVA's statewide voter registration database requirement, a system that will cover the largest number of registered voters of any state in the country. For the past three years since the passage of HAVA, we have likewise engaged in outreach to state and local officials and other organizations all over the United States to explain the statutory requirements of this new legislation and to provide assistance in complying with the provisions.

As all of these facts illustrate, there has been no decline in our enforcement of the Voting Rights Act of 1965, or of the Nation's other voting rights laws. Rather, this Administration has an extraordinarily strong record of voting rights enforcement. The attorneys and staff of the Civil Rights Division - career professionals and political appointees alike – have helped achieve major advancements for all Americans through the fair, faithful, and vigorous enforcement of our federal civil rights laws. We take great pride in these accomplishments.

89. On March 16, 2006, we were notified that the Department of Justice had precleared the election procedures submitted by the State of Louisiana for the April 22 New Orleans municipal elections. Given the apparent risk of disenfranchisement for the tens-of-thousands of citizens displaced by hurricane Katrina outside the state, what is the Department doing to protect their voting rights? More specifically, is the Department prepared to initiate legal action to compel the state to implement out-of-state satellite voting procedures similar to those made available for Iraqi citizens in their national elections?

ANSWER: The election procedures that we precleared for the April 22 New Orleans municipal elections were designed to ameliorate voting conditions for individuals displaced from their homes and the city because of Hurricane Katrina. These new procedures proposed by the State of Louisiana included early voting in 10 satellite locations throughout the State, as well as relaxed absentee voting procedures.

The bills enacted by the Louisiana legislature, which included many of the new provisions, enjoyed the endorsement of the Louisiana Legislative Black Caucus. In a February 25, 2006, letter, the Caucus characterized the creation of satellite voting locations within the State (but no such locations outside the State) as "a progressive effort to enfranchise displaced voters." The Caucus wrote: "The Louisiana Legislative Black Caucus fully supports the legislation and respectfully requests expeditious preclearance of the acts by the United States Department of Justice." Minority members of the Louisiana House and Senate were unanimous in voting for the three legislative bills with proposed changes in elections procedures.

There were some additional changes proposed by the Secretary of State in an Emergency Election plan on January 23, 2006. The Secretary of State's plan provided for measures such as additional voting machines, office space, staff and equipment to assist the City in the conduct of the elections; created a Baton Rouge mailing address for absentee applications and ballots to address mail delivery

problems in New Orleans; and promulgated a voter outreach campaign (including mailings to displaced voters) and a media campaign both within and outside Louisiana to inform voters of their rights and election procedures. A majority of the Louisiana Legislative Black Caucus supported the Secretary of State's plan.

The Department of Justice, as a matter of law, has a narrow role in reviewing voting changes submitted by covered jurisdictions, like Louisiana, pursuant to Section 5. Our function and authority are limited to examining whether the change is retrogressive – that is, whether the purpose or effect of the change is to put racial minorities in a position inferior to the one they occupy under the status quo, as compared to non-minorities, vis a vis their ability to elect their candidates of choice. In this case, the law permitted the Department of Justice to object to the satellite voting procedures under Section 5 only if the Department determined that the State of Louisiana had not met its burden of showing that the position of minority voters in the 2006 New Orleans elections would not be worse with the changes that it would have been without them. Just as the Louisiana Legislative Black Caucus voted in favor of these changes, the Department concluded that these changes helped minority voters.

We understand that some mistakenly perceive the role of the Department under Section 5 as far more expansive than it is. Under Section 5 of the Voting Rights Act, the relevant legal question is not whether the procedures could be better. Rather, the sole Section 5 inquiry is whether New Orleans voters would be better off without the change. The Department lacks the legal authority to design a plan for New Orleans elections, or to demand that the State adopt a particular set of procedures, such as satellite voting locations outside the State, that it chose not to adopt.

Highly experienced voting rights counsel did bring legal action to compel the state to implement out-of-state satellite voting procedures. U.S. District Judge Ivan Lemelle found, however, that the unprecedented steps that the State had taken, including the establishment of a series of satellite voting locations across the State, satisfied the requirements of federal law. Given the decision of the Court, as well as the absence of any previous Voting Rights Act case of which we are aware that has gone so far as to require even those satellite voting steps taken by the State, we did not initiate a legal action.

Department of Justice personnel monitored the in-state satellite voting, as well as the conduct of the primary election in New Orleans on April 22, 2006, and the May 20, 2006 run off election. The Voting Section coordinated with civil rights groups on their efforts to assist displaced persons, and addressed a number of issues during the election. The run-off election resulted in the re-election of Mayor Ray Nagin, and minority voters retained their dominant voice in local

government. Over 113,000 citizens cast ballots in the run-off election, approximately 25,000 by absentee ballot or at the early voting locations around the state.

90. Identify the name, filing date, and the affected racial or ethnic group of each case alleging a Voting Rights Act violation(s) that the Civil Rights Division has filed under the current Administration.

ANSWER: In addition to the Section 2 lawsuits discussed in response to Question 91, we have undertaken the most vigorous enforcement of the language minority provisions of the Voting Rights Act in its history. The Division has filed more enforcement actions under Sections 4(e), 4(f)(4), and 203 since 2001 than in the previous 26 years of the Act's history combined. We have filed more cases in 2005 than in any previous year – breaking the previous record set in 2004. The 15 lawsuits filed by this Administration have provided comprehensive minority language programs to more citizens than all previous lawsuits combined and have included the first lawsuits ever to protect Filipino and Vietnamese voters. Our language minority cases include the following:

- United States v. Orange County, FL; filed 6/28/02; Hispanic
- United States v. Berks County, PA; filed 2/25/03; Hispanic
- United States v. Brentwood Union Free School District, NY; filed 6/4/03; Hispanic
- United States v. San Benito County, CA; filed 5/26/04; Hispanic
- United States v. San Diego County, CA; filed 6/23/04; Hispanic and Filipino (relief also obtained for Vietnamese)
- United States v. Suffolk County, NY; filed 6/29/04; Hispanic
- United States v. Yakima County, WA; filed 7/6/04; Hispanic
- United States v. Ventura County, CA; filed 8/4/04; Hispanic
- United States v. Westchester County, NY; filed 1/19/05; Hispanic
- United States v. City of Azusa, CA; filed 7/14/05; Hispanic
- United States v. City of Paramount, CA; filed 7/14/05; Hispanic
- United States v. City of Rosemead, CA; filed 7/14/05; Hispanic and Chinese and Vietnamese
- United States v. City of Boston, MA; filed 7/29/05; Hispanic and Chinese and Vietnamese
- United States v. Ector County, TX; filed 8/23/05; Hispanic
- United States v. Hale County, TX; filed 2/27/06; Hispanic

In addition, of the six lawsuits that have been filed under Section 208 of the Voting Rights Act in the entire history of the Act, four were filed by this Administration,

including cases filed on behalf of Hispanic voters and Haitian American voters. Our Section 208 cases include the following:

- United States v. Miami-Dade County, FL; filed 6/17/02; African American
  (Haitian)
- United States v. Osceola County, FL; filed 6/28/02; Hispanic
- United States v. Berks County, PA; filed 2/25/03; Hispanic
- United States v. Hale County, TX; filed 2/27/06; Hispanic

91. Identify the name, filing date, and the affected racial or ethnic group of each case alleging vote dilution under Section 2 of the Voting Rights Act that the Civil Rights Division has filed under the current Administration.

ANSWER: During this Administration, the Civil Rights Division has filed or litigated nine Section 2 lawsuits, including suits on behalf of African American, Hispanic, and Native American voters. Two of these Section 2 cases were successfully won on appeal: one on behalf of African American voters and another on behalf of Native American voters. A tenth Section 2 matter was settled out of court without the necessity of filing suit; two other Section 2 vote dilution cases were authorized on behalf of African American voters but not pursued after African American candidates were elected to offices in those jurisdictions.

Cases filed during this Administration involving vote dilution include:

- United States v. Crockett County, TN; filed 4/17/01; African American
- United States v. Alamosa County, CO; filed 11/27/01; Hispanic
- United States v. Osceola County, FL; filed 7/18/05; Hispanic

Cases filed during this Administration involving vote denial include:

- United States v. Osceola County, FL; filed 6/28/02; Hispanic
- United States v. Berks County, PA; filed 2/25/03; Hispanic
- United States v. Brown (Noxubee County, MS); filed 2/17/05; White
- United States v. City of Boston, MA; filed 7/29/05; Hispanic, Chinese, and Vietnamese
- United States v. Long County, GA; filed 2/08/06; Hispanic
- United States v. City of Springfield, MA; filed 8/2/06; Hispanic

92. Identify the number of times under the current Administration that the Assistant Attorney General (or the individual designated to act as Assistant Attorney General) has not agreed with the recommendation of the Voting Section to interpose a Section 5 objection.

ANSWER: As stated above, the Department has a long-standing policy against disclosure of internal deliberations.

93. Identify the number of times under the current Administration that the Assistant Attorney General (or the individual designated to act as Assistant Attorney General) has not agreed with the recommendation of the Voting Section to bring a lawsuit.

ANSWER: As stated above, the Department has a long-standing policy against disclosure of internal deliberations. As noted above, attorneys in the Voting Rights Section have, in fact, set a number of records in terms of the initiation of cases.

94. Identify the number of times under the current Administration that the Assistant Attorney General (or the individual designated to act as Assistant Attorney General) has not agreed with the recommendation of the Voting Section to cover an election.

ANSWER: As stated above, the Department has a long-standing policy against disclosure of internal deliberations. We do note that the Division has maintained the most robust election monitoring program in its history.

During 2004, the Division conducted its largest election-monitoring program ever. We sent a total of 1,996 individuals (533 Department personnel and 1,463 federal observers from OPM) to monitor 163 elections in 105 political subdivisions in 29 states. This compares with the 743 individuals (103 Department personnel and 640 federal observers from OPM) sent to monitor 46 elections in 31 political subdivisions in 13 states during all of CY 2000. The Division similarly had an extraordinary level of election monitoring for "off-year" in 2005. The Division sent a total of 831 individuals (191 Department personnel and 640 federal observers from OPM) to monitor 47 elections in 36 political subdivisions in 14 states.

95. For every recommendation made by the Voting Section from 2002-2005 to bring a Section 2 vote dilution lawsuit, identify the number of days that elapsed between the date the recommendation was first received by the "front office" (or, if that date cannot be identified, the date of the recommendation in the J-Memo) and the date that Assistant Attorney General (or the individual designated to act as Assistant Attorney General) either approved or disapproved the recommendation. To the extent that there are recommendations made in 2002 - 2005 which are still pending, indicate how long those recommendations have been pending.

ANSWER: As stated above, the Department has a long-standing policy against disclosure of internal deliberations.

96. The issue currently before the Supreme Court in *Burlington Northern and Santa Fe Railway v. White*, Docket No. 05-0259, is what type of employer conduct rises to the level of unlawful retaliation. The civil rights community has urged the Court to uphold the standard developed by the Equal Employment Opportunity Commission, the federal agency tasked with enforcing Title VII. Under the EEOC standard, employers would be prohibited from taking any action "reasonably likely to deter the exercise of rights under Title VII." This standard would provide broad protection against retaliation. This is the position the EEOC has argued for in the courts, and indeed, in the lower court in this case. The U.S. Department of Justice rejected the EEOC standard. Instead, the government's brief to the Supreme Court endorsed a more stringent standard. Under this more stringent standard, employers would be liable only for retaliation that took the form of a "materially adverse change in terms of employment." Please explain why DOJ rejected the standard advocated by the EEOC?

ANSWER: In the amicus brief that it filed with the Supreme Court in this case, the United States argued that the term "discriminate" in Title VII's anti-retaliation provision must be read consistently with the statute's core anti-discrimination provision, which prohibits discrimination in employment on the basis of race, sex, national origin, or religion. As discussed more fully in its amicus brief, the United States determined that this position is the correct interpretation based on the text and structure of Title VII. A majority of the circuits that have decided the issue -- the 1st, 2nd, 3rd, 4th, 6th, and 11th -- have reached the same conclusion. A copy of the United States's amicus brief, which sets forth fully its position in this case, may be found at: www.usdoj.gov/osg/briefs/2005/3mer/1ami/2005-0259.mer.ami.html. The Department acknowledges and accepts the Supreme Court's decision in this case, and as with all decisions of the Supreme Court the Department will follow the Court's precedent.

97. You have never seen fit to appoint an outside special counsel under 28 C.F.R. part 600 to investigate the possible commission of crimes by Administration officials, including: (1) torture in Iraq, Afghanistan, and Guantanamo Bay by U.S. military personnel and military contractors; (2) the Thomas Noe fundraising scandal in Ohio; (3) the demotion of U.S. Attorney Frederick Black for investigating Jack Abramoff; and (4) the potentially unconstitutional wiretapping of U.S. citizens without court orders. Similarly, Attorney General Ashcroft refused to appoint special counsels for: (1) fraudulent Halliburton activities; (2) Iraqi prisoner abuse; (3) Westar Energy for potential bribery; and (4) Enron accounting fraud. On December 30, 2003, then-Deputy Attorney General James B. Comey, in the position of Acting Attorney General, delegated to U.S. Attorney Patrick Fitzgerald the powers of the Attorney General for purposes of the CIA name leak investigation. According to Mr. Comey's letter to Mr. Fitzgerald, this appointment was made pursuant to 28 U.S.C. §§ 508-10, 515 (not 28 C.F.R. part 600). Is it your contention that, even if the President or Vice President were subjects or targets of investigation, you could investigate them impartially and without the need for an outside special counsel under 28 C.F.R. part 600?

