S. HRG. 110–630

OVERSIGHT OF THE DEPARTMENT OF HOMELAND SECURITY

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

APRIL 2, 2008

Serial No. J–110–83

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WEDNESDAY, APRIL 2, 2008

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 9:37 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kennedy, Feinstein, Feingold, Schumer, Whitehouse, Specter, Hatch, Grassley, Kyl, Sessions, and Cornyn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. First off, I thank those who are here. I know it is a very busy time, and Senator Specter, who is on a whole lot of committees, is going to have to be leaving for another Committee. And I know people come in and out. I am glad you are here, and I thank Secretary Chertoff for being here. And it is an important part of our oversight responsibilities having him here.

As I noted recently with respect to the publication of rules governing passport and entry requirements, I am worried about the Department's record in how it has handled the Western Hemisphere Travel Initiative, the REAL ID Act, naturalization backlogs, the resettlement of Iraqi refugees and asylum seekers, and the aftermath of Hurricane Katrina.

Recently, President Bush used the fifth anniversary of the Department to speak about spreading freedom and liberty around the world, as he did, and I had applauded him at the time during his second inaugural address. But, accordingly, in order to protect the freedom and liberties of Americans, we have to adhere to the rule of law and honor America's commitment to basic human rights.

The first Secretary of the Department, Thomas Ridge, has acknowledged that waterboarding is torture. This administration will not even share with this oversight Committee its legal justifications for waterboarding and why the administration supports waterboarding and other practices that we would condemn if they were used against an American anywhere in the world. Unfortunately, we have sadly gone from the world's human rights leader; now we find ourselves being lectured on human rights by the Pakistani and Chinese Governments. I mean, that puts us in a pretty bad position.

Sixty-six people have died since 2004 while in the Department of Homeland Security's custody, some for lack of medical care or from outright neglect. Now, we have told, and rightly so, other countries to be careful how they are holding people. I do not know how we can say we are adhering to our standards when we lose 66 people in the custody of the Department of Homeland Security alone.

Imagine the outrage if an American citizen were held in immigration detention in another country and then he or she died for lack of basic medical care. When it takes a lawsuit to improve substandard detention conditions for children and families at an immigration detention facility in Texas, the U.S. Government is failing its basic commitments to human rights and the rule of law—again, things for which we would criticize other countries if they did.

Now, I recognize that the Immigration and Customs Enforcement branch has worked with nongovernmental organizations to make improvements in family detention standards and detention standards for asylum seekers who are fleeing to America to escape persecution in other parts of the world. But as the Department increased its enforcement activities, I wish it had planned better.

We have also seen that the administration has failed to live up to its promises to resettle Iraqis who have helped the United States in their home country. This problem is compounded by the Department's inability to use the authority that Congress has given it to address the terrible effects of the material support bar and the related, overly broad definitions of "terrorist organizations."

The recent case of Saman Kareem Ahmad, now a language instructor for the U.S. Marines who has received commendations from General Petraeus for his service in Iraq, exemplifies these problems. He was granted a special visa to come to the United States, but then, even though he has commendations from General Petraeus, even though he works as a language instructor for the U.S. Marines, his green card application was denied by your Department, which said that the pro-American, anti-Saddam Hussein group, the Kurdistan Democratic Party, with which Mr. Ahmad served, was a terrorist organization. He is caught in an "Alice in Wonderland" trap that could very easily be solved if DHS wanted to.

Now, here at home, of course, you are well aware of my concerns about the Department's implementation of the Western Hemisphere Travel Initiative. The Department must now make good use of the time Congress has given to make sure that the implementation goes smoothly and to minimize disruption in Americans' lives and in our relations with our good neighbors to the north and south.

I also share the view of many on both sides of the aisle and across the country about the so-called REAL ID Act and its unfunded mandates for the States. If we are going to have a national ID card, we ought to at least make sure that somebody is paying for it, and not the States.

Now, I agree that there are benefits to be gained by encouraging the States to make improvements in the identification that they issue. Everybody wants that. I do not believe that somebody at the border ought to be able to check several thousand different kinds of identification. But I share the view that far greater cooperation

would have been gained by partnering with the States, rather than imposing a costly unfunded Federal mandate. Bullying the States is not the answer, nor threatening their citizens' rights to travel. And from Maine to Montana, States have said no.

A Republican Congress rejected efforts toward comprehensive immigration reform and adopted the Secure Fence Act. My recollection is that their bill entrusted you with the power to "take all actions" you determine necessary and appropriate to achieve and maintain operational control over our borders. The Department's virtual fence pilot program, which was apparently designed without adequate consultation with the Border Patrol, simply does not work. The administration can spend hundreds of millions of dollars on things that sound great on paper, but if they do not work, we gain nothing.

In fact, your Department has begun condemning the property of private citizens in Texas and Arizona who would prefer that you not construct a border wall on their property. And just yesterday, you announced that the Department has waived all environmental laws in areas across 470 miles of border lands.

I wonder if you will speak out for sensible enforcement policies or defend the billions of dollars in taxpayers' money being wasted in what seems to be a mean-spirited, costly effort, especially the landowners, some who say it is Big Government coming in and saying, "You are going to do it our way, and you have got nothing to say about it." The border fence and the related actions scar not only our landscape but our legacy as a Nation of immigrants.

Another example, of course, has resulted in the backlogs at the Citizenship and Immigration Services branch. You have told Congress that higher fees would bring faster and better services, and you now preside over citizenship application backlogs that could and should have been anticipated. These are applications from legal permanent residents and people who have followed the rules, but because there was incompetent Government planning, they cannot get through.

I appreciate the recent efforts of Director Gonzalez and his hard-working staff, but I will be looking forward to see—you are the one in charge—if you are going to deal aggressively with this issue. What commitment to the Senate and the American people can you make? Can you assure those who applied for U.S. citizenship before March 31, 2008, that they are actually going to be able to get that citizenship in time to vote in this next election? Or is it going to be, as many have suggested, that there is an effort made to make sure they do not vote in the next election?

Now, we want security. But we want a Federal Government that works and which respects the principles of federalism and the basic human rights and civil liberties that we all hold dear.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator Specter?

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Secretary, I begin by thanking you for your service and taking on this Department, one of the toughest in the Federal Government. You have a very distinguished record as U.S. Attorney, Assistant Attorney General, Third Circuit Court of Appeals, stepping over into this position, with a lot of problems, inevitable criticism, and I think you are doing a really outstanding job.

I want to focus on a problem which I think is enormously serious, which has been significantly ignored under the radar, and that is the issue of illegal aliens who have been convicted of crimes who remain on the streets of America committing more crimes because we cannot deport them because their country of origin will not take them back.

The statistics are alarming. Estimated by your Department, between 300,000 and 450,000 removable criminal aliens are in Federal, State, or local custody. They are an enormous cost, but more importantly, they are a gigantic public safety problem, because after they have served their sentences and been ordered removed, the immigration officials can only detain them for 180 days unless there is a significant prospect of deportation. But if none, they are released onto the streets of America.

In the past several months, I have visited a number of prisons in Pennsylvania: the State Institution at Camp Hill, outside Harrisburg; Pittsburgh's Allegheny County; Luzerne County in the northeastern part of the State; Chester and suburban Philadelphia. And it has been a real eye opener on the issue of public safety and on the issue of cost.

In Chester County, illustratively, it costs county officials $1,700,000 a year, and they are only compensated by the Federal Government, a couple of hundred thousand dollars. But the cost factor pales into insignificance on those who have been released back to the streets with the statistics showing they are recidivists, six, seven, eight repeat crimes on the average.

There are a couple of things that can be done. You have the discretionary authority now to institute procedures so that the State Department will not grant visas to countries which do not accept back their criminals. I have introduced legislation which would make that mandatory.

With all respect, I do not think there has been diligence by your Department in pursuing that option, but my legislation would make it mandatory. If another country wants to have visas and let their citizens come to the United States, let them take back their convicts. If they do not, we ought to deny them visas. The statistics show that there are an enormous number of individuals who are being kept here because their home countries will not take them back.

I have also covered in my legislative initiative a proposal to restrict or cutoff foreign aid to countries. Egypt, for example, will not take back an inmate who has to be force-fed in Camp Hill, Pennsylvania, at a cost estimated by prison officials at $250,000 last year. And I have written to President Mubarak of Egypt about that and would ask consent for a copy of that to be included in the record.

Chairman LEAHY. Without objection.

Senator SPECTER. Mr. Secretary, we have found that a Department of Justice survey last year showed that 40 percent of prisons

surveyed did not even ask inmates about their immigration status. Now, the issue of sanctuary, some sanctuary cities, has significance when you are talking about not asking a witness to a crime what their immigration status is because you do not want to discourage witnesses from coming forward to report crimes. So there is a justification, at least arguably, for that distinction. But there is no reason why there should not be a mandate for inmates in jail to be asked about their immigration status so that deportation can be initiated.

In my visit to the Philadelphia correctional institution, I talked to a group of inmates, 66 in number, all outfitted in their green jackets. I started to explore with them their willingness on minor offenses to waive the complexities of return under the immigration laws, and a number of them said they would be willing to do so. The Federal laws authorize voluntary return to be considered in plea bargains, and I would ask you to take a look at what has been done at the Federal level.

And your officials were with me, very cooperative, very helpful, but they had not explored that in the county prisons. But if someone is charged with a minor offense, it has to be up to the DA to make the decision not to prosecute in the court. But if they will return voluntarily, let's get them out of the jails where they are very, very expensive.

With respect to those who are released, I discussed with you informally a few moments ago the possibility of detaining them even after their sentences are concluded where there is evidence of their being violent criminals. It could be analogized to the Sexual Predators Act. But we ought to be exploring ways, even after sentences are concluded, where there is a real risk in returning them to the streets to figure out what might be done. And I would ask you now for the record what we discussed informally to have you seek an opinion from the Department of Justice as to what might be done.

My red light is about to go on, and I want to raise one other subject with you, and that is the status of having workers in the United States to help on vital agricultural matters and other lines of work. There is a major story in the New York Times today about tomato growers in northeastern Pennsylvania who have given up on their crops, and I have heard that in other parts of my State and heard about it in other parts of the country.

So that I do think the guest worker program and the availability of labor where we can regulate people coming in and going back is something that requires some immediate attention, as we need some immediate attention on the visa issues with the need for many skilled people—professionals, doctors, PhDs—who are willing to come to this country to perform vital services, and the visa quotas ought to be substantially expanded. There have been letters signed by many Members of the Senate on that subject.

Finally, Mr. Chairman, I ask consent that my letters to Mr. Chertoff of February 15th and February 28th be included in the record with my request for a response as promptly as the Secretary can manage it.

Chairman LEAHY. Thank you. Without objection, they will be.

Mr. Secretary, please stand and raise your right hand. Do you solemnly swear that the testimony you will give in this matter will

be the truth, the whole truth, and nothing but the truth, so help you God?

Secretary CHERTOFF. I do.

Chairman LEAHY. Please go ahead, sir.

STATEMENT OF MICHAEL CHERTOFF, SECRETARY, DEPARTMENT OF HOMELAND SECURITY, WASHINGTON, D.C.