ANSWER: The Department of Justice and the Attorney General place a high priority on assuring the public that the nation's laws are being enforced fairly and impartially. The bedrock of our effort to do so is the Department's reliance on experienced and dedicated career prosecutors who handle difficult and sensitive matters on a daily basis. Those prosecutors have been, and will continue to be, the front line in our effort to enforce the law.

As you noted, title 28 U.S.C. §§ 508-510 and 515 provide statutory mechanisms for the Attorney General to delegate authority to other prosecutors within the Department of Justice in appropriate circumstances. In addition, Department of Justice regulations, 28 C.F.R. § 600, *et seq.*, provide a mechanism for the Attorney General to appoint an attorney outside the Department of Justice to act as a Special Counsel if investigation or prosecution by Department of Justice attorneys would present a conflict of interest or other extraordinary circumstance, and if the Attorney General determines that it would be in the public interest to do so. The Special Counsel regulations were designed as a replacement for the former Independent Counsel Act, which required mandatory appointment of Independent Counsels, many of whom continued for lengthy terms at substantial cost to the taxpayers. By contrast, the Special Counsel regulations make clear that the Attorney General is responsible for determining whether the public interest would best be served by allowing the appropriate office within the Department of Justice to handle a matter according to the normal

and well-established process, or by removing the matter from the Department's normal processes.

Over the past several years, there have been a number of matters in which there have been calls for the recusal of the Attorney General or the appointment of an outside Special Counsel. As you noted, those matters have included the investigation of the activities of Washington lobbyist Jack Abramoff and corporate fraud involving Enron. In each instance, the matters have been handled fairly, appropriately, and impartially by dedicated career professionals in the Department of Justice, and the Attorney General has taken all steps that are necessary to ensure public confidence in the fairness of the investigation. In these matters, the Attorney General has determined that the public interest would best be served by allowing experienced career prosecutors to handle the matters according to well-established Department of Justice procedures and principles. Those career professionals have conducted thorough and complete investigations without interference, and they have brought charges where they deemed appropriate. We have every confidence that they will continue to do so.

In one instance, former Deputy Attorney General James Comey used the provisions of title 28 to authorize United States Attorney Patrick Fitzgerald to handle the investigation regarding the leak of information regarding the identity of a CIA operative. As you know, charges have been brought against a high-ranking White House official, and Mr. Fitzgerald's professionalism, integrity, and impartiality are beyond question.

We do not believe that it would be appropriate to address questions regarding hypothetical situations involving allegations against the President or Vice President. However, we assure you that we will continue to uphold the highest standards of ethics in the enforcement of federal law, and that we will take all steps that are necessary to ensure public confidence in the outcome of matters that are handled by the Department of Justice. If a circumstance arises in which the public interest would best be served by the appointment of a Special Counsel, we will not hesitate to do so.

98. Have there been any instances since President Bush took office in which there has been disagreement within the Justice Department about whether a special counsel should be appointed pursuant to 28 C.F.R. part 600; more specifically, have there been situations where Department officials or employees have argued in favor of the Attorney General exercising his authority under 28 C.F.R. part 600? If so, please describe the investigation or allegations in question.

ANSWER: It would not be appropriate for provide information regarding the Department of Justice's internal deliberative processes regarding the potential appointment of a Special Counsel under 28 C.F.R. § 600, *et seq*. Moreover, it would not be practical for me to assess which officials, among the Department's many employees, may have argued in favor of the appointment of a Special Counsel in any particular situation. We can assure you, however, that we have been and will continue to be dedicated to doing whatever is in the public interest. We will continue to uphold the highest standards of ethics in the enforcement of federal law, and we will take all steps that are necessary to ensure public confidence in the outcome of matters that are handled by the Department of Justice.

99. The Justice Department has claimed that the President is permitted to authorize domestic surveillance without court orders as a result of (1) his inherent authority as Commander-in-Chief and (2) his statutory authority under the Authorization for Use of Military Force. The purported statutory rationale is that the Use of Force explicitly authorizes military action against suspected terrorist and, therefore, implicitly authorizes any lesser action against suspected terrorists, such as surveillance. Would it be the position of the Department that the Commander-in-Chief has inherent constitutional authority to engage the U.S. Armed Forces against suspected terrorists living within or visiting the territory of the United States? If so, what action(s) would such authority encompass (i.e, military detention of such suspected terrorists, targeted killing of such suspected terrorists)?

ANSWER: We do not contend that because the Force Resolution "authorizes military action against suspected terrorists [it], therefore, implicitly authorizes any lesser action against suspected terrorists, such as surveillance." Rather, it is the position of the United States, confirmed by a majority of the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that when Congress authorized the President to "use all necessary and appropriate force" against those responsible for the September 11th attacks, it also authorized use of the "fundamental and accepted" incidents of waging war. *Id.* at 518 (plurality opinion); *see id.* at 587 (Thomas, J., dissenting). Just as capturing and detaining enemy combatants is a fundamental and accepted incident of waging war, *see id.*, signals intelligence has long been recognized to be a basic tool of warfare to ensure our troops are not fighting blind. Consistent with this traditional understanding, other Presidents, including Woodrow Wilson and Franklin Roosevelt, have interpreted general force authorization resolutions to permit warrantless surveillance to intercept suspected enemy communications. *Cf.* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2091 (2005) (explaining that, with the Force Resolution, "Congress intended to

authorize the President to take at least those actions permitted by the laws of war"). The terms of the Force Resolution must be understood in light of that historical practice.

It is the position of the United States that the President's inherent authority, confirmed and supplemented by the Force Resolution, authorizes the detention of enemy combatant terrorists in military custody, even if captured within the United States. That view has been embraced by the U.S. Court of Appeals for the Fourth Circuit. *See Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005); *cert. denied*, 126 S. Ct. 1649 (2006). The same authorities also clearly authorize the use of force against al Qaeda terrorists within the United States. In the Force Resolution, Congress expressly recognized that the September 11th attacks "render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both *at home* and abroad." Force Resolution pmbl. (emphasis added). Congress concluded that the attacks "continue to pose an unusual and extraordinary threat to the national security." *Id.* Congress affirmed that "the President has authority under the Constitution to take action to deter and prevent actions of international terrorism *against the United States*." *Id.* (emphasis added). Accordingly, Congress authorized the President "to use all necessary and appropriate force against those" associated with the attacks "in order to prevent future acts of international terrorism *against the United States*." *Id.* (emphasis added).

It is unclear from your question which forms of force you are inquiring about. If by "targeted killings," you mean "assassination," we have previously responded to Senator Feingold that that hypothetical question is far removed from the very well established authority of nations to engage in signals intelligence during military conflict.

100. Is it the position of the Department that the Authorization for Use of Military Force authorizes the President to engage the U.S. Armed Forces against suspected terrorists living within or visiting the territory of the United States? If so, what action(s) would such authority encompass (i.e, military detention of such suspected terrorists, targeted killing of such suspected terrorists)?

ANSWER: Please see the answer to question 99, above.

101. Has the Department provided any legal opinion or other memorandum to the President analyzing any inherent constitutional or statutory authority to engage the U.S. Armed Forces against suspected terrorists living within or visiting the territory of the United States? If so, please provide a copy of such opinion or memorandum.

ANSWER: Any such opinions would constitute the confidential legal advice of the Executive Branch and would reflect the Branch's internal deliberative process. We are not able to discuss the contents of confidential legal advice.

102. The White House has asserted that the President has the authority to declassify information at will. White House Press Secretary, Press Briefing by Scott McClellan (Apr. 7, 2006). Without regard to any specific instance, is the President similarly empowered to declassify the identities of current covert agents of the United States?

ANSWER: The Supreme Court has expressly stated that the President's foreign affairs powers and his role as Commander in Chief give him considerable authority over the protection and dissemination of classified information: The President's "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and *exists quite apart from any explicit congressional grant*." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (emphasis added). Both the Court's opinion in *Egan* and longstanding Executive Branch practice support the conclusion that the Constitution grants the President plenary authority to determine whether national security considerations require the classification or declassification of particular information. Of course, a declassification decision is rarely a simple matter, and the protection of the identity of a covert agent of the United States is a particularly serious matter, as evidenced by the provisions of the Intelligence Identities Protection Act, 50 U.S.C. 421. Any decision to disclose the identity of a covert agent should ensure that appropriate steps are taken to protect intelligence sources and methods, including the agent.

103. When declassifying information, what procedures does the President follow? How can those procedures be changed? Do the procedures differ based upon type of classified information in question? If so, in what manner?

ANSWER: The currently applicable procedures within the Executive Branch generally governing the classification and declassification of information by officers within the Executive Branch are set forth in Executive Order 13292, which was issued on March 25, 2003.

104. Last week Congressman Jane Harman and Congressman John Conyers, Jr. wrote to you and asked that you rescind the signing statement that accompanied the PATRIOT Act reauthorization. The statement claimed that the unilateral authority for the President permits him to ignore new reporting requirements in that bill. Can you please explain under what authority the President can single-handedly ignore a valid law passed by the United States Congress?

ANSWER: We respectfully disagree with your statement that the President's signing statement indicates that he was "single-handedly ignor[ing] a valid law passed by . . . Congress." The President's signing statement was entirely consistent with his duties under the Constitution and with the actions of past Presidents of both parties.

The Constitution requires the President to take an oath to "preserve, protect, and defend the Constitution," and directs him to "take care that the Laws be faithfully executed." U.S. Const., Art. II, §§ 1, 2. When Congress passes legislation containing provisions that could be construed as contrary to well settled constitutional principles, or that could be applied in a manner that is plainly unconstitutional, the President can and should take steps to ensure that such laws are interpreted and executed in a manner consistent with the Constitution. As Benjamin R. Civiletti, Attorney General during the Carter Administration, wrote, "the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts." *Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 59 (1980). Using a presidential signing statement to give a potentially problematic provision in a bill a construction that renders it constitutional does not represent an affront to Congress; rather, it gives greater effect to Congress's will than simply vetoing the legislation, or tacitly declining to enforce a provision (as other Presidents have done). As Assistant Attorney General Walter Dellinger explained early in the Clinton Administration, the practice of issuing a signing statement to construe a statutory provision to ensure its constitutionality is "analogous to the Supreme Court's practice of construing statutes, where possible, to avoid holding them unconstitutional." *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 133 (1993) (*available at* http://www.usdoj.gov/ olc/signing.htm). Thus, as Assistant Attorney General Dellinger noted, "[s]igning statements have

frequently expressed the President's intention to construe or administer a statute in a particular manner (*often* to save the statute from unconstitutionality)." *Id.* at 132 (emphases added). "[S]igning statements of this kind can be found as early as the Jackson and Tyler administrations, and later Presidents, including Lincoln, Andrew Johnson, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Lyndon Johnson, Nixon, Ford and Carter, also engaged in the practice." *Id.* at 138; *cf. Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 202 (1994) (memorandum opinion of Assistant Attorney General Walter Dellinger) ("[E]very President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions") (*available at* http://www.usdoj.gov/olc/nonexcut.htm).

When the President signed the USA PATRIOT Act reauthorization into law, he stated that the legislation would "help us continue to fight terrorism effectively and to combat the use of the illegal drug methamphetamine that is ruining too many lives." The President indicated that the Executive Branch would construe the provisions that may involve "furnishing information to entities outside the executive branch, such as sections 106A and 119, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties." The two sections of the USA PATRIOT Act reauthorization specifically mentioned in the signing statement involved audits of the use of certain business records and National Security Letters. Although neither of the provisions of the law the President signed themselves necessarily required disclosure of classified information, it was foreseeable that such information might be disclosed during the course of such audits. In the signing statement, the President simply indicated that he would construe the Act, which was itself silent on the point, in a manner to safeguard information the disclosure of which could impair foreign relations or national security. That signing statement also served as an instruction to those in the Executive Branch to safeguard that information.

That instruction is fully consistent with the well established principle, explicitly recognized by the Supreme Court, that the President has the power to "supervise and guide [Executive officers'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone," *Myers v. United States*, 272 U.S. 52, 135 (1926). It was particularly appropriate that the President take such action here to safeguard classified information: as the Supreme Court has recognized, the President has the "authority to classify and control access to information bearing

on national security." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (citations omitted). That authority, the Supreme Court has noted, "flows primarily from this constitutional investment of power in the President and *exists quite apart from any explicit congressional grant*." *Id.* (emphasis added).

In accordance with Assistant Attorney General Dellinger's opinion, President Clinton issued signing statements addressing constitutional issues with respect to *105* laws he signed, *see* Christopher Kelley, *A Comparative Look at the Constitutional Signing Statement* 18 (2003) (*available at* http://mpsa.indiana.edu/conf2003papers/ 1031858822), including several that are virtually identical to the one the President issued here. *See, e.g.*, *Statement of President Clinton on Signing the Intelligence Authorization Act for Fiscal Year 1999* (Dec. 3, 1999) ("H.R. 1555 provides that '[n]o department or agency of the Government may withhold information from the [National Commission for the Review of the National Reconnaissance Office] on the grounds that providing the information to the Commission would constitute the unauthorized disclosure of classified information or information relating to intelligence sources or methods.' I do not read this provision to detract from my constitutional authority, including my authority over national security information."); *Statement of President Clinton on Signing the National Defense Authorization Act for Fiscal Year 2000* (Oct. 5, 1999) ("A number of other provisions of this bill raise serious constitutional concerns. Because the President is the Commander in Chief and the Chief Executive under the Constitution, the Congress may not interfere with the President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch (sections 1042, 3150, and 3164). . . . To the extent that these provisions conflict with my constitutional responsibilities in these areas, I will construe them where possible to avoid such conflicts, and where it is impossible to do so, I will treat them as advisory. I hereby direct all executive branch officials to do likewise."); *Statement of President Clinton on Signing the Intelligence Authorization Act for Fiscal Year 1998* (Nov. 20, 1997) ("So that this provision [section 307] cannot be construed to detract from my constitutional authority and responsibility to protect national security and other privileged information as I determine necessary, and so that the provision does not require the release of information that is properly classified, I direct that it be interpreted consistent with my constitutional authority and with applicable laws and executive orders."); *Statement of President Clinton on Signing the National Defense Authorization Act for Fiscal Year 1998* (Nov. 18, 1997) ("Other provisions of H.R. 1119 raise serious constitutional issues. Because of the President's constitutional role, the Congress may not prevent the President from controlling the disclosure of classified and other sensitive information by subordinate officials of the executive branch (section 1305). . . . These provisions will be construed and carried out in keeping with the President's constitutional

responsibilities."). Indeed, President Clinton's use of signing statements to give narrowing constructions to provisions he believed to raise constitutional concerns has been praised in Congress. *See. e.g.*, Cong. Rec. 151 Cong. Rec. E357-03, E357 (Mar. 2, 2005) (statement of Rep. Scott); 151 Cong. Rec. H8264, H8272 (Sept. 22, 2005) (statement of Rep. Scott)

106. Why have there been no indictments of civilians by the Justice Department in the nearly two years since Attorney General Ashcroft announced the protocol for investigation and prosecution of allegations of torture or abuse by civilians?

ANSWER: The Department of Justice takes allegations of torture or abuse by civilians seriously, and we have vigorously investigated and will continue to vigorously investigate any allegations of torture or other abuse using all appropriate investigative tools. Be assured that allegations involving abuse by civilians of which we are aware, and for which we have jurisdiction to prosecute, have been and will continue to be investigated thoroughly by the Eastern District of Virginia Task Force. If evidence is developed in any cases sufficient to sustain proof beyond a reasonable doubt of a federal offense, those cases will be charged and prosecuted.

QUESTIONS FROM REPRESENTATIVE NADLER

107. With respect to bankruptcy law enforcement, how many criminal referrals have been made by the U.S. Trustee program in each of the last five years? What is the disposition of these referrals? What is the Department's current policy on enforcement of bankruptcy crimes?

ANSWER: The chart below provides the number of criminal referrals made by the United States Trustee Program (USTP or Program) over the past five fiscal years. In addition to the 744 formal referrals made in FY 2005, which represent a 12 percent increase over FY 2004, the Program also assisted law enforcement and prosecutors in investigating and prosecuting an additional 300 bankruptcy-related matters separate from USTP referrals.

USTP CRIMINAL REFERRALS BY FISCAL YEAR				
FY 2001	**FY 2002**	**FY 2003**	**FY 2004**	**FY 2005**
1,059	939	817	660	744

Prior to FY 2005, the Program did not have a comprehensive database for collecting the full range of data related to its criminal referrals. Effective in FY 2005, however, all 95 USTP offices began reporting criminal referral information using a new Criminal Enforcement Tracking System (CETS). CETS provides comprehensive data and allows for the analysis of criminal referral activity, including case disposition information, in a more reliable and accessible electronic format. With the implementation of CETS, the criminal referrals reported for FY 2005 will serve as the benchmark for all subsequent reporting years.

The chart below is based upon Program records and provides the outcome data for the 744 criminal referrals made by the Program in FY 2005. As of May 2006, the data reflects that 53 referrals from FY 2005 have resulted in formal criminal charges being brought, 25 of which have not yet been resolved by plea, trial, or other disposition. As suggested above, the Program does not have complete and reliable information on criminal referrals and, in particular, their outcomes for FY 2001 through FY 2004.

OUTCOME/DISPOSITION OF FY 2005 REFERRALS	NUMBER OF CASES
Prosecution Declined by U.S. Attorney's Office	251
Administratively Closed	3
With Investigative Agency	49
Under Review in U.S. Attorney's Office	388
Formal Charges Filed (Case Still Active)	25
Formal Charges Filed (Case Closed)	28 *
– *At least one guilty plea or conviction*	25
– *At least one pre-trial diversion*	2
– *At least one acquittal*	0
– *At least one dismissal*	2
* One case had more than one defendant and thus more than one outcome.	

Criminal enforcement aimed at combating bankruptcy-related crimes continues to be a priority of the USTP. In 2003, the Program established a special unit with four experienced criminal prosecutors to provide leadership of its referral and prosecution assistance responsibilities. Additionally, about 25 staff attorneys have been designated as Special Assistant U.S. Attorneys to assist U.S. Attorney's offices in prosecuting cases. The Program has also done extensive outreach and training. This past year alone, the Program conducted or participated in over 50 training programs that reached more than 1,500 employees, private trustees, prosecutors, and law enforcement agents through courses conducted at the National Advocacy Center and local training seminars. The Program also recently commenced a study with the National Institute of Justice and a group of outside experts aimed at identifying and measuring bankruptcy-related fraud, abuse, and errors.

The Department of Justice is fully committed to investigating and prosecuting bankruptcy crimes. The Department sponsors a National Bankruptcy Fraud Working Group that assists in coordinating a national response to bankruptcy fraud issues, and encourages the formation of inter-agency bankruptcy fraud working groups at the local level. Members of the local working groups include representatives from the United States Attorneys' offices, the United States Trustee Program, the Federal Bureau of Investigation, the Postal Inspection Service, HUD's Office of the Inspector General, the IRS's Criminal Investigation Division, as well as other federal agencies. In addition, the Department of Justice

has satisfied its obligations under 18 U.S.C. § 158, and has designated an Assistant United States Attorney in every judicial district and an FBI agent from every field office to have primary responsibility for investigating and prosecuting bankruptcy fraud violations.

108. What efforts has the Justice Department made to ensure that individual debtors who are not English Language Proficient are able to comply with the credit counseling and debtor education provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act? In the absence of such assistance, has the U.S. Trustee program sought dismissal of a case filed by such an individual, or objected to a discharge, because that individual was unable tom [sic] comply with section 109(g), 727(a)(11) & (12), or 1328(g) of the Bankruptcy Code?

ANSWER: The U.S. Trustee Program (USTP or Program) is the Department's component charged with implementation of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, including the approval of credit counseling agencies and debtor education providers. The USTP has encouraged providers of those services to expand their language capabilities and will be exploring other options to ensure easier access to credit counselors and debtor educators.

Currently, credit counseling and debtor education services are offered in a total of 30 languages in various judicial districts throughout the country. There are at least two national providers that will arrange for translation services in over 150 languages using a tele-interpreter service at no cost to the consumer. One of those providers also has individuals on staff who are able to provide service in 22 different languages over the telephone (with some languages available at "in person" locations as well), and two other national providers offer services in Spanish at all of their "in person" locations and over the telephone. In order to facilitate matching consumers with approved providers who offer language services, the USTP recently compiled data on additional languages offered by every credit counseling agency and debtor education provider, and this information is posted on the Program's public Web site. The Program also permits individuals with limited English proficiency (LEP) to have members of volunteer community groups, friends, and relatives act as interpreters.

The USTP has filed approximately 950 motions to dismiss consumer bankruptcy cases for failure to file a credit counseling certificate. When such motions are filed, the Program generally is not aware of the debtor's reasons for failure to comply with the filing requirement. Field offices have been directed to be judicious in bringing and prosecuting cases regarding deficiencies related to credit counseling, especially as the debtor's bar is in the learning phase of the new requirements. Although not specifically tracked, anecdotal information suggests

that there have been only a handful of cases where a debtor has requested relief from the credit counseling requirement because of LEP.

Finally, USTP records reveal only a small number of actions brought by its attorneys to date under section 727(a)(11) or section 1328(g) to deny a discharge for failure to fulfill the debtor education requirement. None of those actions related to the inability of a debtor to receive a course in financial management due to LEP. Under extant court rules, in the absence of proof of debtor education, the clerk of court generally will close a case without entering a discharge. The debtor may then later reopen the case, file proof of debtor education, and receive a discharge.

QUESTIONS FROM REPRESENTATIVE SANCHEZ

110. As you may know, the Department of Justice entered into an agreement with the California Secretary of State on implementing the statewide voter database requirements of the Help America Vote Act (HAVA). This unique agreement resulted in the establishment of procedures for processing voter registration forms that has proven to be highly problematic in practice. Across the state of California, 26 percent of all voter registration forms between January 1 and March 15, 2006, have been declared invalid by the California Secretary of State's office. In highly urbanized Los Angeles County, this number is as high as 43 percent. Before the implementation of this new system, the number of truly false or otherwise invalid registrations was less than one percent. Clearly the new system for processing voter registration forms is invalidating legitimate voters and will potentially disenfranchise tens of thousands of voters, including many who have voted for years and who attempted to re-register in a good-faith effort to update their registration with a new address, change in party affiliation or change in name due to marriage. It is my understanding that the problem is not with HAVA itself, but rather the unique way in which the California Secretary of the State is implementing the law, in accordance with an agreement reached with the U.S. Department of Justice. Considering the problems arising from the DOJ-California Secretary of State agreement, do you disagree with the claim by Bradley J. Schlozman, Acting Assistant Attorney General for the Civil Rights Division, that it is "a model for other states"?

ANSWER: The agreement reached with California is fully consistent with HAVA's requirements. The reported problems the State has experienced with its new statewide voter registration list are not a result of the Agreement; rather, as we understand the alleged problem, it involved a question of California law.

The specific legal issue involved the "matching criteria" that were being utilized by counties, pursuant to regulation of the Secretary of State, in order to verify information provided by voter registration applicants on their applications. Under Section 303(a)(5) of HAVA, as of January 1, 2006, a state cannot accept or process a voter registration application for an election for federal office unless that application includes the applicant's driver's license number or the last 4 digits of the applicant's social security number (where the applicant does not have a driver's license number). In those cases where an applicant has neither number, the state is required to assign to the applicant a unique identification number.

It is our understanding that, prior to January 1, 2006, under California state law, neither number was required to be supplied by applicants on a voter registration form. Pursuant to state legislation enacted in 2005, effective January 1, 2006, voter registration applicants are required to supply such number(s) for the

first time. Concurrent with our Agreement with the state, the Secretary of State's office drafted regulations to implement the new voter registration database. Based on what we understand to be that Office's interpretation of existing state law, these regulations required that where a new voter registration application did not contain either identification number required under HAVA, and a check of the state's motor vehicle records indicated a possible match with a person in that system, counties were to make contact with applicants to verify the driver's license number and complete the registration process. Apparently, as many new applicants after January 1 neglected to place such numbers on forms, the verification workload for the counties increased, in some cases dramatically. The failure of so many voters to supply their driver's license number does not appear to have been anticipated.

Most recently, we have been advised by the state of California that, based on an interpretation of the pertinent state law by the office of state legislative counsel, the Secretary of State has determined that state law does not require such personal contact for purposes of verification in certain instances, and that a technological "fix" can be and has been made to the voter registration system which should reduce substantially the number of registration applications subject to personal verification. We have also been advised by the Secretary of State that emergency regulations to formalize the change are being processed. We have informed the Secretary of State that we have no objection to the proposed change.

111. Considering the difficulties being experienced in California, will you direct subordinates in your department to not enter in any such agreements with other states?

ANSWER: No. As set forth above, the reported problems the State has experienced with its new statewide voter registration list are not a result of the Agreement; rather, as we understand the alleged problem, it involved a question of California law.

112. The agreement your department entered into with the California Secretary of State goes beyond what is required under HAVA. Other states that didn't enter into such an agreement with your department are experiencing much lower rejection rates. Why did your department impose such an agreement on California?

ANSWER: The agreement reached with California is fully consistent with HAVA's requirements. The agreement was entered into initially when the state reported to the Department that it would not meet the HAVA deadlines; it then offered to enter into an agreement to memorialize its plans to comply with HAVA. The reported problems the state has experienced with its new statewide

voter registration list are not a result of the Agreement; rather, as we understand the alleged problem, it involved a question of California law.