Secretary CHERTOFF. Thank you, Mr. Chairman, and thank you, Senator Specter, members of the Committee. It is good to see you. I look forward to dealing with the issues you have raised—not all in my opening statement. I have got a fuller statement which I request be accepted as part of the record of the hearing.

[The prepared statement of Secretary Chertoff appears as a submission for the record.]

Secretary CHERTOFF. I was reminded, as I walked into the building this morning, that a year ago I was spending quite a bit of time up here, including quite a bit of time with members of this Committee, as we tried to wrestle with issues of immigration. And although I think we made some progress, we were not able to take the ball over the goal line, although I am confident that in the fullness of time, it actually will get over the goal line.

But we do need to make a deposit for the American people on the issue of credibility on enforcement, and I hope that as we do that, we can continue to look at the broader picture with respect to immigration reform so that we can reconcile our desire for security, the economic needs that Senator Specter alluded to in discussing some of the problem that our agricultural workers are having, and also to have a system that is humane but that respects the rule of law, which I think the American people care deeply about.

We are continuing to move forward using the existing laws with respect to security, and we have also put into place some measures which I am hoping will at least make the existing temporary worker programs a little bit more user friendly, and I am happy to get into those.

To give just a brief oral summary of where we are, let me begin with the border itself. We currently have approximately 310 miles of border fencing constructed. That is about 170 miles of pedestrian fencing and 140 miles of vehicle fencing. We are on track to reach our goal of 670 miles combined by the end of this calendar year. That would be 370 miles of pedestrian fence and 300 miles of vehicle fence, depending upon what is appropriate at a particular location on the border.

In fiscal year 2005, we had 11,264 Border Patrol. Currently, we have 15,852 Border Patrol. That is an increase of 4,500, you know, in less than 3 years, which I think is a very dramatic increase and one which I am happy to say has not been at the cost of quality. We had a group of former Border Patrol agents come in and look at our training program, and they have indicated it is as good as or better than it has ever been in the past. So we are on track to hit our goal at the end of this year of over 18,000 Border Patrol.

With respect to technology—and, again, I am happy to get into this with more detail—we have actually made enormous progress with technology. The P–28 prototype, which we deployed in 28

miles of Tucson Sector, contrary to some of the news articles, did actually work and does work. It is currently operational. It has led to the apprehension of over 2,500 illegal aliens. We need to take it to what I call 2.0 to make it more optimal, but it works, and it was made to work within the original budget. In fact, it wound up costing us a little bit less money than we budgeted for it because we got a credit on a couple of items that we ultimately decided were not performing and we did not need.

But in addition to that, I want to emphasize what else we are doing with technology. We have four unmanned aerial vehicles. We will have by the end of this year 40—that is, 4–0—mobile radar systems called "mobile surveillance systems" deployed all across the border. We have 7,500 ground sensors, and we will have another 2,500 this fiscal year, including 1,500 for the Northern border, so that the virtual fencing element of this is, in fact, progressing and it is, in fact, producing real value.

At the ports of entry, as you said, Mr. Chairman, we have the Western Hemisphere Travel Initiative now due to come into effect in June of 2009. We have in the meantime narrowed the number of documents that will be accepted at the border from 8,000 to about 20 in order to eliminate the problem of people coming in literally with documents that are not worth the paper they are printed on.

We have also eliminated oral declarations at the border, and one example of how this works occurred 2 weeks ago in Buffalo when an individual presented a Colorado driver's license, tried to make an oral claim of U.S. citizenship, was put into secondary because he did not have proof of citizenship; and ultimately, after we did a fingerprint search, we discovered he was not an American citizen. He had previously been removed from the country, and he had been denied entry in Mexico. This is exactly what we wanted to do, to catch this kind of individual, and literally every week, maybe as much as every day, we are catching people using this type of procedure at the ports of entry.

Now, the good news on the Western Hemisphere Travel Initiative is the following: Currently, we have deployed at every port of entry a machine that will read the documents that will be required in June 2009. Those are currently deployed. We have the ability right now to read passports at the border using the machine-readable zone at all of our land ports of entry, as well as, of course, at our airports and seaports.

There will also be an alternative reading device which will be able to read the RFID chip, which will actually speed up the flow across the border and answer one of the persistent complaints we get about long lines. We have awarded the contract for the readers. We will begin deploying the readers this summer. By next spring we will have readers for the RFID fully deployed and operational at the top 39 ports in the country, covering approximately 95 percent of the traffic. So we will be well underway to have this fully implemented in advance of June 2009.

In addition, besides the passports themselves, besides the Pass Card, which the State Department is going to be issuing this spring, we have negotiated with a number of States to improve enhanced drivers' licenses that will also meet the requirements of the

Western Hemisphere Travel Initiative. The State of Washington is already issuing the licenses; 6,500 have been issued, and about 18,000 people queued up in order to be interviewed to get the licenses. New York is working on its business plan to do it. Vermont is working on its business plan to do it. Michigan has just approved legislation to do it. And Arizona is working on it. And although we are not making States do this, it is certainly a convenience and an expense saver for the citizens, and we are encouraging more States to do this.

On interior enforcement, we have see dramatic increases across the board in our capability and our results. Deportations, we went up from 2004 where there were 173,000 to last year where there were 283,000. Fugitive arrests went up from 6,500 in 2004 to 30,000 last year. Work-site criminal arrests went up dramatically. Work-site administrative arrests went up dramatically, and removal of criminal aliens also doubled—more than doubled between 2004 and 2007. So we are making progress in these areas as well.

E-Verify, our system for employers to verify that their workers are, in fact, using legitimate Social Security numbers that match the names. We have been getting 1,000 employers joining every week. We now have over 58,000 employers participating in the program. Ninety-three percent of employees who submit to the process are instantly verified and approved. Seven percent are not. But when you look at what happens with the 7 percent, the vast majority of those never contest the fact that they do not have a legitimate number. They simply leave. We have 1 percent contesting, and those, of course, get resolved and people can be hired. This program works. It does, however, need to be reauthorized at the end of this year, and we are going to be asking Congress to do that.

Our temporary worker program, we are looking forward to a streamlined H–2A program. I am well aware of the fact that our H–2B program needs to be—the cap needs to be extended, and we are working with Congress in order to do that.

Finally, I know I will get into many of these issues in questions, but let me address two things that you raised, Mr. Chairman.

First, with respect to Mr. Ahmad, the translator, I waived the objection to his getting a green card yesterday, so that—we are out of "Alice in Wonderland," and he is now on track to getting a green card.

And, finally, we have stepped up the tempo of our naturalization of people who apply for green cards. Our target this year will be over a million. This will be the largest number of people that have been naturalized, as far as I know, in history—certainly more than in the past 2 years—and we are doing it without compromising the vetting process to make sure that we do not have a repeat of the debacle in 1996 with the Citizenship USA program.

So, with that, Mr. Chairman, I am delighted to answer questions.

[The prepared statement of Secretary Chertoff appears as a submission for the record.]

Chairman LEAHY. Well, thank you, and thank you for what you said about Mr. Ahmad. You know, it is interesting this happened the day before the hearing and after a major review in the Washington Post. The man lost his entire family in the chemical gas attacks unleashed by Saddam Hussein in Kurdistan in 1988, 20

years ago, and instructing U.S. Marines in Arabic language and culture at Quantico, General Petraeus, as I said, commended him. Why did it take so long? I mean, is each one of these cases going to require a major story in the Washington Post or other major newspaper and a congressional hearing before they get resolved?

Secretary CHERTOFF. Mr. Chairman, as you know, until last year, when I think as part of the omnibus bill, when we were given the flexibility with respect to—broader flexibility with respect to these organizations to waive the material support provision, until then we were bound by law with respect to these cases.

After the new legislation was enacted, instruction and guidance went out, and we are now freezing action on all the people who might be eligible for a waiver who are similarly situated so that we can review and make the individualized determinations.

Chairman LEAHY. Is it coincidence that his was granted yesterday, the day before this hearing? Is that just coincidence?

Secretary CHERTOFF. I think what happened—no. It is not the hearing that did it. When I saw the piece in the paper, I raised the question about why this was not included in the hold order that had gone out, and apparently, the hold order went out after the rejection of this particular individual had occurred. So I asked that we go back retroactively and make sure we were not losing people because of an artifact of time.

Chairman LEAHY. OK. So we had the newspaper article, went back and did it. I would think that would ring some bells in your Department that maybe if reporters can find out where something has not been done right and find out that easily, why can't we?

Secretary CHERTOFF. And they have done that. They have gone back now, and we have frozen the people who are eligible, and we will make the appropriate individualized determination.

Chairman LEAHY. Now, the other thing I mentioned earlier, the backlog of the citizenship applications at USCIS, it has been widely reported, it is well known. When you asked for a fee increase, which we granted, the reason for giving that, for the Congress to allow for that increase in fee or tax or whatever you want to call it, you promised an average processing time of 5 months. Now we are told it is going to be 14 to 15 months. And we gave you extra money to get a 5-month return.

Now we get 14 to 15 months. And thousands, and maybe tens of thousands—some say hundreds of thousands—who applied in time so that they might be able to vote and participate as citizens—you can see where this is going. A lot of people are wondering whether—they have followed the rules. They have done everything that they have been told in this great country they want to be in so they can vote and everything else. But even though we are going to charge more and all that, sorry, we cannot get around to this until after this Presidential election, the first one in years—decades, really—where you have no incumbent running.

Can you say that those who followed the rules, that have a naturalization application that was filed by March 31st, just 2 days ago, those applicants will be processed and qualified to vote, qualified to be naturalized as citizens in time to register to vote before the November elections?

Secretary CHERTOFF. Let me tell you what I can say. First of all, just to give you an idea of—

Chairman LEAHY. Is that answer a no, you cannot—

Secretary CHERTOFF. I do not think I can tell you there is a particular date, partly because I cannot tell you whether any particular individual will have a problem in the background check. They may not qualify, or there may be a—

Chairman LEAHY. Assuming you have a qualified person.

Secretary CHERTOFF. I can tell you that we have reduced the wait time. I can tell you we will—a record number of people will qualify. It will be over million, is our current estimation, which is far more than in any prior year. But what I cannot—

Chairman LEAHY. You are also charging far more than you ever did in any previous year in history.

Secretary CHERTOFF. And the money is going to hire additional adjudicators and people to do the work that has to be done.

Chairman LEAHY. Well, how many of the individuals who did apply before March 31st will not be naturalized by September 30th?

Secretary CHERTOFF. I cannot—I don't—the statistics I have don't fit within that categorization. I have them a completely different way.

Chairman LEAHY. Would it be thousands? Tens of thousands?

Secretary CHERTOFF. I cannot—I don't want to guess. Let me tell you—

Chairman LEAHY. Can you get us the answer?

Secretary CHERTOFF. Pardon?

Chairman LEAHY. Can you get us the answer?

Secretary CHERTOFF. It may be difficult to give you anything other than a rough estimate, but I can give you some information which I do have with me.

Chairman LEAHY. Even a rough estimate, can you give us that?

Secretary CHERTOFF. I can tell you that we will have—we are targeted, we expect to have over a million naturalized by the end of this fiscal year. That will be about 30 percent more than we did the prior year and 30 percent more than we did the year before that. So it will be a record number that are naturalized.

Chairman LEAHY. Well, with the record high price that they are paying and the record high price which was put in at your request so they could get them through, it still appears—and feel free to go back and tell me if I am wrong on this—that tens of thousands, maybe even more, are going to be precluded from a chance to vote in the Presidential election.

Secretary CHERTOFF. There may be a significant number that do not—that have applied as of this date that do not make it through. I mean, we are talking about 6 months. I do not think under the best of circumstances we ever guaranteed that we could process people in 6 months, even before the surge. And, of course, the surge in applications, the doubling in applications, created a lot more stress on—

Chairman LEAHY. Try to give us some numbers, because I don't mean to be cynical, but I am concerned that some of them are not going to be able to vote because—well, they will get through some very quickly after the Presidential election, not before.

Let me ask you, you—

Secretary CHERTOFF. I just—I would not like to let that linger in the air. We are going to be able to naturalize in record numbers, which I think is a powerful demonstration of good faith. At the same time, I do have to also recognize that 10 years ago there was a blistering IG report relating to the 1996 naturalizations which were riddled with fraud and misconduct. We are not going to repeat that either. So we are going to be secure and we are going to—

Chairman LEAHY. My time is nearly up, but I want to ask you, on REAL ID, the unfunded mandate put on the States, why not repeal that and return to negotiated rulemaking with the States? I hear on the one hand the great speeches from Members of Congress of both parties that we just do not like these unfunded mandates on the States, but here is a huge, huge one; some say it can go into the billions of dollars. We still have the question of whether your computers that you have talked about that are going to be in place can even talk to the State's computers, which will also be there, which has been a huge financial problem trying to work out. Why not just negotiate this for the States instead of saying, here, Big Daddy in Washington knows a lot better than you and here is what it is going to be?

Secretary CHERTOFF. Well, first, Mr. Chairman, as I know you know, this was not my decision. This was a congressional decision.

Chairman LEAHY. No, but that is why I am saying, why not just have the Congress repeal it and go to a negotiated—would you like that better?

Secretary CHERTOFF. I would say that we have actually, in effect, done the negotiation. We have spent an enormous amount of time negotiating with the States. As a consequence of that, we have reduced the cost by three-quarters. It is now—

Chairman LEAHY. The States still have to pay it.

Secretary CHERTOFF. That is right. The States still have to pay it—

Chairman LEAHY. It is still an unfunded mandate.

Secretary CHERTOFF.—although we do have some grant money available.

Now, we are estimating it is about $8 a license. I am quite sure that I could predict with confidence that the States will come back to the Federal Government and maybe ask for more money, and that will be an issue to be dealt with in the appropriations process.

Chairman LEAHY. Yes, but there is nothing in the President's budget for it.

Secretary CHERTOFF. There is some money in the President's—

Chairman LEAHY. $80 million, which would not even begin to touch this. We are talking about billions of dollars.

Secretary CHERTOFF. There is some money in the President's budget for this. Also, given the fact that it is about $8 a license, it is obviously also a subject to be recaptured through fees. Certainly that reflects only a fraction of what I pay when I renew my license.

So I understand there is always a financial issue here, and I respect the fact that there is disagreement about it. But I do want to say we have done a lot of negotiation with the States to address

their concerns, and I think we are so far along the road to getting this done that I think we are better served, you know, continuing to address the outstanding issues, but moving forward with speed.

Chairman LEAHY. We will come back to that. I would mention one other thing, if I might, Senator Specter. Let me just ask this: I believe—and we have had some question in this Committee to have a special law passed declaring that Senator McCain, who was born in the Panama Canal Zone, that he meets the constitutional requirement to be President. I fully believe he does. I have never had any question in my mind that he meets our constitutional requirement. You are a former Federal judge. You are the head of the agency that executes Federal immigration law. Do you have any doubt in your mind—I mean, I have none in mine. Do you have any doubt in your mind that he is constitutionally eligible to become President?

Secretary CHERTOFF. My assumption and my understanding is that if you are born of American parents, you are naturally a natural-born American citizen.

Chairman LEAHY. That is mine, too. Thank you.

Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Secretary, do you know to what extent existing law is being implemented which authorizes on notice by you to the Secretary of State that visas will be denied to citizens of nations which refuse to accept repatriation of these convicted illegal aliens?

Secretary CHERTOFF. I know we have used it on a couple of occasions, and it—

Senator SPECTER. A couple of occasions? Would you take a look at that procedure and see if it can be implemented to put some muscle into the requirement that these nations take back their—

Secretary CHERTOFF. Yes.

Senator SPECTER. How about the legislation which I have introduced which would make it mandatory? Would you object to that?

Secretary CHERTOFF. I think that, you know, there are probably foreign policy issues that suggest that a mandatory rule might be a little bit—

Senator SPECTER. Well, let's examine those foreign policy issues. Why? Why shouldn't—when we have somebody who has been convicted of a crime, many crimes of violence, and they are on the streets of the United States, the most Immigration can hold them is 180 days, and they are back on the streets, they have a very high recidivism rate, an average of six to eight repeat crimes, what foreign policy considerations override the public safety?

Secretary CHERTOFF. I mean, I agree with you. I think that countries ought to take their people back. And I should say most countries do, so it is not a widespread problem. There are some that do not.

I always say that an automatic rule that says if you do not take somebody back you lose your visas might be regarded by the President as a—

Senator SPECTER. OK, we will withhold on an automatic rule and give you a chance to use it on a discretionary basis.

Secretary CHERTOFF. But I do think—and we have used—

Senator SPECTER. Would you report back to this Committee in 3 months and tell us how well you are using the existing authority you have to, in effect, compel countries to take back these convicts on pain of not having visas issued?

Secretary CHERTOFF. Yes.

Senator SPECTER. How about the point of denying foreign aid to countries which do not take back their convicts? I know there, again, you have foreign policy considerations, and these are delicate matters. But how do we get some teeth in the approach that these countries ought to take back these criminals?

Secretary CHERTOFF. I think that actually the visa has proven in the past to be pretty effective leverage. I can think of a couple of instances where it did break a logjam. I do need to make one point clear, though. There are some times—there are two problems that arise when we try to send people back. One is if the country does not want to take them back, but the second problem that arises is sometimes the individual will claim that if we send them back, they are going to be tortured, and then we have a treaty problem. And some of the worst instances of people that we have essentially been stuck with are people that we cannot send back because our own courts say if you send them back, they may be tortured and, therefore—

Senator SPECTER. Mr. Secretary, I accept that as a limitation if there is an inquiry made and real factual justification. There are, however, some in that category who ought to be sent back at least under an exception which is possible to the international covenant. Legislation implementing Article 3 of the U.N. Convention Against Torture says that there can be an exception to that if a regulation is adopted that the aliens are security risks, such as terrorists or those who have been convicted of a particularly serious crime. They are not entitled to that protection. But that cannot be done under international law unless a regulation is adopted by your Department. Canada has such a regulation. Canada has a good record on human rights. But your Department has not adopted that regulation.

Would you take a look at that—

Secretary CHERTOFF. Absolutely.

Senator SPECTER.—and report back within 3 months whether you have adopted it? Because at least that exception, I think, ought to be utilized.

Secretary CHERTOFF. I agree with that. Yes, we will definitely look at that.

Senator SPECTER. Moving now to the question of detention of these dangerous people, going back to the proposition that once somebody has served their sentence and been ordered removed, Immigration can detain them for only 180 days unless there is a significant prospect of repatriation in the reasonably forseesable future, and if not, they have to be released, what could be done to detain these individuals by analogy to the predatory sexual offender? You and I have discussed and I mentioned in my opening statement that you will seek an opinion from the Department of Justice as to what we could legislate on there. But what is your thinking? First of all, do you believe that we ought to be searching

for some way to detain these violent criminals longer as opposed to putting them back on the streets as a matter of public safety?

Secretary CHERTOFF. I fully agree with that. It has been very frustrating when we have occasions where someone serves their sentence, we want to ship them out, that we cannot ship them out because either they have a legal basis to block it under the Convention or the country will not take them back, and then we cannot hold them. So I think at a minimum we should be abe to hold them, and I do believe actually this is something where a legislative cure is appropriate.

Senator SPECTER. Let me move to a final point—I have about a minute left—and that is on the issue of voluntary departure. I was struck when I visited the Philadelphia jails and talked to quite a number of men who were there that they would be glad to go back voluntarily if the charges were dropped. And this is a matter that has to be evaluated by the prosecuting attorney who has the discretion in the local courts. But if there is a minor offense—your officials were not pursuing that line. So would you undertake to look at that situation with a view to—first of all, do you think your immigration officials ought to be encouraged to identify people who are held in custody on minor charges to explore the possibility of voluntarily leaving the country, going back to their native country without all the delays which they can interpose?

Secretary CHERTOFF. Well, let me say something. Not only do I agree, but we actually have done this with a number of States. We have at least with New York an arrangement where for non-violent criminals, they can actually get a reduction in their sentence if they will go back voluntarily. And the flip side of that is then they are under a restriction that if we should catch them sneaking back in, not only do they get punished for violating the law by coming back in, but they then have to go back and serve the balance of their original sentence.

Senator SPECTER. Well, aside from a reduction in sentence, I would like you to explore the issue that people are not sentenced. They are in detention—the detention sometimes lasts several years. Chester County paid out $1,700,000 for their board and keep, was only compensated a couple hundred thousand, and that is taxpayers' money at the Federal level.

Would you explore the issue beyond what you have said on those who have been convicted for lesser time, which I think is a good idea, to see if we can get these people out of our jails where they are minor offenders and send them back to the host country?

Secretary CHERTOFF. I would be happy to, but I would also want to make sure that under that circumstance it is clear that if they come back in again illegally, they get a double whammy. They not only get punished for that, but they have to wind up serving their original—

Senator SPECTER. Glad to see the double rap if they violate the law again.

Thank you very much, Mr. Secretary.

Chairman LEAHY. Thank you, Senator Specter.

Senator Kennedy?

Senator KENNEDY. Thank you. Thank you and welcome. There are three areas I would like to cover, and I appreciate your cooperation in letting me try to get through them.

One is an area that the Chairman has mentioned about the naturalization of individuals who want to become American citizens, the naturalization process. You are familiar with the timeline. In January 2007, the fees were increased. Historically, whenever the fees have been increased, the numbers have spiked before the fee increase. Against this background, we find that not only historically numbers have spiked, but we had a lot of NGOs conducting citizenship campaigns to increase the number of naturalization applicants, which did take place, and we had a fierce debate on the immigration bill in Congress, which caused a lot of concerns, and we should have anticipated that there was going to be a backlog problem.

At that particular time, DHS was processing applications within 7 months. Within 7 months. Now after the announcement of the increased fees, processing time has been extended to 14 to 16 months. The administration had indicated you would reduce processing time by 20 percent--20 percent of 7 months—but we have seen instead the increase in processing time to 14 to 16 months.