113. Can the State of California unilaterally change the agreement if it realizes it's too restrictive and denying eligible voters the right to register to vote?

ANSWER: As indicated above, we understand that California has changed its matching criteria for voter registration applicant verification and we have advised the state that we have no objection to this change.

114. Does the State of California risk being sued by your department if it changes its regulations?

ANSWER: As indicated above, we understand that California has changed its matching criteria for voter registration applicant verification and we have advised the state that we have no objection to this change.

115. Does the State of California risk being sued by your department if it passes a law to override the regulations?

ANSWER: As indicated above, we understand that California has changed its matching criteria for voter registration applicant verification and we have advised the state that we have no objection to this change.

QUESTIONS FROM REPRESENTATIVE WEXLER

116. Each year, approximately 25,000 women in the United States become pregnant as a result of rape. An estimated 22,000 of these pregnancies - or 88 percent - could be prevented if sexual assault victims had timely access to emergency contraception. Unfortunately, according to 2005 nationwide survey, 42 percent of non-Catholic hospitals and 55 percent of Catholic hospitals do not dispense emergency contraception under any circumstances, including when a woman has been sexually assaulted. As I'm sure you know, emergency contraception (EC) is a concentrated dosage of ordinary birth-control pills that can dramatically reduce a woman's chance of becoming pregnant if taken soon after sex. EC does not cause abortion; rather it prevents pregnancy by inhibiting ovulation, fertilization, or implantation before a pregnancy occurs. Why then is information about EC not included in the DOJ's National Protocol for Sexual Assault Medical Forensic Examinations even after being urged to address the issue by a bipartisan contingent of 22 Senators?

ANSWER: The cornerstone of the National Protocol for Sexual Assault Medical Forensic Examinations is a victim-centered approach. The premise underlying this approach is that a well-informed victim is the person best equipped to make decisions affecting the victim's health and well-being. The protocol, therefore, emphasizes providing information to victims. Then, based upon this information and the victim's own preferences and beliefs, the sexual assault victim controls as much of the process as possible.

Specifically, the protocol recommends discussing treatment options with patients, including all reproductive health services. The protocol encourages health care professionals to discuss the variety of and recommend appropriate treatment options to female sexual assault victims.

QUESTIONS FROM REPRESENTATIVE LOFGREN

117. In Mr. Gonzales' testimony on April 6 before the House Judiciary Committee, he stated that the President has the authority to conduct warrantless eavesdropping on U.S. persons because the United States is at war pursuant to the adoption of the AUMF and the President as Commander-in-Chief has the authority under Article II of the U.S. Constitution to conduct warrantless eavesdropping on U.S. persons as a fundamental incident to war. During the hearing, Ms. Lofgren asked whether "shooting people, capturing them in their homes or on the street, putting them in POW camps" were also authorized as "fundamental incidents" to war. Mr. Gonzales did not disavow such authority and left open the possibility that the Administration believed the AUMF authorized such activities as incidents to war, stating merely that "I think we'd have to look at what has occurred in the past in connection with conflicts." Does the Attorney General now deny each of the following activities is a "fundamental incident" to the AUMF, yes or no? Does he deny each of the following activities is a <u>likely</u> "fundamental incident" to the AUMF, yes or no?

ANSWER: Please see the answer to question 118, below.

118. Reinstatement of the draft?

ANSWER: We have not had the opportunity to conduct an exhaustive historical examination of each of these questions, but we will attempt to respond to the best of our ability. Reinstatement of conscription into the armed forces is not likely to be a fundamental incident to the use of armed forces authorized by the Force Resolution. Conscription has traditionally been a matter governed by statute. *See, e.g.*, 50 U.S.C. app. § 451 *et seq.*; *see also* the National Defense Act of 1916, 39 Stat. 134. Such treatment is consistent with the fact that the Constitution vests Congress with authority to "raise and support Armies," U.S. Const. Art. I, § 8, cl. 12, and providing for conscription into the Armed Services would be a traditional part of that authority. Detailed statutes are of particular importance in establishing a draft because compliance is generally enforced through criminal statutes, and only Congress can authorize the imposition of judicially enforceable criminal punishments under federal law. *Cf. Bousley v. United States*, 523 U.S. 614, 620-21 (1998); *United States v. Hudson*, 7 Cranch 32 (1812).

119. Shooting U.S. persons on U.S. soil?

ANSWER: Inside the United States, the Fifth Amendment prohibition against depriving a person of life without due process of law and the Fourth Amendment restriction on unreasonable seizures place significant restraints on the

government's authority to use deadly force. Without reference to the Force Resolution or the President's inherent constitutional authority, we note that it is well established that law enforcement officials may use deadly force to prevent an act that threatens life or severe bodily injury or to apprehend a suspect who is believed to have committed such an act. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 10-12 (1985).

120. Detaining U.S. persons in their homes or on U.S. soil?

ANSWER: It is the position of the United States that enemy combatants with plans to attack the United States may be captured on U.S. soil, even if they are U.S. citizens. The United States Court of Appeals for the Fourth Circuit upheld that position in *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1649 (2006), holding that the President had authority under the Force Resolution to capture on U.S. soil and detain in military custody a United States citizen who planned to engage in terrorist operations on behalf of al Qaeda.

121. Holding U.S. persons in POW camps?

ANSWER: A majority of the Supreme Court specifically has concluded that the Force Resolution authorizes the President to capture and detain United States persons, including United States citizens, who are enemy combatants. *Hamdi v. Rumsfeld*, 542 U.S 507 (2004); *see also Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

122. In the Attorney General's testimony, he stated under oath that one or more undisclosed surveillance programs, the legal authority for which was disputed by Attorney General John Ashcroft and Deputy Attorney General James Comey, exist besides the "terrorist surveillance program" disclosed publicly by the President. What categories of communications are captured and what categories of individuals are targeted by this or these programs?

ANSWER: As an initial matter, we are not aware of any instance in which the Attorney General, as your question asserts, "stated under oath that one or more undisclosed surveillance programs . . . exist besides the" Terrorist Surveillance Program. In recognition of the fact that he was testifying in public, the Attorney General has simply declined to discuss the existence or non-existence of specific intelligence activities besides the Terrorist Surveillance Program, which had already been publicly disclosed. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the intelligence committees and congressional leadership. For the same reasons, it would be

inappropriate to discuss in this setting the existence or non-existence of any specific intelligence activities or the operations of any such activities, besides the Terrorist Surveillance Program.

123. Press reports indicate that AT&T and possibly other telecommunications providers are data-mining communications on behalf of the NSA prior to any human review. Rather than discuss the so-called "operational details" of NSA surveillance programs, does the Attorney General deny each of the following statements with respect to any and all NSA surveillance programs: Does the Attorney General deny that communications to which U.S. persons are parties are routinely intercepted and analyzed by one or more automated systems under the control of or established on behalf of the NSA, prior to any individualized human determination that probable cause exists that a specific communication intercepted by this or these automated systems includes as a party an overseas member of al Qaeda?

124. Does the Attorney General deny that the automated interception described in [Question 122] involves millions of instances of communications or more?

ANSWER: The Terrorist Surveillance Program targets for interception a limited set of communications where one party is outside of the United States and there is reasonable grounds to believe that at least one party is a member or agent of al Qaeda or an affiliated terrorist organization.

It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the intelligence committees and congressional leadership

125. Does the Attorney General deny that the interception described in [Question 122] involves tens of thousands of U.S. persons or more?

ANSWER: Again, the Terrorist Surveillance Program targets for interception a limited set of communications as described in response to question 124. It would not be appropriate to discuss the operational details of the Program or the existence or non-existence of any other intelligence activities in this setting.

QUESTIONS FROM REPRESENTATIVE JACKSON-LEE

127. There have been reports of political appointees overruling staff recommendations. For example, in January 2005, the Washington Post reported that political appointees overruled a staff recommendation that the Texas congressional redistricting plan of 2003 be rejected as retrogressive under Section 5 of the Voting Rights Act. And before that, in November 2005 the Washington Post reported that a team of Justice Department lawyers and analysts who reviewed a Georgia voter-identification law recommended rejecting it because it was likely to discriminate against black voters, but they were overruled the next day by higher-ranking officials at Justice, according to department documents. What concrete steps have you taken to eliminate this type of undue political influence that permits political appointees to overrule staff recommendations?

ANSWER: Partisan considerations should not play a role in the Justice Department's decisions. The Attorney General and the Assistant Attorney General of the Civil Rights Division ("Division") believes strongly in this principle as well. The Division's successful record in the courts – and in the Texas redistricting and Georgia voter-identification matters specifically -- demonstrates that its decisions are based on the facts and the law.

As explained in our response to Question 86, above, the Texas redistricting submission involved a deliberate and careful review of every relevant fact. Subsequent events – including the decision by a three-judge panel finding no violation of the Voting Rights Act, and the 2004 elections held under the new plan that resulted in the election of an additional African American legislator – indicate that the preclearance decision was correct. In the Supreme Court's recent decision regarding the Texas congressional redistricting plan, LULAC v. Perry, the only challenge to the precleared plan sustained by the Court was brought under Section 2 of the Voting Rights Act. There, a majority of the Court held that new District 23 violated Section 2, and that the new District 25, despite being majority-minority, did not make up for the loss of minority voting strength in District 23 because the new District 25 was not a compact remedial district. This does not suggest that the Department's decision to preclear the Texas congressional plan under Section 5 was in any way erroneous. What we were judging under Section 5 was whether the new districts retrogressed minority voting strength (not whether the new districts were compact). A lack of compactness would not give us a basis to object under Section 5. Under Section 5, once a plan is precleared, the Supreme Court has said that Section 5 provides no further remedy, so no Section 5 issue was before the Court in the LULAC case.

Likewise, the decision to preclear the State of Georgia's amendments to its voter identification statute was made by the Chief of the Voting Section, a veteran career attorney with more than 30 years of experience in the Civil Rights Division. The decision was well grounded in law and fact submission. The 2005 Georgia voter identification law, which amended an existing voter identification statute that had been precleared by the prior Administration, was precleared after a careful analysis that lasted several months and took into account all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of state photo identification and driver's license cards. That data supported the ultimate preclearance decision in this matter.

128. Given that political appointees have virtually no role in determining whether to bring public corruptions cases (like Abramoff), why do political appointees play such a big role in determining whether to bring major voting rights cases?

ANSWER: Political appointees do not play an inordinate role in determining whether to bring major voting rights cases. The Assistant Attorney General for the Civil Rights Division is, of course, the official responsible for all cases brought by the Division, just as the Assistant Attorney General for the Criminal Division is the official responsible for all cases brought by that Division, including public corruption cases. It has been the practice of the Civil Rights Division since its inception that the Assistant Attorney General must approve each case initiated by the Division before it is filed. Cases are approved based solely on the facts and the law. There certainly has been no reluctance to bring cases under the Voting Rights Act. For example, in this Administration, the Assistant Attorneys General for Civil Rights have approved more cases under Sections 203 and 208 of the Voting Rights Act than all previous Assistant Attorneys General combined.

129. President Bush has occupied the office for nearly 6 years but is yet to veto a single bill. Instead he has exhibited a penchant for issuing the signing statements in which he usually claims that he is not bound by the law he just signed. What is the legal significance of a presidential "signing statement"? Is it not true that it is entitled to no consideration whatsoever in the interpretation of congressional intent?

ANSWER: Since the time your question was submitted, the President vetoed H.R. 810, the Stem Cell Research Enhancement Act of 2005.

We strongly disagree with your characterization of the President's use of the traditional tool of the presidential signing statement represents a "claim[] that he is not bound by the law he just signed." The President's use of signing

statements is both entirely consistent with his duties under the Constitution and with the actions of past Presidents.