At the present time, according to the figures that have been provided by CIS to the members of this Committee and our conversations, you would have been able to naturalize applicants up to the period of May of this year, May of 2008, and now the backlog is going to go back to July 2007. That is what CIS has told us. That amounts to 580,000--580,000—individuals who applied in time who will not get the right to vote. Five hundred eighty thousand. Members of this Committee, have offered to provide additional resources, additional personnel, and we are stuck with this reality.

What can you tell individuals who have played by the rules, have done the things that they have had to do that they do not have the right to vote, the most sacred right that we have in our country and our society, and have had background checks. Mr. Mueller and others have pointed out, in the background review of the naturalization applicant there is about 1 percent that have problems.

When you have this enormous number of individuals who want to be a part of the American dream, who have paid their taxes, have met various requirements but are outside of the system, what answer can we possibly tell them for the reasons? And what, if anything, can you do about it?

Secretary CHERTOFF. Let me say first of all that it is true that historically there has been an increase in applications in anticipation of a fee increase. However, in 1999, there was about a 30-percent increase. This year, there was over a 100-percent increase. So I think the dimensions are unprecedented.

As soon as we got the money—and, of course, we needed the money to hire the adjudicators—we went out and trained and hired adjudicators, and we are deploying those. We have also worked with the FBI to reduce some of the delays in the background check process.

The consequence of this is that we have reduced the lag time that we originally projected, which was 16 to 18 months. We are now projecting 13 to 15 months. And we are now projecting that

we will have processed within this fiscal year in time to vote over a million people. That is by comparison to about three-quarters of a million in 2007 and about 800,000 in 2006.

So we are making more people citizens more rapidly than ever before, but I have to say mindful not to sacrifice the quality assurance.

Obviously, we have more money in the system now. The limiting factor is we need—we still need, A, to train people to adjudicate and, B, the FBI has to be able to process the background checks. And that is—

Senator KENNEDY. And I appreciate your response. It is still for people who have played by the rules and tried to get in line.

Two other quick questions, because my time is running out. Today, your Department will issue two waivers—one that nullifies 26 Federal laws, another that nullifies nearly 35 Federal laws. These new waivers will create sweeping zones of lawlessness along the entire U.S.-Mexico border. The New York Times is reporting that you refused to explain the decision to the House Energy and Commerce Committee.

Is it your position that your waiver preempts large unnamed swaths of State land in Texas, Arizona, New Mexico, and California? Your new waiver also applies to the Religious Freedom Restoration Act, a law protecting churches from unlawful seizures. Do you intend to construct the walls on church property without consulting religious—

Secretary CHERTOFF. No. No, this is a tribute to the fact that we have laws and creative lawyers that permit people to come up with all kinds of arguments about why we should—

Senator KENNEDY. I happen to be the author of the Religious Freedom Restoration Act.

Secretary CHERTOFF. I do not think it applies really to the border. I do not think it actually prevents us from building a fence, but I am quite sure that some lawyer would make an argument that it prevents it. We would then be in court for a couple of years fighting about it, and that would delay the process.

The bottom line is we have done an enormous amount of consultation, and we will continue to do, with respect to the environmental rules. However, we are currently in a lawless situation at the border because we have not just human smuggling but drug smuggling and violence occurring there. I had to go visit with the family of a Border Patrol agent who was killed a couple months ago because a smuggler ran him over with a jeep. And that vehicle would not have been there if we had a vehicle barrier in place.

So I feel an urgency to get this tactical infrastructure in, and although we are going to be respectful of the environment, we are going to be expeditious.

Senator KENNEDY. I think all of us understand we need secure borders. The real question is whether the fence is effective. Half of all the undocumented are coming in and overstaying their visa. And the other side of this is that we are taking and preempting land in these areas, and that has to be, I think, done with great care.

A final point, and my time is running out. This is on the number of Iraqi refugees that we are letting in. The administration said

that it is admitting 12,000 this year. This is outside of the newer program. It is just with regard to the numbers that were agreed to by the administration.

On page 17 of your testimony, it says that the U.S. Government has put in place resources for up to 12,000. It says "up to 12,000." What is it, Mr. Secretary? Is it going to be 12,000 or some nebulous goal? At the present time, the administration has admitted fewer than 3,000.

I have listened to the testimony of the ICRC. This is one of the greatest humanitarian disasters of all time that is happening. We need them to admit move refugees, clearly. We had agreed to 12,000. We are at 3,000 at the present time. What can you tell us? Are we going to meet that number?

Secretary CHERTOFF. I think the answer to that is yes, Senator. I think we are at about 3,900 right now. Now, of course, we are only one part of the process. There is the U.N. has to make the referrals and the State Department has to do certain things as well.

I can assure you that in terms of our piece of the process, we are quite current with respect to interviews, and we have already done 8,600 interviews and conditionally approved 8,600 total. Now, there are some other agencies that are part of the process before everything gets finalized, but we are not going to be an obstacle for hitting 12,000. We are on track to do our part to hit the 12,000.

Senator KENNEDY. My time is up, Mr. Chairman. Thank you.

Chairman LEAHY. Thank you very much.

Senator Grassley?

Senator GRASSLEY. Yes. Mr. Chairman, first, I have two unanimous consents: one, to put an opening statement in the record, and number two, to have some documents connected with my questions inserted in the record.

Chairman LEAHY. Without objection, so ordered.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Senator GRASSLEY. The first thing I want to comment on is where Senator Specter left off. I'm only making this as a statement, not something for you to respond to. But along the lines of what Senator Specter was saying about H–1Bs, it's my personal view, working with Republicans and Democrats on this issue, that the administration needs to think more about using its authority to deny visas.

For instance, we have 18,000 Indian nationals here that India won't take back. By the way, you don't have to worry, I think, about India torturing their citizens. At least, I don't think they have that reputation. But at the same time, we turn a blind eye and grant them 20,000 to 40,000 H–1B visas each year.

My first question continues with H–1B visas, but in a different vein. Some companies applying for H–1B visas actually are looking for people in positions like pizza-tossers, hotel managers, llama farm operators. Even the Republican Party of California hired a Canadian as "State Deputy Political Director" through the H–1B pilot programs.

Now, these don't seem to me like the high-tech jobs that we're hearing from industry that they need H–1B visas for. On March 10th, I sent a letter asking for you to show progress on the promise

made August 2007 to reform visas programs, particularly H–1B. I asked about efforts to institute administrative reforms to reign in fraud and abuse. Your staff responded to me, saying that the Department has "convened working groups to identify and work on reforms".

I realize that Congress needs to enact some changes, but I think that this is a very cavalier response to my letter that I have here, indicating that the issue of fraud and abusive in a vicious visa program is not being taken very seriously. In fact, I would have to say that your letter is a non-answer.

So, my question: what are you doing to ensure that the program is not being abused and that the U.S. is bringing in the best and the brightest and not just a Republican Party political director for the State of California? Obviously they need some new advice out there.

Secretary CHERTOFF. Let me at least give you two examples. One, is we have, I think, promulgated a regulation that prevents or discounts companies that were abusing the process by filing multiple applications for the same people. There were some companies that were flooding the process by having, you know, 10, 20, 30 applications, and because it was a lottery system, they were basically buying more lottery tickets. So we've cut that out.

The second thing we want to do, although it's still in the administrative regulatory process, is we want to deal with the problem of companies that attempt to essentially hoard the zone by so dominating the process or banking H–1Bs that other companies don't have an opportunity to compete. That is in the rulemaking process.

I can attest to you, it always takes a lot longer than I'd like it to take because the Administrative Procedures Act makes getting a regulation out of the executive branch like passing a kidney stone. It just takes an enormous amount of time. I'm kicking people to get this moving as quickly as possible, because I agree that the program has been abused. I promise you, I will continue to prod on these issues, because I agree with you, we should not let some companies try to exploit the process.

Senator GRASSLEY. OK. I would appreciate, on another point—this being the Optional Practical Training Program—more information. I'll get into some details in just a minute. But this program is administered by your Department. I'd like to make sure we know who is here on OPT and what they're doing.

Foreign students obviously are the ones that take advantage of this. There are no requirements, like wage requirements, no protections of our own U.S. students or workers, virtually no strings attached. These are people that could be sitting on the beach in California for a year, they could be playing some guitar on the streets of New York, who knows what.

I know you're responding to the squeals of powerful business interests regarding their inability to bring in an infinite number of foreign workers through the H–1B visa program. Their latest attempt to get around the H–1B program is to keep these foreign students here longer than 1 year. We don't keep track of them.

So, two questions. Does the Department of Homeland Security know how many people are in the United States on OPT status today? Second, does the Department know where each and every

person with OPT status is in the United States if they needed to track them down?

Secretary CHERTOFF. I think—I believe the answer to that, but I'm going to have to verify it, is yes to the first, and to the second, you know, if we grant someone Optional Practical Training, it's with the understanding that they're going to be working in a particular setting.

Now, could someone abscond or violate the rule? Yes, that happens all the time. I mean, people violate rules all the time. Then, of course, they would not only lose their OPT status, but they would lose the possibility of ultimately getting a green card or a long-term work visa, which, from their standpoint and from the company's standpoint, would be a pretty serious sanction. So, I'll get—I mean, I'll verify all this, but that's my understanding.

Senator GRASSLEY. Last fall, I sent you a letter asking for information about two University of South Florida students arrested near Goose Creek, South Carolina with explosives in their trunk. They're Egyptian nationals, and have been charged with terrorism-related offenses. I learned that one of them, Ahmed Mohammed, entered the United States on a student visa, despite having been previously arrested in Egypt. Worse than that, he had even declared his arrest on his visa application form.

I then inquired to find out why the State Department and why your Department failed to use their shared responsibilities over visa policies to keep an individual like this, and this specific individual, out of the country. It took 4 months to get a reply from your Department, and even then all I got was a letter that denied my request on the grounds that the indicted terrorist had not consented to the release of his records.

So, could you explain why this Committee should be denied information necessary to conduct oversight of the visa issuance process just because an indicted terrorist, who is neither a U.S. citizen nor a legal permanent resident, didn't give his consent? Doesn't that sound a little ridiculous?

Secretary CHERTOFF. Yes, it does. But unfortunately sometimes we operate under constraints that are—legal constraints that are a little bit puzzling. Let me tell you what my understanding of the rule is. First of all, obviously I can't publicly comment about the individual because there's a pending case. The case is going to go to trial. If I say anything about the individual in a public forum, I'm going to have a judge getting on my back about why I'm, you know, creating a problem for the jury.

In terms of responding in writing, my understanding is that if the Chairman makes a request for this kind of information we are permitted, under the relevant laws, to convey a lot of this information. And that's just the way the law is written. I didn't write it, but we have to abide by it. So if the Chairman makes the request, I think that does give us an ability to be a little more forthcoming about this.

Senator GRASSLEY. Mr. Chairman, I'm not sure I was aware of that law. I was treated rudely by the Department as a FOIA request, not as a Senator's request. So I might ask you to sign a letter for some information that I might want on some of these issues

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that I'm not getting an answer because I'm not Chairman of the Committee.

Chairman LEAHY. For several decades, the Senator from Iowa and I have worked together, when he's been in the Majority or when I've been in the Majority, to get things, and of course I'll work with him. If we can sit down later, we'll figure it out what it is you want and I'll join you on the request.

Senator Feinstein?

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Mr. Chertoff, I'd like to join with those who thank you for your service. It is very much appreciated.

As you know, I have a lot of concerns about the visa waiver program. I believe it's the soft underbelly of this country. And because so many millions come in from so many countries, it represents a real threat not only to profound over-stays, but also to the security of our Nation.

Not long ago, Senator Kyl, Senator Sessions, and I had a hearing and, on March 3rd, the three of us sent you a letter requesting that DHS explain how it plans to comply with two requirements of the 9/11 legislation, specifically that it develop a fully operational electronic travel authorization system, and second, that it certify that there's an air exit system in place that can verify the departure of 97 percent of the foreign nationals who leave through airports in the United States.

At the hearing on February 28th, we were informed by your staff that DHS may use a methodology that only tracks departures without considering whether an individual arrived in determining the departure of the 97 percent. In other words, if two people come into the country, or three, or four, or five, and only one leaves, the only track is on the one that leaves. This is what we were told.

We wrote to you, Senator Kyl, Senator Sessions, and I, that such a methodology is unacceptable. It does not account for a person who has arrived and departure, nor does it track those who have over-stayed their visas. Now, we haven't received a response. We believe that methodology violates the law. If you care to respond to this now, we'd be very happy.

Secretary CHERTOFF. I'd be happy to. I will write a letter, but I actually pulled the letter because I wasn't satisfied it was clear.

Senator FEINSTEIN. You thought it might come up?

Secretary CHERTOFF. No. I wasn't satisfied it was clear enough. I think there might have been, in the prior hearing, the Committee and the witness might have talked past each other. So, let me try to explain my understanding of the law, which I have looked at and I have in front of me.

First of all, we will have the electronic system of travel authorization up and running before the program—before the expansion of the program.

Senator FEINSTEIN. At every port of entry?

Secretary CHERTOFF. Yes. It's not a port of entry. For every—for traveler—before we admit a country into the program, they will have to—their visitors will have to submit the electric travel authorization. It's not done at the port of entry, it's done online before you leave. So by the time you arrive at the port of entry, we will have done the assessment of the travel authorization.

Senator FEINSTEIN. Let me stop you there. What are there, 23 million people that come in? It's 13 million people, or 16 million, I believe, came in. So does that refer to the existing countries in the visa waiver program or only the new countries?

Secretary CHERTOFF. We will begin with the new countries. Existing countries, we will then, as we expand the program over the next 9 months, we will bring all the old countries in. But the requirement of the law is, as a predicate to admitting the new country, we have to have this in place. This is something we argued for. We want it to happen. So we are going to begin in a few months with the first deployment of the system and we'll begin with some of the smaller countries first and start the process there, and then ultimately we will cover everybody. With respect to the 97 percent—

Senator FEINSTEIN. Incidentally, if I might. I don't mean to interrupt you, but I will.

Secretary CHERTOFF. Yes.

Senator FEINSTEIN. The countries you're admitting are all above the legal refusal rate. We know that.

Secretary CHERTOFF. So then we come to the next element, because there are a number of tests that have to be met. The current—the old rule was, the visa refusal rate was 3 percent. The statute raised the visa refusal rate to 10 percent. That allowed some countries that fell within the 3 percent to 10 percent range to become eligible, provided they did the other things in the statute.

One of the things the statute then provides, is that the Secretary of State and I, or my successor, can admit countries using an alternative to the visa refusal rate if we can demonstrate that the actual over-stay rate is below a certain number that we have to determine is consistent with national security. In order to make that determination, we have to compare the entry and the exit to make sure that we know how many people from each country are overstaying and how many are leaving, and that's what we need to do in order to get to that.

Senator FEINSTEIN. Well, but in other words, you're making up your own refusal rate.

Secretary CHERTOFF. No. I'm—

Senator FEINSTEIN. The law says 10 percent.

Secretary CHERTOFF. Right.

Senator FEINSTEIN. Let me just finish. Latvia, which you're going to admit, is at 11.8 percent; Slovakia, 12 percent; Lithuania, 12.9 percent; and Hungary, at 10.3 percent.

Secretary CHERTOFF. Those will only be admitted when they fall below 10 percent. I think if you—in other words, you may be using figures from last year. These are countries which are laying the groundwork to be admitted, but they will have to meet the 10 percent or below threshold. We're not waiving the 10 percent requirement, but they are, as your own figures indicate, coming very close to 10 percent. So—

Senator FEINSTEIN. What are the other countries that you are going to admit?

Secretary CHERTOFF. I think the ones we've signed up so far, and these are the ones we think are close to satisfying the require-

ments, are: the Czech Republic, Latvia, Estonia, Slovakia, and Hungary. I think there are other states that—that's in Eastern Europe. It may be that South Korea will be in a position relatively soon to meet the requirement.

Some of the other countries are further off and, although they may begin the process of negotiating on other elements, I think everybody understands, until they hit all the requirements, they will not actually be admitted. But some of them may want to get started on some of the information exchange and things of that sort, you know, while they're hoping to drive the visa refusal rate down, and that's OK. But we're not excusing them from the visa refusal rate requirement, we're just trying to get some of the preliminary work done so when the hit the mark they can then be admitted.

Senator FEINSTEIN. And what you're telling us is that every one of the visitors, which will be, literally, hundreds of thousands that come in in these programs will have the fraud-proof passport, they will be checked when they come in, and they will be checked when they go out?

Secretary CHERTOFF. Right.

Senator FEINSTEIN. And you will know where they are in this country when they come in?

Secretary CHERTOFF. Well, we will know that they've come in. They will put on their form where they're going to be, and then we will know when they leave. Now, as with any other visitor, if someone says they're going to be in Massachusetts and they lie to us and they go to Ohio, we're not going to know that until the time comes that they should have departed. At that point we'll know the over-stayed.

Now, will we be able to find them immediately? It depends. It depends if they're hiding or not. That's true of all kinds of fugitives. But we will have achieved, I think, what we did not have, which is visibility into the flow in and out such that we can determine whether a particular country has an over-stay rate that is unacceptable, which I think is ultimately where we all want to go.

Senator FEINSTEIN. OK. I think my time has run out. Thank you, Mr. Chairman. Thank you. May I enter these two letters into the record?

Chairman LEAHY. Of course.

Senator FEINSTEIN. One on visa waiver, and the second on border tunnels.

Chairman LEAHY. Without objection.

My list had Senator Sessions next, but he's not here. Senator Kyl?

Senator KYL. Thank you very much.

Chairman LEAHY. Oh. Senator Sessions is here. I'm sorry.

Senator SESSIONS. I'll defer to Senator Kyl. That's fine.

Chairman LEAHY. OK. I take my list from the Republican side, so—

Senator KYL. We are a courteous bunch, and I appreciate that very much from my colleague. I think Senator Sessions was here first.

But, Mr. Secretary, you have an impossible job to do. There's always room to find criticism. I hope that it's always constructive. I do appreciate your efforts, and those of your Department.

I just want to lead by saying that over the break I was down in Yuma. First of all, Mr. Chairman, it might be of interest that over half of all of the illegal immigrants coming into the United States across our border come through the Tucson sector, about 51 or 52 percent, so this is a huge problem in Arizona and the Tucson sector has a lot of work to do. The Yuma sector is the other part of the Arizona border and goes over into Senator Feinstein's State for about 10 or 12 miles.

What is illustrated by Congress' efforts, with the Department of Homeland Security, is that when we put our mind to it, we can significantly affect the problem of illegal crossing. Fences are being constructed, vehicle barriers, double fences, a lot more agents, radars deployed, and all of this has had a dramatic impact, along with one other program which I'm going to get to, and that is automatically detaining and not releasing to the border Mexican citizens.

The combination of these has, at least in the first 6 months of the fiscal year, reduced illegal immigration in this sector by an order of magnitude. Now, that's a big change. What it shows is that if we have the will and if we apply the resources, we can get the job done.

The one question I have, Mr. Secretary, is that, as you know, in the Yuma sector they have begun to do the same thing that's been done in Del Rio, Texas, and the Tucson sector is also beginning, the detention of aliens with the prospect, in most cases, of a 60-day detention in jail automatically. It's a zero-tolerance policy. This has had a dramatic deterrent effect. People just don't want to come through that area because they can't afford to be 60 days without work, and that's those that just come to work and not commit a crime.

The question I have, and I would appreciate a written answer, really, because we have a lot of information from the chief judge of the Arizona District Court for that area, about what they need to process this many people, is your estimates of the costs that the Congress can help defray for the entire tale of the judicial process from the additional court space, the judges, the magistrates, the marshals, the clerks, the prosecutors, the public defenders, and, perhaps most importantly, the detention space itself.

What would be needed to ensure that this kind of program could continue in Yuma and could be fully implemented in the Tucson sector, and anywhere else along the border that you think it should, and what do you think about the program?

Secretary CHERTOFF. First, let me say I think the program is a great program. To be clear for the public, this is more than just detention. We do detain everybody, as it is under immigration authorities, until we deport them. This is actual criminal punishment, which does have a remarkable deterrent effect and it's worked very well in the Del Rio sector.

As far as the money, I'm delighted to answer. I'm going to need to have the Department of Justice really put the facts together, because it's really their stuff rather than mine.

Senator KYL. Thank you. Thank you. I'll make that inquiry of them.

But Congress has, over the last 3 years, at least, been very willing to fund whatever works. It seems to me that this is one of those things that clearly works, and I do know that there is additional funding that will be required for this.

Is there sufficient money for the remainder of 2008 to achieve the fencing requirements that you identified in your opening statement, and does the budget for 2009 reflect an adequate sum to do the remainder of the work in 2009?

Secretary CHERTOFF. The answer to that is yes. The money that's appropriated in 2008, already appropriated, is sufficient to get us through what we need to do this fiscal year. The money we've requested for 2009 would get us to what we need in 2009, but of course that hasn't passed yet, so that depends on Congress.

Senator KYL. Thank you.

With regard to the exit-entry system—Senator Feinstein talked a little bit about this—on page 15 of your testimony you talked a little bit about this. First of all, can you describe the process when it becomes apparent that an individual has not exited, but should have by then? What actually happens in terms of notifying other law enforcement so that whoever might have an opportunity to inquire of the individual in terms of law enforcement authority, a highway patrolman in some State, or whoever it might be, would actually have the information enabling them to know to ask the appropriate questions?

Secretary CHERTOFF. I think the answer is that under the current system we have some, but not complete, information on this at our law enforcement center up in—I think it's up in Vermont, where if you apprehend someone you can call and get information. But we have not yet fully automated it. To do that, we need to move from the current biographic-based system which looks at names to a biometric-based system which is fingerprints. That is, of course, US-VISIT air exit.