As noted above in response to question 104, the Constitution requires the President to take an oath to "preserve, protect, and defend the Constitution," and directs him to "take care that the Laws be faithfully executed." U.S. Const., Art. II, §§ 1, 2. When Congress passes legislation containing provisions that could be construed as contrary to settled constitutional principles, or that could be applied in a manner that is plainly unconstitutional, the President can and should take steps to ensure that such laws are interpreted and executed in a manner consistent with the Constitution. Thus, Presidents have used signing statements to construe enactments of Congress since the early days of the Republic, and President Clinton himself issued constitutional signing statements with respect to 105 statutes. *See* Kelley, *supra*, at 18; *see also, e.g., Statement of President Clinton on Signing the National Defense Authorization Act for Fiscal Year 2000* (Oct. 5, 1999) ("A number of other provisions of this bill raise serious constitutional concerns. Because the President is the Commander in Chief and the Chief Executive under the Constitution, the Congress may not interfere with the President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch (sections 1042, 3150, and 3164). . . . To the extent that these provisions conflict with my constitutional responsibilities in these areas, I will construe them where possible to avoid such conflicts, and where it is impossible to do so, I will treat them as advisory. I hereby direct all executive branch officials to do likewise."); *Statement of President Clinton on Signing the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act* (Dec. 21, 2000) ("I also oppose language in the Act related to the Kyoto Protocol. . . . I direct the agencies to construe these provisions to be consistent with the President's constitutional prerogatives and responsibilities and where such a construction is not possible, to treat them as not interfering with those prerogatives and responsibilities."); *Statement of President Clinton on Signing Legislation To Reform the Financial System* (Nov. 12, 1999) ("Under section 332(b)(1) of the bill, the President would be required to make such appointments from lists of candidates recommended by the National Association of Insurance Commissioners. The Appointments Clause, however, does not permit such restrictions to be imposed upon the President's power of appointment. I therefore do not interpret the restrictions of section 332(b)(1) as binding and will regard any such lists of recommended candidates as advisory only."); *Statement of President Clinton on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act* (Oct. 23, 1998) ("Section 610 of the Commerce/Justice/State appropriations provision prohibits the use of appropriated funds for the participation of U.S. armed forces in a U.N. peacekeeping mission under foreign command unless the President's military advisers have recommended such involvement and the President has submitted such recommendations to the Congress. The 'Contributions for International

Peacekeeping Activities' provision requires a report to the Congress prior to voting for a U.N. peacekeeping mission. These provisions unconstitutionally constrain my diplomatic authority and my authority as Commander in Chief, and I will apply them consistent with my constitutional responsibilities.").

It is not the case that the President's only option when confronting a bill containing a provision that is constitutionally problematic is to veto the bill. Presidents Lincoln, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Kennedy, Lyndon Johnson, Ford, Carter, and Clinton each signed legislation rather than vetoing it despite concerns that it posed constitutional concerns. *See The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. at 132 nn. 3 & 5, 138 (memorandum opinion of Assistant Attorney General Walter Dellinger). Using a presidential signing statement to give a potentially problematic provision in a bill a construction that renders it constitutional does not represent an affront to Congress; rather, it gives *greater* effect to Congress's will than simply vetoing the legislation, or tacitly declining to enforce a provision (as other Presidents have done). As Assistant Attorney General Walter Dellinger explained early in the Clinton Administration, this practice is "analogous to the Supreme Court's practice of construing statutes, where possible, to avoid holding them unconstitutional." *Id.* at 133.

Presidential signing statements serve several purposes that are "[s]eparate and distinct" from any argument that they represent "legislative (or 'executive') history" to be considered by "the courts in ascertaining the meaning of statutory language." *Id.* at 135. Signing statements "explain to the public, and more particularly to interested constituencies, what the President understands to be the likely effects of the bill," and also serve to "guide and direct executive officials in interpreting or administering a statute." *Id.* at 131-32. Assistant Attorney General Dellinger wrote that one "*uncontroversial*" function of presidential signing statements is to "guide and direct executive officials in interpreting or administering a statute." *Id.* at 132 (emphasis added). "Signing statements have frequently expressed the President's intention to construe or administer a statute in a particular manner (often to save the statute from unconstitutionality)." *Id.* at 132. The President may also use a signing statement to announce his "view of the constitutionality of the legislation he is signing," *id.* at 132, either to explain that he will refuse to enforce the bill in various unconstitutional applications, *see id.* at 132-33, or to "put forward a 'saving' construction of the bill, explaining that the President will construe it in a certain manner in order to avoid constitutional difficulties," *id.* at 133. As Assistant Attorney General Dellinger noted, each of those "uses of Presidential signing statements generally serve[s] legitimate and defensible purposes." *Id.* at 137.

131. As I'm sure you're aware, I differ with the administration on the issue of legal abortion. But I believe that people who disagree on that issue can and should find common ground working to prevent the unintended pregnancies that increase the need for abortion. Do you agree that America would be a better country if no woman ever faced the difficult choice posed by an unintended pregnancy?

ANSWER: We agree that America would be a better country if there were no unintended pregnancies.

132. Each year, approximately 25,000 women in the United States become pregnant as a result of rape. An estimated 22,000 of these pregnancies - or 88 percent - could be prevented if sexual assault victims had timely access to emergency contraception. Unfortunately, according to 2005 nationwide survey, 42 percent of non-Catholic hospitals and 55 percent of Catholic hospitals do not dispense emergency contraception under any circumstances, including when a woman has been sexually assaulted. As I'm sure you know, emergency contraception (EC) is a concentrated dosage of ordinary birth-control pills that can dramatically reduce a woman's chance of becoming pregnant if taken soon after sex. EC does not cause abortion; rather it *prevents* pregnancy by inhibiting ovulation, fertilization, or implantation before a pregnancy occurs. EC therefore has tremendous potential to assist sexual assault victims avoid the additional trauma of an unintended pregnancy - do you agree?

ANSWER: The National Protocol for Sexual Assault Medical Forensic Examinations addresses many critical issues facing sexual assault victims, all through the lens of a victim-centered approach. The protocol recommends that health care providers discuss the possibility of pregnancy with the patient, being cognizant that "[P]atients of different ages, social, cultural, and religious/spiritual backgrounds may have varying opinions regarding treatment options." This section goes on to recommend conducting a consensual pregnancy test to assist in prescribing appropriate medications.

Finally, the protocol recommends discussing treatment options with patients, including all reproductive health services. The protocol encourages health care professionals to discuss the variety of and recommend appropriate treatment options to female sexual assault victims.

133. In late 2004, the Department of Justice issued the first-ever National Protocol for Sexual Assault Medical Forensic Examinations. I commend the establishment of a national protocol as a critical first step towards ensuring that all sexual assault victims receive quality medical and forensic services, but I am extremely concerned that the protocol lacks any mention of emergency contraception or recommendation that it be offered to sexual assault victims. In early 2005, 22 senators from both parties - and from both pro-life and pro-choice perspectives - wrote a letter urging DoJ to amend the protocol to include information on emergency contraception. In his response, Assistant Attorney General William Moschella wrote that the cornerstone of the national protocol is a "victim-centered approach"... "that a well-informed victim is the person best equipped to make decisions affecting the victim's health and well-being." I couldn't agree more. But why is it then that the protocol omits critical information about emergency contraception? Would you agree with me that in order for a sexual assault victim to be "well informed," she must receive information about all her available options for care, including emergency contraception?

ANSWER: The National Protocol for Sexual Assault Medical Forensic Examinations recommends discussing treatment options with patients, including all reproductive health services. The protocol encourages health care professionals to discuss the variety of and recommend appropriate treatment options to female sexual assault victims.

134. News reports made clear that information about emergency contraception was included in earlier versions of the protocol and was subsequently eliminated. Last August, the ACLU, NARAL Pro-Choice America, Christians for Justice Action and many other organizations filed a Freedom of Information Act request asking the Department of Justice to release records pertaining to the removal of any references to emergency contraception or pregnancy prevention in the protocol. What is the status of this FOIA request and what is the Department of Justice doing to ensure that it is acted upon promptly?

ANSWER: On September 7, the Office of Justice Programs forwarded a FOIA request to the Office on Violence Against Women (OVW) from the ACLU and other signatories requesting "all agency records held by the Department of Justice regarding the Department's decision about what information to include or omit regarding pregnancy prevention in the National Protocol for Sexual Assault Medical Forensic Examinations."

OVW Director Diane Stuart responded to this request on September 29, 2005 and the package of materials was mailed to Jennifer Nevins at the ACLU on September 30, 2005.

ENCLOSURE

QUESTION 12

3/17/06 LETTER TO
INSPECTOR GENERAL FINE

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

March 17, 2006

The Honorable Glenn A. Fine
Inspector General
Office of the Inspector General
United States Department of Justice
Room 4322
950 Pennsylvania Avenue, Northwest
Washington, D.C. 20530

Dear Mr. Fine:

I would like to thank you for providing the Federal Bureau of Investigation (FBI) the opportunity to respond to your report entitled, "The FBI's Efforts to Prevent and Respond to Maritime Terrorism."

I recognize the substantial challenge the Office of the Inspector General (OIG) has in producing timely reports on complex issues such as this. This challenge is even more difficult when assessing FBI operations because of the rapid changes it continues to undergo to optimally position itself to address the evolving threats to our Nation.

In large part, the FBI agrees with the findings and recommendations of this report. Accordingly, Executive Management from the Counterterrorism Division (CTD) of the FBI and personnel from the appropriate programs within the FBI have reviewed OIG's draft report concerning the FBI's efforts to prevent and respond to maritime terrorism. Ideally, we would like for the report to be updated to provide a current status of maritime security efforts in the FBI, and to that end have set forth several points of information for you to consider.

The FBI initiated the Maritime Security Program (MSP) in July 2005. This proactive measure was taken by CTD Executive Management in recognition of the potential threat of maritime terrorism. It is worth noting that this program was established without additional funding by reallocating resources within CTD.

Availability of resources has also influenced the FBI's participation in various exercises. Although the FBI would like to participate in additional

exercises, the FBI is currently able to support the joint exercises that are coordinated through the National Exercise Program.

- The FBI is actively working with the United States Coast Guard (USCG) and other agencies to resolve potential coordination issues in advance of actual threats and incidents in the maritime domain.

Additionally, the following comments are to correct or clarify statements made in the text of the audit report:

4. Page "v", first paragraph and page 25, first paragraph: The MSP prepared an Electronic Communication (EC) to the field to request that an FBI Special Agent (SA), as opposed to a Task Force Officer (TFO) be designated as the primary Maritime Liaison Agent (MLA). Although this EC was drafted, it was not approved by CTD management. As a result, in many Field Offices a TFO serves as the primary or only MLA.

5. Page "vi", first bullet: This point may need to be modified to include the capabilities of the Laboratory Division's Hazardous Materials Response Unit (HMRU) in dealing with a weapon of mass destruction (WMD) incident. HMRU provides technical and scientific operational response to WMD incidents, including, but not limited to, crime scene management, evidence recovery, emergency decontamination and scientific assessments. The responsibilities of the Hazardous Devices Response Unit (HDRU) includes the response to threats and actual devices before they are detonated or used in an "attack." HDRU does not respond to post-detonation attacks; that is the responsibility of HMRU and/or the Laboratory Division's Explosive Unit.

6. Page "viii", last paragraph: The statement, "The FBI has not collected complete data on the number of suspicious activities or terrorist threats involving seaports," is correct. However, the MSP has begun to collect this information from all available sources. The MSP has created a data base to capture this information which will be used to identify and track possible trends in suspicious activity at ports and port facilities. The MSP is also in the process of creating a standardized reporting mechanism for use by the MLAs when responding to incidents. These reports will be maintained in the MSP case file and the information will also be entered into the data base. Finally, the MSP maintains liaison with other agencies

and the private sector, such as the USCG, Office of Naval Intelligence (ONI) and the International Council of Cruise Lines (ICCL), for the sharing of pertinent threat information.

Page 23, bottom of the page: It should be noted that the MSP will present the 2006 Maritime Liaison Agent Training Conference in Long Beach, California from 04/03-07/2006. The Port of Long Beach is one of the busiest ports in the United States with a variety of inter-modal transportation systems. This site was specifically chosen because it offers hands on/familiarization training using various port facilities and vessels. The curriculum for this conference is expected to include presentations on the impact of maritime directives under the National Strategy for Maritime Security (NSMS); informant and liaison development; legal issues; enhancing maritime domain awareness; the FBI's capabilities and resources to respond to a maritime incident; and guidance to the field on best practices.

8. Page 24, first full paragraph: The report indicates that as a result of placing responsibility for managing the MLA Program under the MSP, all of the FBI's transportation related counterterrorism programs are located within the same organizational unit. This is not the case as the National Joint Terrorism Task Force (NJTTF) initiated the Rail Liaison Agent (RLA) Program via EC dated 10/24/2005. The NJTTF requested each Field Office to designate an FBI SA or TFO as a primary and secondary RLA. A separate initiative is currently underway to evaluate the feasibility of creating a program or unit focused on all aspects of the transportation sector. It is important to note this initiative is unfunded and would be created by reallocating existing resources.

9. Page 24, last paragraph: The report mentions that one of the objectives of the MSP was to create a website on the FBI's Intranet to facilitate the dissemination of information pertaining to directives, training, intelligence and other matters. This objective has been accomplished. The MSP website address is http://ctd.thinet.fbi/semu/maritime/. This website contains information on maritime directives including National Security Presidential Directive (NSPD) 41/Homeland Security Presidential Directive (HSPD) 13, the NSMS and key supporting plans; maritime related statutes; intelligence reports; points of

contact; and links to related programs including the Directorate of Intelligence (DI), and the Office of the General Counsel (OGC). Information is continually updated or added to the website. The MLAs are notified of information posted to the website via e-mail. The website has generated positive feedback from the MLAs and is a readily available source of standardized information for the field.

10. Page 24, last paragraph: The report also mentions that another objective of the MSP was to review maritime related suspicious activity reports to identify any trends that may be indicative of pre-operational planning. As noted above, the MSP has already started this process, which is ongoing. This effort is complicated by the lack of standardized reporting and difficulty in retrieving this information, as stated elsewhere in the findings.