Now, I would very much like to do this this year. We can get it done by next summer, but there's one obstacle: the airlines are bitterly opposed to it. I know they've been up here complaining about it, because they view the requirement of giving fingerprints, if you're a foreigner, when you leave the country, as interfering with their business model. This, Senator, goes right back to the point we made earlier about willpower. We can get it done. We're poised to issue a rule. But it will require the willpower to face down the airline industry in order to implement it.

Senator KYL. I appreciate that. Why doesn't the biographical information itself—if, for example, you have a name and then any other identifying feature, a Social Security number or a birthplace, whatever it is, if that information is sent to all of the local police, highway patrol, and elsewhere, wouldn't that be a significant improvement over the lack of any information today?

Secretary CHERTOFF. I think it's—I don't know if I'm that well versed in the technical element, but I think simply sending a list of that all over the place would, I think, be really inefficient. I'd like to see us move to a system where, when you get the overstays—right now it's a system where we know when you leave.

If we could get it all integrated in a data base, particularly with a fingerprint data base so there was a unique identifier, we could

then construct an automated system that—and I think we have it partly now, but not entirely—kicks out when you are, let's say, over 90 days or whatever it is, or a week over 90 days. That could then be in our data base in Vermont and anybody who wanted to ping it could ping it if they arrest somebody. It would be up to the local law enforcement.

So I think we have this partially in effect now, but I'm not confident that we have it seamlessly or fully in effect. Some of it is an automation problem, but some of it is that, in general, a names-based system is not as reliable as a fingerprint-based system.

Senator KYL. Well, understood. But, you know, Mohammed Attah, for example, was stopped, I believe it was twice. If he had used his name—and I gather he did—if law enforcement had had a place to call in, then a whole lot of things might not have happened that ended up happening. It just seems to me that perfection shouldn't be the enemy of the good here.

Secretary CHERTOFF. I agree. I agree. We're going to be working toward this, I agree with you. I just want to make sure that we do it in a way that's cost-effective so we don't waste money. That's the only other constraint.

Senator KYL. Well, let me just ask one final question here. If it's in the Vermont data base, what would be necessary for a local law enforcement, or say highway patrol, to gain access to that data base in a real-time way, like a traffic stop?

Secretary CHERTOFF. I think they call in. I don't know whether they go in online or whether they call in, but there is a way they can communicate in. And they use it. The system does yield benefits. The reason I'm a little hesitant, is I'm not sure it is a complete system. It may depend upon what we input as opposed to something that's fully automated.

Senator KYL. Would you, for the record, expand on that?

Secretary CHERTOFF. Yes, I will.

Senator KYL. Have your office give us a more complete answer on that.

Secretary CHERTOFF. I'll give you a more complete and maybe a more—I'm not fully confident in my answer, so I want to give you a verified answer.

Senator KYL. I appreciate that very much. Thank you.

And I thank my colleagues.

Chairman LEAHY. Thank you very much.

Senator Schumer?

Senator SCHUMER. Well, thank you. And, first, Mr. Chairman, I want to thank you for having these hearings, which are very important. I appreciate Secretary Chertoff being here.

First, I'd like to start off with some questions on border security. As a New Yorker, as an American, I have an unshakable commitment to securing our country from those who want to harm us. However, when it comes to border security, as you know, Mr. Secretary, I've sometimes differed with DHS on the best way to achieve the goal.

First, I want to thank the Department for their little-noticed, but important regulation that said that they were going to comply with the law that Senator Leahy and others put into effect to delay the passports until 2009. I just want to say that I appreciate, Secretary

Chertoff, your efforts to work with New York State to develop an enhanced driver's license that can be used instead of passports to cross land borders in Canada.

I think the licenses, the enhanced licenses, building on REAL ID, something I've always supported, is a very good alternative that gives us both security, but makes commerce easier. If they're done right, they can assure both. I want to tell you, I've spoken to Governor Patterson. I know we had had meetings that I had set up between you and Governor Spitzer, which myself Senator Clinton, Congressmen Reynolds and Slaughter attended, and now we have Governor Patterson. I know he fully supports the development of enhanced licenses.

I understand the process is going well, from your Department and from New York State's point of view. New York has submitted a business plan for your Department's approval. The goal is rolling out the new licenses State-wide by the late summer, and focusing on the border areas first—Buffalo, Watertown, Plattsburg, places that really have the need.

So to move forward, New York is going to need a timely response to their proposed plan. When can you commit to giving a response to New York's business plan for enhanced driver's licenses?

Secretary CHERTOFF. I can't give you a precise date. We will do it promptly because we've already—you know, not only did we approve the State of Washington, they've actually begun the process of issuing them.

Senator SCHUMER. Right.

Secretary CHERTOFF. They've issued 6,500.

Senator SCHUMER. Right.

Secretary CHERTOFF. So we'll do it as fast as we can.

Senator SCHUMER. Do you think within the next month we can get an answer? Our goal is to get this going before 2009.

Secretary CHERTOFF. I believe the answer to that is yes. I'm going to have to verify that.

Senator SCHUMER. OK. If you could verify, but I'll take it as a tentative yes, which I appreciate.

Secretary CHERTOFF. I certainly like you doing that.

Senator SCHUMER. Right.

Secretary CHERTOFF. There's no reason we shouldn't be able to.

Senator SCHUMER. Now, if you have concerns with New York's plan, will you commit to working cooperatively and productively with New York to resolve concerns rather than sending us back to square one?

Secretary CHERTOFF. Oh, absolutely. We want this. We think this is a good thing. This is—there's a unity of interest here.

Senator SCHUMER. OK. And will you commit to just doing whatever you can so that we can start issuing the licenses, as we hope, by the end of the summer?

Secretary CHERTOFF. Absolutely.

Senator SCHUMER. Right. OK.

And do you agree with me that enhanced driver licenses, if done right, will be just as secure for border crossings as passport books?

Secretary CHERTOFF. Absolutely.

Senator SCHUMER. Good.

Secretary CHERTOFF. For land borders.

Senator SCHUMER. This is a very good interchange. We don't have so many of those these days.

So wouldn't it make more sense right now for DHS to focus limited resources on driver licenses—it provides better security and efficiency—as opposed to a new rule that requires birth certificates at the border, which, in the past, you had even said was not the best way to go about doing this?

Secretary CHERTOFF. Here's the problem. The problem is that I believe that next June—not every State is going to want to do the license. I think by next June we can easily be in a position to meet the requirements of the Western Hemisphere Travel Initiative. The problem I have is that I've got to deal with the period of time between now and next June.

As I said in the opening statement, just a couple of weeks ago we found a guy coming through Buffalo trying to make an oral declaration, discovered that that wasn't going to work anymore, got pulled into the secondary, and we discovered he was masquerading as an American citizen. He'd been rejected coming into the country in Mexico. He had been previously removed. So I'm trying to plug a gap now in the interim between where we sit and June 2009, but I very much want to see us, in June 2009, with an enhanced driver's license. For any State that will do it, we'll be happy to do it.

Senator SCHUMER. Right. And New York does, Washington does.

Secretary CHERTOFF. Right.

Senator SCHUMER. I mean, the worry here is this summer when the traffic over the borders increases. You have all kinds of vacationers. We in New York State expect a lot of Canadians coming, given the values of the dollar, to help our tourist season. We're worried that if they think it's going to be very onerous—so far it hasn't.

Secretary CHERTOFF. Right.

Senator SCHUMER. And, you know, when they say they don't have a birth certificate, you just give them a warning.

Secretary CHERTOFF. Well, the Canadians are—I mean, we've had to get their attention, too. The Canadians are now putting money into their budget for increased distribution of Nexus cards, which I know you know is also acceptable.

Senator SCHUMER. That's fine. Yes.

Secretary CHERTOFF. So, you know, we're working through the process. But we do have to deal with an existing act.

Senator SCHUMER. I would just urge you to focus fully on driver's licenses. The birth certificates, in my judgment, are going to be a dead end.

Anyway, let me go to something else, which is citizenship backlogs, which I know the Chairman and Senator Kennedy have asked questions about. I just have a few more because, as you know, we received a letter from CIS which explained the status of naturalization applications pending with CIS.

The letter states, "Historically, there have been increased filings in advance of fee increases, Presidential elections, immigration debates, and new legislation." Now, given that DHS is aware of trends in application filings, how is DHS credible in saying it couldn't have anticipated a major surge in applications in 2007,

where we saw a fee increase, the start of a Presidential campaign, and a national immigration debate all at once?

Secretary CHERTOFF. I would say, if we go back historically, in 1999, which was the last major increase, there was a bump-up of about 30 percent. It was the magnitude. The bump-up here was over 100 percent. So, that was one. I think the magnitude startled everybody. But the larger problem is this. In order to deal with the mass of people, you need to hire adjudicators and people to deal with the work.

Senator SCHUMER. Yes.

Secretary CHERTOFF. Until you get the fee increase you can't hire them, because you can't hire people if you don't pay it. Then once we got the fee increase, we began to hire, but they still have to be trained. So, inevitably there is some lag that occurs when you—until you get the money in the pipeline—

Senator SCHUMER. Let me interrupt you here for a minute because my time is running out. I understand the training. I would like to see even a sort of program where, out of the general fund, people could be hired in anticipation of the fees coming in, because we can't wait.

But let's just talk about the training. Last year, as you know, I pushed CIS. I pushed to have CIS get authority to re-hire retired workers—they don't have to be trained, they've been doing this for years, and often decades, very well—to help address the backlog. That was in December. I regret to say it's now April and not one has been hired. We called in the former head of CIS, who had very poor—he's no longer there. He resigned the same day we talked to him, although he didn't tell us that he was resigning.

But he had very poor answers in terms of contacting people. There were 700 people that they'd identified. They sent them a letter. There was no followup. These people are invaluable, because some of them would want to get back to work. Now we've made it so that they don't get their pensions cutoff or anything by coming back and working till you can train the new workers. Can you give us some assurances about the retired workers and going all out to hire them as quickly as possible, particularly -

Secretary CHERTOFF. Let me find out.

Senator SCHUMER.—when we have the Presidential election coming up soon.

Secretary CHERTOFF. Let me find out about that. I wasn't aware there was a problem rehiring them. I know that our estimates about the number of people we can process have gotten better. We've had a higher and higher projection as time has gone on. Again, as I said earlier, I would like to process as many people as we can, consistent with, obviously, security. So, I'll find out about that.

Senator SCHUMER. Could you get back to me?

Secretary CHERTOFF. Yes.

Senator SCHUMER. Because to not hire one retiree, when I know there are many who want to come work and they don't need the rehiring, that's the, at least, most immediate answer. I think the Department is sort of twiddling its thumbs.

Secretary CHERTOFF. I'll find out the answer.

Senator SCHUMER. Thank you.

Mr. Chairman, thank you.

Chairman LEAHY. Thank you, Senator Schumer.

Senator Sessions?

Senator SESSIONS. Mr. Secretary, thank you for your service. I think you're one of the most able members of the President's cabinet. I've known you for a number of years and I highly respect you and your capabilities.

I do believe that this administration has been less than fully committed in terms of will to creating a lawful system of immigration in our country and eliminating some of the border problems, and you and I have had discussions about that. But you have made some progress.

First, I'll ask you about that. Arrests were down 20 percent last year. Just for those who may not understand, the year before we arrested 1.1 million people entering our country illegally, and that reduction took us down to about 870,000. That is 20 percent.

Do you think that is a reflection on the number of people who are attempting to enter the country also?

Secretary CHERTOFF. I do. It's not a perfect reflection, but we also validate it by looking at other measures, like activities south of the border and things of that sort. So I'm comfortable, I'm persuaded, that it is, in general, a reflection of the decrease in efforts to come across.

Senator SESSIONS. Some of that, I think, is because we've sent a message to the world that the border is no longer open. We've had the National Guard there, although I'm very concerned, and I think the Governors of California and New Mexico also, of the removal of the National Guard that will be occurring this summer and the increased enforcement in fencing, and barriers, and Border Patrol, all of which work, and the prosecutorial policy in those four districts seems to be working.

So those are things we know work. The question is, will we follow through and continue to see another reduction, and another reduction? Certainly in my own view, this Nation could easily get to an 80 percent reduction in illegality at our borders in the next few years if we have, as a Nation, the commitment to do so.

There are some questions that have been raised about your waiving environmental rules so that these barriers could be constructed at the border. We realize in Congress, when we passed the Fencing Act, that these lawsuits could delay indefinitely.

I would note that you have a letter sent to you from the Secretary of Interior, the Associate Deputy, saying that, "Because our visitors and employees are at risk, we had to close off substantial portions of Department of Interior lands. The infrastructure will improve the security of our lands and increase the safety of both our visitors and our employees. Finally, these pedestrian and vehicle fences will decrease some adverse environmental effects of the illegal activities upon the fragile plant and animal communities located within the Interior lands."

So the Department of Interior has indicated it will actually help the environment by reducing this broad traffic that's occurring there.

Secretary CHERTOFF. That's correct.

Senator SESSIONS. They sent that to you.

Secretary CHERTOFF. Yes.

Senator SESSIONS. That was part of your decision-making process.

Secretary CHERTOFF. Correct. And I've also discussed this with the Secretary. So, I mean, we had a discussion over months about this issue.

Senator SESSIONS. Well, we realized from the beginning that if we intended to move decisively on barriers at the border, lawsuits of this kind would have to be taken off the table.

On the E-Verify, some 58,000 employers now utilize this computer system to verify the person's Social Security number that they're hiring before they hire. I understand 1,000 per week employers are signing up.

Secretary CHERTOFF. Right.

Senator SESSIONS. Tell us about the accuracy of that, briefly. Are there benefits for innocent people, legitimate people, when a "no match" occurs?

Secretary CHERTOFF. I gave you some figures earlier. Now I'm actually—I've reminded myself, I think actually the figures—those might be slightly out of date. They've actually gotten better.

Basically, inaccuracies, where there's actually a mistake in the system, are less than 1 percent, and those get resolved. What we find is that about 95 percent, I think is the most recent figure, get immediately validated through the system on the spot. Then of the remainder, there's a very small number where there is a mistake and it's rectified.

Of course, there are some where there's not a mistake and those people, not surprisingly, just fade away because they realize that their Social Security number isn't valid. We are enhancing the system by giving people the capability with certain kinds of documents, Federal documents, to also verify with a photograph that the underlying document is, in fact, accurate and matches our data base, and that makes it even a more useful system.

This is not a cure-all because it doesn't necessarily catch the person who steals a legal person's identity, so that remains a vulnerability we're trying to deal with in other ways. I do want to take the opportunity, Senator, to again plead to have this reauthorized. The authorization runs out this year. Everybody wants it. Let's enable those who want to obey the law to do that.

Senator SESSIONS. Thank you. There's no doubt that we should reauthorize it. In fact, we should require it and move forward with that. It would be one of the most significant steps this Nation could take. But a lot of employers apparently are quite willing to do this when asked. It's certainly a minimal disruption of their business. I think they are given their information within seconds, or minutes, of the inquiry.

Secretary CHERTOFF. Correct.

Senator SESSIONS. It's not going to delay the employment. I would offer for the record, Mr. Chairman, a letter from the Governor of Arizona, Janet Napolitano. She says this about the National Guard: "We continue to remove, and eventually terminate, a successful program using the National Guard in our border Operation Jump Start. I urgently request that you reconsider the drawn-down of Jump Start and instead retain National Guard per-

sonnel strength and numbers necessary to maintain the hard-won improvements and operational controls of the international border."

Mr. Secretary, first, I'll offer that for the record.

Chairman LEAHY. Without objection.

Senator SESSIONS. And, second, are you concerned about the removal of the Guard at the border under the current law?

Secretary CHERTOFF. Senator, when we started this 2 years ago we had about 11,300 Border Patrol. The understanding was, we were going to have 6,000 Guard. They were going to drawn down over 2 years as we matched them, basically, one-for-one with our Border Patrol. By the time we do the draw-down in July, we will be at about 16,500, so we will essentially have added 5,000 Border Patrol, a little over 5,000 Border Patrol, to replace the National Guard that have been pulled off.

I should also say that we have always, and will continue to, use National Guard not just—not under Jump Start, but under routine training, so you will continue to see National Guard at the border, but it won't be under this program and it won't be in the same number.

I am confident that we have the personnel in place so that, as of this summer, we will essentially be pretty close to one-for-one replacement of National Guard with Border Patrol. All things being equal, a Border Patrol agent is more effective than a National Guardsman because they can do more things.

We are also using—

Senator SESSIONS. But you would have to admit, would you not, it would reduce your capability because even though you're bringing on Border Patrol agents, the Guard is providing—

Secretary CHERTOFF. It surely provides a capability. But—

Senator SESSIONS. Capability that would be lost. My time is about out. I would offer, Mr. President, an article in the New York Times, March 28, indicating that there are 304,000 immigrant criminals eligible for deportation that are behind bars, in jail today. Senator Specter asked you some about that. If you need additional money—

Chairman LEAHY. It will be made part of the record, without objection.

Senator SESSIONS.—I would ask that you ask for that. I mean, it's just fundamental that we follow through on that requirement.

Secretary CHERTOFF. I think we have asked for money and I think we have a strategy that we have presented to the appropriators for this.

Senator SESSIONS. Well, I hope that you will.

Chairman LEAHY. Thank you, Senator.

Senator Whitehouse?

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Mr. Secretary, thank you for joining us today. Just quickly, of the 304,000 that were discussed, how many of those folks eligible for deportation are presently Federal inmates?

Secretary CHERTOFF. I don't know the answer to that. I'm sure only a fraction are. I'm sure most of them are—

Senator WHITEHOUSE. Well, presumably a very small fraction.

Secretary CHERTOFF. Yes.

Senator WHITEHOUSE. But if you could get that number, I would appreciate it.

Secretary CHERTOFF. Sure.

Senator WHITEHOUSE. In terms of our evaluation of that question, you've indicated that there are concerns about the treatment of the inmate in the host country if they were to return, particularly being subject to torture. That would be one concern. Another concern, I assume you would agree, would be inmates who are so dangerous, that we'd rather keep them locked up tight in the United States rather than face the risk of reentry if we don't have confidence in the security of the system in the home country, major heads of drug-dealing organizations and things like that.

Secretary CHERTOFF. Well, I guess, yes, if you have a really bad guy. If we got a sentence that's a life sentence, I'd rather keep him locked up for life than send him out, unless I'm confident that the host country will let this—

Senator WHITEHOUSE. Yes. So that will be an issue.

Are there reciprocality issues? Would you be concerned that Americans would be—we'd have to treat, say, a—

Secretary CHERTOFF. No. No. I don't want to over—the issue of torture is a very small number.

Senator WHITEHOUSE. I understand.

Secretary CHERTOFF. So that's not a big issue.

Senator WHITEHOUSE. Lots of issues.

Secretary CHERTOFF. The largest issue is, frankly, some countries are just very dilatory about taking their people back. China is really the worst in that respect.

Senator WHITEHOUSE. Yes.

Secretary CHERTOFF. Interestingly, the Latin American countries are quite good, and we work with them and they're very effective in taking their people back.

Senator WHITEHOUSE. And has the experience been that if they're released into those systems, they actually are kept?

Secretary CHERTOFF. It hasn't been uniform. Sometimes, unfortunately, some of the countries in Latin America don't have the capability, and we try to work with them. We've given them assistance in identifying people who are being sent back who are dangerous so they can try to keep them in jail. But once they serve their sentence, as you know, we can't just keep them in jail. The host country can't keep them in jail. That's a problem. That is a problem for us.

Senator WHITEHOUSE. And would you have any problem incarcerating, in the United States, an American who was convicted of a foreign crime in a foreign country and deported from that country for an immigration violation on the same terms that we're talking about in which we would deport foreign nationals subject to incarceration in their home country to—

Secretary CHERTOFF. I think it has to be done by treaty. In other words, we have these prisoner exchange treaties. I know with Mexico, for example, if you get a 20-year sentence in Mexico, we have an arrangement where you can, as a U.S. citizen, serve your time back in the U.S., and vice versa. I think if someone were deported without that, we would have trouble putting them in jail unless we could prosecute them under our own laws.

Senator WHITEHOUSE. So the treaty would be a key component.
Secretary CHERTOFF. That's right.
Senator WHITEHOUSE. OK.
Secretary CHERTOFF. And we have that, I know, with Mexico.
Senator WHITEHOUSE. On a different subject, are you familiar with the OCDETF program?
Secretary CHERTOFF. From my last job, it's dimly implanted in my mind, yes.
Senator WHITEHOUSE. Familiar enough to describe it briefly for people who are listening and don't know what we're talking about?
Secretary CHERTOFF. My knowledge may be out of date. Back when I was head of the Criminal Division when I was a prosecutor, it was an Organized Crime Drug Enforcement Task Force. It was designed to bring together Federal and State authorities to focus on, you know, more organized narcotics trafficking organizations.
Senator WHITEHOUSE. And it's still going and very active and very helpful in your estimation, is it not?
Secretary CHERTOFF. I have—to the extent I know. But I have to say I don't have a lot of visibility into it.
Senator WHITEHOUSE. Yes. The Fusion Center program that the administration has embarked on in a variety of different areas. Are you familiar with that?
Secretary CHERTOFF. Yes.
Senator WHITEHOUSE. There is evidently an OCDETF, to use one term, Fusion Center, to use another, not far from where we're sitting right now whose function is to fuse, to bring together, information from a variety of Federal law enforcement agencies to enhance the mission of protecting us from organized criminal organizations that traffic in narcotics.
I am informed that the Immigration and Customs enforcement folks refuse to participate in it, won't send someone to the meetings, won't like data bases to what is called the Compass program, which is the computer network set up for the Fusion Center to integrate ATF, FBI, Secret Service, all the different law enforcement computer data bases. I'm interested—and I understand that the Border Patrol is now beginning to look at participating, but to date hasn't. Since those are both DHS agencies, I'm wondering if you know why they're refusing to participate in this function.
Secretary CHERTOFF. I had not heard that, so I'll just have to find out.
Senator WHITEHOUSE. Would you?
Secretary CHERTOFF. Yes.
Senator WHITEHOUSE. Because I think it makes sense. Between the two of us, we can agree that if the purpose of the OCDETF function is to protect this country from organized criminal efforts to engage in narcotics trafficking, the Border/Customs function is a pretty darned essential part of that equation.
Secretary CHERTOFF. Oh, there's no question about it.
Senator WHITEHOUSE. And when you have Treasury agencies, Justice agencies, and all sorts of other kinds of agencies—and you and I both remember—I was a U.S. Attorney, as you may recall—it can be pretty complicated to chase through multiple data bases if you had to find a particular individual. To coordinate those in these Fusion Centers seems like a pretty good idea.