11. Page 25, middle of the page: The report states that the MSP has not reviewed the eight supporting plans under the NSMS to identify the FBI's responsibilities nor identified all of the FBI's representatives assigned to the corresponding working groups. That information was supplied to OIG at the inception of the MSP. Since then, the MSP has thoroughly reviewed NSPD-41/HSPD-13, the NSMS and all eight of the supporting plans. The FBI's responsibilities under these directives have been identified and are being addressed. NSPD-41/HSPD-13, the NSMS and key supporting plans are posted to the MSP website. Due to limited resources, the MSP must prioritize which of the working groups to attend in support of these efforts. In that regard, representatives from the MSP have regularly attended and participated in the Maritime Security Policy Coordinating Committee (in support of Executive Management); the Maritime Security Working Group; the Maritime Operational Threat Response (MOTR) Implementation Team; and the Maritime Domain Awareness Implementation Team. In addition, an interagency MOTR Joint Working Group (JWG) has recently been established to address the planning, standardization and exercise requirements that will be deleted from the final version of the MOTR Plan as the Homeland Security Council has indicated. The MSP participates in this JWG as well as the Border and Transportation Security Policy Coordinating Committee.

12. Page 25, fourth paragraph: The report states neither the MSP's FY 2006 goals and objectives nor the critical duties of an MLA include the need for the FBI to develop relationships with people who can inform the FBI about maritime operations. It should be noted that at the time the MSP's goals and objectives were established (via EC dated 08/19/2005), the MSP did not have responsibility for managing the MLA Program. In fact, the first objective identified in that EC was to coordinate with the NJTTF to assume responsibility for the MLA Program. That objective was accomplished on 10/04/2005, when the MSP assumed responsibility for managing the MLA Program.
Furthermore, within the goals and objectives (via EC dated 08/19/2005), the MSP established various objectives for the field. One of these objectives was to "ensure effective liaison between the MLA and various law enforcement agencies, port and shipping officials in respect to counterterrorism preparedness." In the goals and objectives EC, the MSP identified five core competencies which included the establishment of a human intelligence base. Finally, in an EC to all Field Offices dated 07/12/2004, the NJTTF stated, "The goal of the MLA Program is to enhance the maritime environment through increased interaction between MLA members, private industry, state and local port authorities, to include law enforcement and other federal agencies with maritime responsibilities. These enhancements will result from the establishment of close working relationships between the MLAs and concerned entities within the maritime field." The EC goes on to provide additional guidance and an extensive list of recommended liaison contacts, including participation in the local Area Maritime Security Committee (AMSC). In addition to these specific recommendations, every FBI SA, including those designated as MLAs, are evaluated on specific critical elements. One of the core critical elements for all FBI SAs is the development of an intelligence base, which includes source development. This process encompasses identifying, initiating and developing relationships with individuals or organizations that may provide information or assistance in investigations and assignments. Therefore, CTD believes the need for the FBI to develop relationships with people who can inform the FBI about maritime operations has been thoroughly addressed.

Mr. Glenn A. Fine

As you requested, the MSP has provided responses to pertinent recommendations. Additionally, recommendations not under MSP's purview were provided to the appropriate offices, (i.e., the DI, the Critical Incident Response Group (CIRG), and CTD's Counterterrorism Analysis Section.) Responses to the recommendations are set forth below.

Recommendation #1

OIG Recommendation: Ensure that MLA guidance is consistent with the actual role of MLAs.

FBI Response: FBI agrees with this recommendation. The MSP has already made significant progress in this regard.

Through the creation of the MSP website, which contains information on maritime directives, including NSPD-41/HSPD-13, the NSMS and key supporting plans, maritime related statutes; intelligence reports; points of contact; and links to related programs including the DI and the OGC. Information is continually updated or added to the website. The MLAs are notified of information posted to the website via e-mail. The website has generated positive feedback from the MLAs and is a readily available source of standardized information for the field.

The MSP is in the process of planning the 2006 Maritime Liaison Agent Training Conference in Long Beach, California from 04/03-07/2006. This site was specifically chosen because the Port of Long Beach is one of the busiest ports in the United States with a variety of inter-modal transportation systems. The conference will include hands on/familiarization training using various port facilities and vessels. The curriculum for this conference is expected to include presentations on the impact of maritime directives under the NSMS; informant and liaison development; legal issues; enhancing maritime domain awareness; the FBI's capabilities and resources to respond to a maritime incident; and guidance to the field on best practices.

Finally, now that the MSP has responsibility for management of the MLA Program, the MSP will establish specific, quantifiably measurable and attainable goals and objectives that are consistent with the responsibilities assigned to the MLAs, to include recommendations for participation in various local working groups and liaison contacts.

Recommendation #2

OIG Recommendation: Assign MLAs based on an assessment of the threat and risk of a terrorist attack to critical seaports.

Mr. Glenn A. Fine

FBI Response: FBI agrees with this recommendation. FBI will ensure that resources are assigned or available necessary to address the risk or threat based on the assessment.

Recommendation #3

OIG Recommendation: Measure the amount of resources devoted to maritime efforts by establishing a maritime case classification under the general Counterterrorism Preparedness classification.

FBI Response: FBI agrees with this recommendation. The MSP has already taken certain steps which would enhance the FBI's ability to measure the amount of resources devoted to maritime efforts.

FBI is in the process of establishing a classification for maritime matters.

In August 2005, the MSP provided recommendations to the Counterintelligence Division for changes to the Investigative Accomplishment Report (FD-542) to capture activity conducted in support of the MLA Program. Finalization of the modifications to this report are pending.

Recommendation #4

OIG Recommendation: Require field offices to name at least one MLA to each AMSC.

FBI Response: FBI agrees with this recommendation. FBI will ensure that adequate resources are dedicated to each Area Maritime Security Committee to address priority matters.

Recommendation #5

OIG Recommendation: Require field offices to immediately notify the Maritime Security Program of any MLA appointments or reassignments.

FBI Response: FBI agrees with this recommendation. The MSP updates the MLA list on a regular basis. The MLA list is maintained by the MSP and is available on the MSP web site. The list identifies, by Field Office, all of the MLAs as well as the JTTF Supervisors who have oversight of the MLA Program. The list provides contact information, identifies if the MLAs are assigned to a Resident Agency (RA) and which ports they cover. The MSP has advised field offices to immediately notify the MSP

of any personnel changes affecting the MSP, and this guidance will be reiterated through training such as the 2006 Maritime Liaison Agent Training Conference.

Recommendation #6

OIG Recommendation: Ensure that the Maritime Security Program has measurable objectives.

FBI Response: FBI agrees with this recommendation and recognizes that significant changes and progress in the MSP require the establishment of more specific, quantifiably measurable and attainable goals and objectives.

While FBI recognizes that the goals and objectives established for the MSP (via EC dated 08/19/2005) did not include quantifiable measures, it should be noted that the MSP was a new program and no previous goals and objectives had been established. Furthermore, the MSP did not have responsibility for managing the MLA Program at the time the initial objectives were established. The first objective of the MSP was to coordinate with the NJTTF to assume responsibility for the MLA Program.

It is also worth noting that the NSMS and all of the supporting plans were released in the final quarter of 2005, after the date on which these objectives were established. Final directives under the NSMS have not been established, even as of the date of this response. Under these circumstances, it is difficult to quantify the amount of training and/or reference materials required to train MLAs in the field.

Despite the lack of specific, quantifiably measurable objectives at the inception of the program, the MSP accomplished several of the stated objectives, including the following:

> The MSP assumed responsibility for managing the MLA Program on 10/04/2005;
>
> Training and reference materials to assist the MLAs have been distributed via e-mail, posted to the FBI's Intranet, and will be presented at the 2006 Maritime Liaison Agent Training Conference scheduled to take place 04/03-07/2006;
>
> The MSP established a web site on the FBI's Intranet where current information including, but not limited to, maritime directives, statutes and intelligence is maintained;

The MSP continually identifies, analyzes and disseminates information pertaining to maritime threats, vulnerabilities and safety/security issues;

The MSP continually coordinates with other programs within the FBI to enhance situational awareness for the MSP, other programs, FBIHQ and the field;

The MSP has already begun to review and track suspicious activity reports to determine if there are any trends which could indicate terrorist activity and has disseminated information to the field in this regard; and

The MSP is actively engaged in liaison with other government agencies as well as the private sector. This effort and the fact that the MSP serves as a primary point of contact and a coordination center within the FBI for maritime issues has enhanced the FBI's liaison with these groups.

Recommendation #7

OIG Recommendation: Ensure that the Maritime Security Program's objectives include developing human intelligence.

FBI Response: FBI agrees with this recommendation and asserts that the MSP and the NJTTF have already provided such guidance to the MLAs.

As stated above, at the time the MSP's goals and objectives were established, the MSP did not have responsibility for managing the MLA Program. Even so, the MSP established various objectives for the field. One of these objectives was to "ensure effective liaison between the MLA and various law enforcement agencies, port and shipping officials in respect to counterterrorism preparedness." In the goals and objectives EC, the MSP identified five core competencies which included the establishment of a human intelligence base.

Prior to the existence of the MSP, in an EC to all Field Offices dated 07/12/2004, the NJTTF stated, "The goal of the MLA Program is to enhance the maritime environment through increased interaction between MLA members, private industry, state and local port authorities, to include law enforcement and other federal agencies with maritime responsibilities. These enhancements will result from the establishment of close working relationships between the MLAs and concerned entities within the maritime field…" The EC goes on to provide additional guidance and an extensive list of recommended liaison contacts, including participation in the local AMSC.

In addition to these specific recommendations, every FBI SA, including those designated as MLAs, are evaluated on specific critical elements. One of the core critical elements for all FBI SAs is the development of an intelligence base, which includes source development. This process encompasses identifying, initiating and developing relationships with individuals or organizations that may provide information or assistance in investigations and assignments. Therefore, FBI believes the need for the FBI to develop relationships with people who can inform the FBI about maritime operations has been thoroughly addressed.

The MSP also plans to address liaison and the development of a human intelligence base during the 2006 Maritime Liaison Agent Training Conference which is scheduled for 04/03-07/2006. In addition, the MSP will include specific recommendations to the MLAs in the objectives which will be established for FY 2007.

Recommendation #8

OIG Recommendation: Ensure that the FBI's MOTR operations plan examines high risk scenarios, determines the required response time, and evaluates how FBI resources would address the scenarios.

FBI Response: The FBI's maritime operational response plan takes into account various high-risk scenarios to include the criminal/terrorist use of biological, chemical or radiological WMD, as well as Improvised Explosive Devices (IEDs) and Improvised Nuclear Devices (INDs). Other high-risk scenarios include a large number of hostages on a maritime platform and/or the involvement of sophisticated criminal/terrorist adversaries. The FSB's tactical response to maritime threats mirrors the response to any other tactical response. That is, the FBI tactical response is a tiered approach which recognizes that local field offices will respond as necessary (Tier 1), with regional response (Tier 2) added as the evaluation of the situation may dictate. National response, as required (Tier 3), will involve the deployment of the Hostage Rescue Team (HRT), as well as other FBI SWAT teams and possibly the HDRU and the Laboratory's HMRU, as the scenarios would necessitate. Response times vary as a consequence of venue. HRT, HDRU and HMRU response times are typically notification plus four hours for deployment in addition to any travel time involved to the specific venue.

Recommendation #9

Mr. Glenn A. Fine

OIG Recommendation: Establish a requirement for joint FBI/Coast Guard exercises in field offices assessed as having high-risk seaports.

FBI Response: CIRG will require the fourteen (14) field offices that have been given enhanced tactical maritime training to make overtures to the USCG to conduct joint exercises on an annual basis. It should be noted that the FBI is not in a position to require USCG participation, however, the FBI will extend the invitation to the USCG as well as to other appropriate entities.

Recommendation #10

OIG Recommendation: Resolve potential role and incident command conflicts in the event of a maritime terrorist incident through joint exercises and, if necessary, a revised and broadened MOU with the Coast Guard.
FBI Response: FBI concurs in stating that this is currently being addressed through the revision of the final interagency MOTR Plan. It may be premature to determine if a revised memorandum of understanding (MOU) with the USCG will be necessary until the final MOTR Plan has been approved and vetted through exercises and/or operations. Again, the FBI is not in a position to require the USCG to enter into a renewed MOU.

Recommendation #11

OIG Recommendation: Prepare after-action reports after all maritime-related exercises and use the reports to identify and disseminate lessons learned and best practices.

FBI Response: This is being addressed in a separate joint initiative within the FBI. It is anticipated an After Action Report (AAR) template will be developed that applies to all critical incidents, special events and exercises. CIRG's Crisis Management Unit (CMU) is responsible for program oversight for the production of AARs per the Manual of Investigative and Operational Guidelines (MIOG), Part 2, section 30-1.8 (1) (a), (b) and (c) which specifically sets out the requirements for AARs.

Recommendation #12

OIG Recommendation: Ensure that all field offices submit critical incident reports to the CIRG by January 15 each year; require the FBI's Maritime Security Program, in consultation with the CIRG, to use the reports to conduct maritime-specific reviews of the FBI's crisis management policies and practices – including any requirements for field office crisis management

plans — and to disseminate maritime-related lessons learned and best practices.

FBI Response: CIRG's CMU ensures adherence to the MIOG's Part 2, section 30-1.8 which requires that field offices submit critical incident reports to CIRG by January 15th of each year. CID's MSP will provide information concerning maritime related lessons learned and best practices.

Recommendation #13

OIG Recommendation: Assess the threat and risk of maritime terrorism compared to other terrorist threats and ensure the National Threat Assessment ranks the various modes of attack and targets.

FBI Response: FBI will ensure that intelligence gaps are identified and action is initiated to resolve any deficiencies.

Recommendation #14

OIG Recommendation: Ensure the amount of FBI resources dedicated to maritime terrorism is based on the extent of the maritime threat in relation to other threats.

FBI Response: FBI agrees with this recommendation. FBI will ensure that adequate resources are allocated to address priority threats.

Recommendation #15

OIG Recommendation: Monitor the progress of operating divisions and field offices in answering intelligence collection requirements pertaining to seaports and maritime terrorism.

FBI Response: The Directorate of Intelligence will provide a response to this recommendation.

Recommendation #16

OIG Recommendation: Focus intelligence reporting to more comprehensively address potential maritime-related terrorist targets and methods.

FBI Response: The Directorate of Intelligence will provide a response to this recommendation.

Recommendation #17

Mr. Glenn A. Fine

OIG Recommendation: Name a unit within the Counterterrorism Division to monitor the volume and substance of all FBI maritime-related intelligence.

FBI Response: FBI Counterterrorism Division will ensure that Maritime related intelligence as well as investigations are monitored and properly managed.

Recommendation #18

OIG Recommendation: Consider establishing a requirement for regular field office intelligence bulletins to summarize the field office's suspicious incident reporting and, if such a requirement is adopted, establish standardized frequency, content, and distribution requirements.

FBI Response: The Directorate of Intelligence will provide a response to this recommendation.

The FBI has prepared the appropriate responses to the recommendations found in your report. The responses have undergone a classification review (Enclosure 1) and Sensitivity Review (Enclosure 2).

The responses were coordinated through the FBI's Inspection Division. Please contact Shirlene Savoy of the Inspection Division should you have any questions. Ms. Savoy can be reached at (202) 324-1833.

I want to thank you again for your efforts in producing this report, and I welcome the opportunity to discuss in detail the progress the FBI continues to make in this area.

Please contact me should you have any questions regarding this matter.

Sincerely yours,

Willie T. Hulon
Assistant Director
Counterterrorism Division

ENCLOSURE

QUESTION 66

8/9/06 LETTER TO CHAIRMAN SENSENBRENNER

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 9, 2006

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

In a letter dated January 13, 2006, we informed you of the Attorney General's call for the Department to undertake a comprehensive review of the Immigration Courts and the Board of Immigration Appeals. We are pleased to inform you that the review is complete.

Over the past six months, a review team convened by the Deputy Attorney General and the Associate Attorney General, comprised of approximately 15 attorneys and staff, traveled to nearly 20 Immigration Courts around the country. The team conducted more than 200 interviews of stakeholders from the Executive Office for Immigration Review, the American Immigration Lawyers Association, the Department of Homeland Security (DHS), pro bono programs, interest groups, and other relevant parties. The team also administered an anonymous online survey to hundreds of participants with whom they could not meet personally. In addition, the team analyzed thousands of pages of material in an attempt to assess the strengths and weaknesses of the current immigration court system.

The review assured us that, despite a staggering caseload that has grown exponentially, and staffing levels and technology that have not kept pace, the vast majority of immigration judges discharge their duties in a professional and effective manner. In addition, it highlighted the impressive accomplishment of the Board of Immigration Appeals in substantially reducing its pending caseload in the face of these same challenges. The review also showed, however, that on rare occasions, some immigration judges do behave inappropriately toward those appearing before them, whether aliens, their representatives, or DHS attorneys. It also indicated that, in some respects, the quality of work that the immigration judges and the Board produce could improve. In an effort to address these areas, the Department is implementing twenty-two measures to improve the Immigration Courts and the Board. Enclosed is a detailed description of these measures. We hope you will find it helpful.

The Honorable F. James Sensenbrenner, Jr.
Page Two

We would welcome the opportunity for representatives from the Department to sit down with you or your staff to walk through the measures and to answer any questions you may have. Toward this end, please do not hesitate to contact me or Deputy Assistant Attorney General Rebecca Seidel at (202) 514-2141 to schedule this briefing.

As we begin the process to improve our immigration adjudications, we look forward to any additional input you may have. Thank you for your attention to this matter.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable John Conyers
Ranking Minority Member

The Attorney General
Washington, D.C.

August 9, 2000

MEMORANDUM FOR IMMIGRATION JUDGES
MEMBERS OF THE BOARD OF IMMIGRATION APPEALS

FROM: THE ATTORNEY GENERAL

SUBJECT: Measures to improve the Immigration Courts and the Board of Immigration Appeals

As you know, in January, I asked the Deputy Attorney General and the Associate Attorney General to undertake a comprehensive review of the Immigration Courts and the Board of Immigration Appeals. I am pleased to inform you that their review is complete and that, based on their work, I am directing that twenty-two new measures be implemented. The attached documents describe the measures in detail.

I want to thank you for your input during the review and look forward to your assistance in implementing these reforms.

Attachments

Department of Justice

MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS

On January 9, 2006, the Attorney General directed the Deputy Attorney General and the Associate Attorney General to undertake a comprehensive review of the Immigration Courts and the Board of Immigration Appeals. During this review, they assembled a team of nearly 20 immigration judges and Board members, conducted more than 200 interviews of stakeholders, administered an online survey to hundreds of participants, and analyzed thousands of pages of statistical information to assess the strengths and weaknesses of the immigration court system. The Deputy Attorney General and the Associate Attorney General have now briefed the Attorney General on the review team's findings and have provided him with their recommendations for reform.

Based on that review, the Attorney General is directing the implementation of the following measures:

1. *Performance Evaluations*

With the assistance of the Director of the Executive Office for Immigration Review (EOIR), the Deputy Attorney General will develop and implement a process to enable EOIR leadership to review periodically the work and performance of each immigration judge and member of the Board of Immigration Appeals. Instances performance-related records are sent elsewhere in the Department to assess the work of personnel at all levels, EOIR performance evaluations will allow for identification of areas where each immigration judge or Board member may need improvement while fully respecting his or her role as an adjudicator. Given the size and structure of the Immigration Courts system, a formal process to allow supervisors within EOIR to evaluate and improve the work of its adjudicators is appropriate at this time.

2. *Evaluation During Two-Year Trial Period*

Like many other Department employees, newly appointed immigration judges and Board members have a two-year trial period of employment. The Director of EOIR will use that period both to assess whether a new appointee possesses the appropriate judicial temperament and skills for the job and to take steps to improve that performance if needed. In addition, the Director of EOIR will provide a short report to the Deputy Attorney General on the temperament and skills of each newly appointed immigration judge or Board member roughly four months prior to the expiration of the two-year trial period. The assessment will be done in a way that fully respects the adjudicator's role.

3. Examination on Immigration Law

Immigration judges and Board members should be proficient in the principles of immigration law. To ensure that is so, all immigration judges and Board members appointed after December 31, 2006, will have to pass a written examination demonstrating familiarity with key precedents of immigration law before they begin to hear cases. The Director of EOIR will develop a set of immigration law questions and submit it to the Deputy Attorney General. The Director may consider the appropriateness of a training course prior to the administration of the examination.

4. Improved Training for Immigration Judges and Board Members

It is important that existing Immigration judges and Board members be competent and up to date. The Director of EOIR will conduct a review of EOIR's current training programs for immigration judges and Board members, develop a plan based on that review to strengthen training, and submit the plan to the Deputy Attorney General. The plan will address, among other things, (i) whether expansion of the training program for new immigration judges and Board members is warranted, (ii) ways to ensure that immigration judges and Board members receive continuing education that is appropriate to their level of experience and is effective in their continued development in the field of immigration law, and (iii) ways to ensure that immigration judges are trained on properly drafting and deciding oral decisions. The Director will consult the Director of the Federal Judicial Center with respect to this and other training-related measures.

5. Improved Training and Guidance for EOIR Staff

The Director of EOIR will conduct a review to assess how well Immigration Court and Board of Immigration Appeals staff are performing their functions and provide a plan for improvement, including any additional training the Director deems appropriate in areas such as case management. In particular, the Director's review will consider how well the Board's staff attorneys are performing their screening and drafting duties and develop a plan based on that review to strengthen these areas. The plan will address, among other things, ways to (i) improve the guidance and training provided to staff attorneys—especially on similar recurring issues (*e.g.*, correct screening standards, proper standards of review, and how to draft effective dispositive orders), and (ii) ensure that Board members provide staff attorneys with appropriate guidance including decisions in individual cases consistent with the policies and directives of the Director of EOIR and the Chairman of the Board of Immigration Appeals. The Director will submit the plan to the Deputy Attorney General.

6. Improved Outbrief Referral Materials and Decision Templates

Immigration judges should have available to them up-to-date reference materials and standard decision templates that conform to the law of the circuits in which they sit. The Director of EOIR is encouraged promptly to form a committee composed of immigration judges and other EOIR personnel to undertake the task of developing these materials.

7. Mechanisms To Detect Poor Conduct and Quality

While most immigration judges and Board members perform their difficult duties with skill and dedication, as in any large organization, instances of poor conduct and quality can occur from time to time. To ensure that these instances are promptly detected, the Director of EOIR will establish regular procedures (1) for Board members and the Civil Division's Office of Immigration Litigation (OIL) to report allegations that reflect immigration judge temperament problems or poor Immigration Court or Board quality to him and to the Chief Immigration Judge and the Chairman of the Board of Immigration Appeals and (2) for the Chief Immigration Judge and the Chairman of the Board to track and report to the Director instances that may signal problems in temperament or quality (*e.g.*, unusually high reversal rates, unusually frequent or serious complaints, and unusually significant backlogs).

8. Analysis and Recommendations Regarding Disparities in Asylum Grant Rates

A recent study has highlighted apparent disparities among immigration judges in asylum grant rates. The Director of EOIR, in consultation with the Acting Chief Immigration Judge, will review this study and provide an analysis and, if appropriate, recommendations to the Deputy Attorney General with respect to this issue.

9. Pilot Program To Develop Structure to Regional Offices

To test whether the Immigration Courts would benefit from having a Senior Chief Immigration Judge assigned regionally rather than at EOIR headquarters, the Acting Chief Immigration Judge will consider assigning one or more of the Assistant Chief Immigration Judges to serve regionally, over the Immigration Courts in the western, eastern, or gulf seats. After the conclusion of this assignment, the Chief Immigration Judge will report to the Deputy Attorney General and the Director of EOIR on whether the assignment improved managerial control and oversight in those courts. The Acting Chief Immigration Judge will also consider piloting other mechanisms for improving the management of the Immigration Courts.

10. Code of Conduct

The Director of EOIR will craft a Code of Conduct specifically applicable to immigration judges and Board members and, after consultation with the Counsel for Professional Responsibility and the Director of the Office of Attorney Recruitment and Management, submit it to the Deputy Attorney General. Thereafter, it will be available online to counsel and litigants who appear before the Immigration Courts and the Board.

11. Complaint Procedures

The Department takes seriously complaints of inappropriate conduct by its adjudicators. Procedures already exist within EOIR, the Office of Professional Responsibility (OPR), and the Office of the Inspector General (OIG) to address them. In

light of the serious and sometimes sensitive nature of these complaints, the following additional measures will be taken to improve the quality and speed of the Department's complaint-handling processes. The Director of EOIR, in consultation with the Counsel for Professional Responsibility and the Inspector General, will conduct a review of EOIR's current procedures for handling complaints against its adjudicators, and will develop a plan based on the review to (i) standardize complaint-intake procedures, (ii) create a tracking process that will clearly define the roles of EOIR, OPR, and OIG in the handling of any complaint, and (iii) ensure a fairly and appropriate response. The Director of EOIR will conduct the review and submit a plan to the Deputy Attorney General.

12. *Improvements to the Streamlining Reforms*

Much commentary has been directed at the reforms that the Department instituted in 1999 and then expanded in 2002 to streamline the Board of Immigration Appeals' procedures for hearing appeals. Critics believe that these reforms have led the Board of Immigration Appeals to dedicate insufficient review to some matters and to produce too few published precedential decisions. Proponents of these reforms, on the other hand, have observed that streamlining brought much-needed efficiency to the review process, enabling the Board to eliminate a large backlog and to provide respondents with a final, reviewable administrative action in a reasonable amount of time. Having carefully considered the existing and predicted caseload, the existing resources, the need to review respondents' claims adequately, and the need to provide respondents with a final decision in a timely fashion, the Department has concluded that it is neither necessary nor feasible to return to three-member review of all cases without recreating unacceptable backlogs. Some adjustments to streamlining, however, are appropriate to allow the Board to improve and better explain its reasoning in certain cases. Accordingly, the following adjustments will be made to the Board's rules.

- The Director of EOIR will draft a proposed rule that will refine streamlining practices in (i) encourage the increased use of one-member written opinions to address poor or interpretate immigration judge decisions that reach the correct result but would benefit from discussion or clarification, and (ii) allow the limited use of three-member written opinions – as opposed to one-member written opinions – to provide greater legal analysis in a small class of particularly complex cases. The Director of EOIR will submit a draft of the proposed rule to the Assistant Attorney General for Legal Policy.

- The Director of EOIR will draft a proposed rule that will revise processes for publishing opinions of three-member panels as precedential to provide for publication if a majority of panel members or a majority of permanent Board members votes to publish the opinion, or if the Attorney General directs publication. The Director of EOIR will submit a draft of the proposed rule to the Assistant Attorney General for Legal Policy.

- The Assistant Attorney General for Legal Policy, in consultation with EOIR and the Civil Division, will draft a proposed rule that would return cases to the Board for

reconsideration when OIL identifies a case that has been filed in federal court and, in OIL's view, warrants reconsideration.

From time to time, the sanctioning rules may need to be adjusted to meet the exigencies and needs of the Board and the parties who litigate before it. Accordingly, the Deputy Attorney General and the Director of EOIR will monitor the effect of these adjustments closely to assure that they are appropriate in light of the Board's changing workload and the Deputy Attorney General will reevaluate the effectiveness of these adjustments after they have been in effect for two years.

15. *Practice Manual*

The immigration judges, and the counsel and litigants who appear before them, would benefit from having a Practice Manual that delineates a set of best practices for the Immigration Courts. Working with the Immigration Judges, the Director of EOIR will draft such a Manual and submit it to the Deputy Attorney General. It will be available online to counsel and litigants who appear before the Immigration Courts.

16. *Updated and Well Supervised Sanction Authority for Immigration Judges for Fraudulent or False Statements and Dilatory Misconduct*

Immigration judges should have the tools necessary to expedite their courtrooms and to protect the adjudicatory process from fraud and abuse. The Director of EOIR will consider, and where appropriate, draft proposed revisions to the existing rules that provide sanction authority for false statements, frivolous behavior, and other dilatory misconduct, see 8 C.F.R. 1003.101-109, and will draft a new proposed rule that creates a tightly defined and clearly delineated authority to sanction by civil monetary penalty the action of litigants in connection with immigration judge's proper exercise of authority. Because the authority to impose a civil monetary sanction exists only for conduct "in connection with an immigration judge's proper exercise of authority" 18 U.S.C. 1229a(b)(1), its use will require substantial oversight (*e.g.*, approval by the Director or EOIR or another overseeing body), and one would anticipate it would be used sparingly. The Director, after consultation with the Counsel for Professional Responsibility, will submit proposed rules to the Assistant Attorney General for Legal Policy.

17. *Updated Sanctions Power for the Board*

Likewise, the Board of Immigration Appeals should have the ability to sanction offending litigants and counsel by similarly defined rules, not of gross misconduct. The Director of EOIR will consider, and where appropriate, draft proposed revisions to the existing rules that provide sanction authority to the Board. I ask the Director, after consultation with the Counsel for Professional Responsibility, to submit any proposed revisions to the Assistant Attorney General for Legal Policy.

16. *Seek Budget Increases*

With its workload having increased significantly in recent years and still further increases in caseload being anticipated, EOIR has demonstrated a need for additional resources. The Deputy Attorney General and the Director of EOIR will prepare a plan as soon as possible to seek budget increases, starting in FY 2008, for (i) the hiring of more immigration judges and judicial law clerks, focusing on those Immigration Courts where the need is greatest, and (ii) the hiring of more staff attorneys to support the Board of Immigration Appeals.

17. *Increase the Size of the Board*

The Director of EOIR will draft and submit to the Assistant Attorney General for Legal Policy a proposed rule to increase the size of the Board of Immigration Appeals from 11 to 15, by adding four permanent members. In addition, the Director is encouraged to continue the use of temporary Board members to fill the ranks of the Board of Immigration Appeals.

18. *Updated Recording System and Other Technologies*

For some time, EOIR has been considering the need to replace the Immigration Courts' aging recording system with a digital recording system. The Director will provide the Deputy Attorney General with a plan and timeline for accomplishing this project. The plan and timeline will include the steps necessary to begin piloting a digital audio recording system during the next fiscal year, and to begin nationwide implementation of that system as soon as feasible.

In general, it is important to ensure that EOIR's use of technology—from the digital recording system to an electronic docket management system—is efficient, innovative, and compatible with the information management systems of users of EOIR's systems.

19. *Improved Transcription Services*

The Director of EOIR will conduct a review of EOIR's current transcription services and develop a plan based on that review to strengthen the transcription of oral decisions, including improving the timeliness of transcription to the extent feasible. The Director will submit the plan to the Deputy Attorney General.

20. *Improved Interpreter Selection*

Likewise, the Director of EOIR will conduct a review of its current interpreter selection process and develop a plan based on that review to strengthen interpreter selection. The plan will address, among other things, (i) ways to improve the screening, training, certification, and evaluation of staff interpreters, and (ii) ways to ensure that contract interpreters meet similar standards of quality. The Director will submit the plan to the Deputy Attorney General.

21. *Referral of Immigration Fraud and Abuse*

The Director of EOIR, in consultation with the Director of the Executive Office for United States Attorneys, will develop a procedure by which immigration judges and Board members may refer cases of immigration fraud and abuse to the appropriate investigative body for appropriate action, including possible future referral to and prosecution by the U.S. Attorney's Offices. The Director will notify the immigration judges and Board members of that procedure.

22. *Expanded and Improved EOIR-sponsored Pro Bono Program*

The Director of EOIR will consider forming a committee to oversee the expansion and improvement of EOIR's *pro bono* programs. Such a committee will be composed of immigration judges, representatives of the Board, other EOIR personnel, representatives of the Department of Homeland Security and the private immigration bar, and any other participants whom the Director deems necessary.

THE WASHINGTON POST NEWS ARTICLE "CIVIL RIGHTS FOCUS SHIFTS ROILS STAFF AT JUSTICE," DATED NOVEMBER 13, 2005

Correction to This Article

A Nov. 13 article incorrectly said that the Justice Department's Civil Rights Division filed three friend-of-the-court briefs in fiscal 2005, down from 22 in 1999. The division filed 14 such briefs in 2005. The article also said that lawyer Richard Ugelow left the division in 2004. He left in 2002.

CIVIL RIGHTS FOCUS SHIFT ROILS STAFF AT JUSTICE

VETERANS EXIT DIVISION AS TRADITIONAL CASES DECLINE

By Dan Eggen

Washington Post Staff Writer
Sunday, November 13, 2005; A01

The Justice Department's Civil Rights Division, which has enforced the nation's anti-discrimination laws for nearly half a century, is in the midst of an upheaval that has driven away dozens of veteran lawyers and has damaged morale for many of those who remain, according to former and current career employees.

Nearly 20 percent of the division's lawyers left in fiscal 2005, in part because of a buyout program that some lawyers believe was aimed at pushing out those who did not share the administration's conservative views on civil rights laws. Longtime litigators complain that political appointees have cut them out of hiring and major policy decisions, including approvals of controversial GOP redistricting plans in Mississippi and Texas.

At the same time, prosecutions for the kinds of racial and gender discrimination crimes traditionally handled by the division have declined 40 percent over the past five years, according to department statistics. Dozens of lawyers find themselves handling appeals of deportation orders and other immigration matters instead of civil rights cases.

The division has also come under criticism from the courts and some Democratsfor its decision in August to approve a Georgia program requiring voters to present government-issued identification cards at the polls. The program was halted by an appellate court panel and a district court judge, who likened it to a poll tax from the Jim Crow era.

"Most everyone in the Civil Rights Division realized that with the change of administration, there would be some cutting back of some cases," said Richard Ugelow, who left the division in 2004 and now teaches law at American University. "But I don't think people anticipated that it would go this far, that enforcement would be cut back to the point that people felt like they were spinning their wheels."

The Justice Department and its supporters strongly dispute the complaints. Justice spokesman Eric Holland noted that the overall attrition rate during the Bush administration, about 13 percent, is not significantly higher than the 11 percent average during the last five years under President Bill Clinton.

Holland also said that the division filed a record number of criminal prosecutions in 2004. A quarter of those cases were related tohuman-trafficking crimes, which were made easier to prosecute under legislation passed at the end of the Clinton administration and which account for a growing proportion of the division's caseload.

In addition, Holland defended the department's decision to approve the Georgia voter law, saying that "career and political attorneys together concluded" that the measure would have no negative effect on minorities.

"This administration has continued the robust and vigorous enforcement of civil rights laws," Holland wrote in an e-mail statement, adding later: "These accomplishments could not have been achieved without teamwork between career attorneys and political appointees."

Attorney General Alberto R. Gonzales, the first Hispanic to hold the job, named civil rights enforcement as one of his priorities after taking office earlier this year and supports reauthorization of the Voting Rights Act.

Although relations between the career and political ranks have been strained throughout the Justice Department over the past five years, the level of conflict has been particularly high in civil rights, according to current and former staffers. The debate over civil rights flared in the Senate in recent weeks after the nomination of Wan J. Kim, who was confirmed on Nov. 4 as the assistant attorney general for the division and is the third person to hold that job during the Bush administration. Kim has been the civil rights deputy for the past two years.

There were no serious objections to Kim's nomination, but Democrats including Sens. Richard J. Durbin (Ill.) and Edward M. Kennedy (Mass.) said they were concerned about serious problems with morale and enforcement within the division.

"Its enforcement of civil rights over the past five years has been negligent," Kennedy said in a statement. "Mr. Kim has promised to look closely at these issues and to increase the division's enforcement, and I believed he should be given a chance to turn the division around."

Critics point to several key statistics in arguing that Gonzales and the previous attorney general, John D. Ashcroft, have charted a dramatically different course for civil rights enforcement than previous administrations of both parties.

The Lawyers' Committee for Civil Rights Under Law, which includes a number of former Justice lawyers, noted in a letter to the Senate Judiciary Committee that the division has filed only a handful of cases in recent years dealing with employ-

ment discrimination or discrimination based on the statistical impact on women or minority groups.

The total number of criminal prosecutions is within the range of the Clinton administration, but a growing percentage of those cases involve prosecuting human smugglers, which have become a priority for the division only in recent years. Other types of civil rights prosecutions are down, from 83 in fiscal 2001 to 49 in 2005.

The Bush administration has filed only three lawsuits—all of them this year—under the section of the Voting Rights Act that prohibits discrimination against minority voters, and none of them involves discrimination against blacks. The initial case was the Justice Department's first reverse-discrimination lawsuit, accusing a majority-black county in Mississippi of discriminating against white voters.

The change in emphasis is perhaps most stark in the division's appellate section, which has historically played a prominent role intervening in key discrimination cases. The section filed only three friend-of-the-court briefs last year—compared with 22 in 1999—and now spends nearly half its time defendingdeportation orders rather than pursuing civil rights litigation. Last year, six of 10 briefs filed by the section were related to immigration cases.

William R. Yeomans, a 24-year division veteran who took a buyout offer earlier this year, wrote in an essay in Legal Affairs magazine that "morale among career attorneys has plummeted, the division's productivity has suffered and the pace of civil rights enforcement has slowed."

In an interview, Yeomans said some of the problems stem from the way the "front office" at Justice has treated career employees, many of whom have been forced to move to other divisions or to handle cases unconnected to civil rights. As an example of the strained relations, Yeomans points to the recent retirement party held for a widely admired 37-year veteran: Not one political appointee showed up.

At the same time, Ashcroft implemented procedures throughout Justice that limited the input of career lawyers in employment decisions, resulting in the hiring of many young conservatives in civil rights and elsewhere in the department, former and current lawyers have said.

"The more slots you open, the more you can populate them with people you like," said Stephen B. Pershing, who left the division in May and is now senior counsel at the Center for Constitutional Litigation, a Washington law firm that handles civil rights cases. "It's pretty simple really."

To Roger Clegg, the situation is also perfectly understandable. A former civil rights deputy in the Reagan administration who is now general counsel at the Center for Equal Opportunity, Clegg said the civil rights area tends to attract activist liberal lawyers who are philosophically opposed to a more conservative approach.

"If the career people are not reflecting the policy priorities of the political appointees, then there's a problem," Clegg said. "Elections have consequences in a democracy."

Holland, the Justice spokesman, said critics are selectively citing statistics. For example, he said, the department is on the winning side of court rulings 90 percent of the time compared with 60 percent during the Clinton years. Federal courts are "less likely to reject our legal arguments than the ones filed in the previous administration," he said.

Ralph F. Boyd Jr., the civil rights chief from 2001 to 2003, agreed: "It's not a prosecutor's job to bring lots of cases; it's a prosecutor's job to bring the right cases. If it means fewer cases overall, then that's what you do."

LETTER FROM THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

See footnote on Page 77