Secretary CHERTOFF. I don't disagree with that. I just don't know enough about the specifics to give you an answer. But I'll find out about it.

Senator WHITEHOUSE. If you could find out why they're refusing to participate, and if there's a reason that they aren't doing it, I'd like to try to get through that reason.

Secretary CHERTOFF. Sure.

Senator WHITEHOUSE. If there's no reason, if you could clear whatever bureaucracy.

Secretary CHERTOFF. I will. I will look into that.

Senator WHITEHOUSE. If you could let me know when you'll get back to me.

Secretary CHERTOFF. OK.

Senator WHITEHOUSE. Thirty days? Sixty days? Ninety days? Pick a number. Any time is good for me, just so I know.

Secretary CHERTOFF. Why don't we say 45 days?

Senator WHITEHOUSE. Forty-five days. I'd appreciate it, Mr. Secretary.

Secretary CHERTOFF. Sure. I will do that.

Senator WHITEHOUSE. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Cornyn?

Senator CORNYN. Thank you, Mr. Chairman.

Mr. Secretary, it's good to see you. Thank you for your service. I agree with Senator Kyl, you've got perhaps one of the most difficult jobs in the President's cabinet. But I think you've done an outstanding job. I appreciate your working with me and my constituents in Texas. I want to go into that in just a little bit here.

First, let's talk about the Secure Fence Act. On September 29, 2006, it passed by a vote of 80 to 19. Interestingly, all of the potential nominees for President of the United States voted "aye". Of course, it passed with strong bipartisan support.

I, frankly, felt like it needed some additional modification. Senator Hutchison and I sponsored an amendment that required consultation with local land owners and community leaders, and you've been very good about doing that consultation. I want to talk about that in just a second.

But first I want to also relay some statistics with regard to the work you've done to try to get voluntary cooperation with local land owners in my State. As you know, unlike some of the other States on the border, Texas is largely private property. Frankly, a lot of these landowners have told me they're afraid to go out on their own ranch unprotected because of criminal activity occurring, coming across the border, particularly associated with narco-trafficking, and the like.

But out of 414, I believe, land owners along the Southwest border that have agreed to access by the Department of Homeland Security, only 46 have refused access, roughly 10 percent. Of course, we know that there is litigation occurring in some cases. I'm glad to see that there are negotiated settlements occurring, particularly with institutions like the University of Texas at Brownsville, to try to work out something that makes sense.

I had mixed feelings about the Secure Fence Act because I didn't want anybody to be under the misimpression that by building fencing we would resolve our border security problem. I know of no fence built by the hand of man that could not be scaled, could not be tunneled under, could not be gone through, so that's why I voted for it. I would note that despite those who criticize it today—and frankly, a lot of them are in my State along the border who don't like the idea of fencing—there has been no attempt to try to repeal the fence requirement.

For myself, I supported it because the Border Patrol told me they thought they needed it. Our professional law enforcement officials, if they tell me they need something, just like our troops in Iraq or Afghanistan, if they tell me they need something in order to do their job, then I'm going to support it. But I think it's simplistic to think that, by building a fence, we're going to solve all of our border security problems.

You testified about the need for more Border Patrol. I'm glad to know that we've trained roughly 16,000. I would note there are 40,000 police officers in New York, roughly, so we're still lagging. I know it takes time but I think we've made some progress. Technology obviously is very important. You've talked a little bit about that. But I believe only a combination of boots on the ground, technology, and tactical infrastructure or fencing in hard-to-control places are we going to have an opportunity for success along the border.

But I want to mention specifically your work in Hidalgo County and the Rio Grande Valley in Texas. You were good to come down for a recent press conference and announcement where, as a result of the local consultation with officials in that area, we've been able to accomplish what I would not have believed possible—that is to take something as controversial as this Secure Fence Act and to come up with a win-win situation. As you know, that involves the dual use of the improved levee system, which is a Federal Government responsibility down in Hidalgo County.

And let me just read a quotation to you from the county judge of Hidalgo County. He said, "Hidalgo County has been at the forefront of the border fence issue from day one, pushing our elected officials in Washington to listen to community concerns and formulating a strategy to protect the residents of Hidalgo County from floodwaters, while accomplishing the plans of the U.S. Department of Homeland Security to protect our Nation's borders. It's a good day when Washington listens and responds to our needs. Hidalgo County appreciates the opportunity to continue consultations with DHS to make our community safer and more attractive to future smart development." That's a quote from County Judge J.D. Salinas of Hidalgo County, as you know.

So, I applaud the work that you have done and that you've been willing to do to meet us half way. I would also note that there are other things that we've been working on with the Department of Homeland Security: carrizo cane eradication, which will enhance the natural barrier that the Rio Grande River presents. It will provide greater visibility and access for Border Patrol in the hard-to-control locations.

I think it's a good example of how communication, cooperation, and consultation, particularly with those most immediately affected at the local level, can result in a positive outcome and one which, unfortunately, seems like it's too rare these days. So, I think we ought to celebrate when they happen.

Secretary CHERTOFF. I want to thank you, Senator, and also Senator Hutchison and Congressman Cuellar for working with us and helping us, and really the community was tremendous about not just coming up with a proposal, but coming up with their resources to cover their part of it. It is a win-win where we can solve two problems with the same effort.

Senator CORNYN. Let me just ask you, since time is running out, about the Meridia initiative. I realize this is perhaps, not strictly speaking, all in your bailiwick. But, of course, this is a proposal by the administration to provide $1.4 billion in funding to Mexico to help with security in the Southwest border area. No funds have been appropriated yet, though the Bush administration requests funding for both, in fiscal year 2008, the Global War on Terror Supplemental Funding request, and the fiscal year 2009 budget.

I have heard from a number of my constituents, law enforcement personnel, sheriffs, and the like, who would like the Federal Government to provide them some assistance so they can do their job. I would note that Governor Perry and the Texas legislature have been fairly generous about stepping up to fill the gap along the border in terms of border security efforts.

But, frankly, this is a Federal responsibility and some of my constituents, law enforcement personnel, are scratching their heads, wondering why the U.S. Government would give $1.4 billion to Mexico for its security efforts when it's unwilling to fund, in a supplemental fashion, local law enforcement's efforts to fill that gap while the Federal Government catches up.

So I would just ask for you to work with us as this proceeds. I'm going to ask other cabinet secretaries, General Mukasey and others, for their cooperation because I think my constituents have got a very good point. We need to keep our commitments to law enforcement officials on this side of the border, while we also need to do everything we can to support President Calderon and his effort to combat the violence, particularly among the drug cartels in Mexico. But Texas law enforcement officials have a good point, and I'd like to work with you on that.

Secretary CHERTOFF. I agree. If I could just address this for one moment. I know it's a little over the time. But obviously we have money which we've made available for locals through Operation Stone Garden. This Meridia initiative is very important because the President of Mexico is putting enormous effort, at considerable risk, to tackling these drug gangs and these smuggling organizations which are located in Mexico.

Of course, as you know from your experience with law enforcement, as you know, Mr. Chairman, the best way to strike at a criminal organization is not the tentacles, but the head. So we've got to enable the Mexicans to do their part in controlling criminal organizations that threaten their government and threaten us. I think this is a terribly important national security program for both countries.

Senator CORNYN. Mr. Chairman, I know we all are perhaps most focused on our own States, but have a national awareness of law enforcement challenges. But I will tell you that there is a huge problem along the border region because of the drug cartels battling it out, kidnappings, and assassinations of local law enforcement officials.

Chairman LEAHY. I read some of the press accounts of that. It's almost unbelievable in this day and age that such things go on. It's a legitimate question you ask. It's not being parochial at all when this is happening on your own border.

Let me ask a question along that line on the northern border. We're short on CBP agents along northern borders, especially States like my own Vermont. What steps are being taken to fill these staffing shortages along the northern border? In fact, we even have full staffing at all of our 325, 326 ports of entry.

Secretary CHERTOFF. If you look back over time, we've been steadily increasing the number of Customs and Border Protection officers at the northern border. This past year we added about 150 additional officers, and we've got money in the 2008 and 2009 budgets to increase the number of inspectors. We're also going to move one of the unmanned aerial vehicles up to the northern border to patrol along there. I think by this summer we'll have our fifth air wing up.

Chairman LEAHY. In particular, what 100? Your target, the promised target is short about 100?

Secretary CHERTOFF. We're at 3,396 officers currently, so I think we'd like to get somewhat more than that. But I think we've gone up in the last few years by about 1,000.

Chairman LEAHY. When do you expect to have full staffing at all official ports of entry?

Secretary CHERTOFF. I don't know the answer to that. I'll have to get back to you.

Chairman LEAHY. The reason I ask, is in your budget, you requested $4 million to install permanent Border Patrol checkpoints far, far from the border on Vermont highways. This was brought back to me yesterday when one of our veterans' organizations, a man who lives up on the Canadian border, goes down to a VA hospital to help our veterans basically as a volunteer. He drives from the Canadian border, drives a couple hours and he gets stopped. This happened a number of times. He gets stopped at your border crossing on Interstate 91 in Vermont. He hasn't crossed any borders. A lot of Vermonters suffer the same thing. Is there any—it seems like kind of a cockamamie thing. If you're trying to catch immigration violators, how does this do it?

Secretary CHERTOFF. Yes. Well, first of all, let me say, right now we're using—we don't have enough people up on the border. Right now, we're using a temporary checkpoint. I don't think there's a—

Chairman LEAHY. You've asked for $4 million to install a permanent checkpoint.

Secretary CHERTOFF. I don't think there's a current plan to put a permanent checkpoint in that location.

Chairman LEAHY. Then why did you ask for the money?

Secretary CHERTOFF. I don't know whether this refers to this location or someplace else, but I'm told the Border Patrol, right now, is still envisioning operating temporarily. But let me make sure.

Chairman LEAHY. Well, they're sure acting like it's permanent. And not under your watch, but I told you about my own frustration, never leaving the country and being stopped hundreds of miles from the border. They made me step out of my car and prove my citizenship. The license plate, that's No. 1, says "U.S. Senator" on it. It certainly has no influence, and I understand that. I shouldn't be treated any differently than anybody else.

But I also see Canadian families—you know, families—that are coming down there, coming down to visit our country, and they're being made to take their suitcases out, children crying, everything else. It just seems like, my God, what are we doing?

Secretary CHERTOFF. Let me—let me—

Chairman LEAHY. Does this really make us safer?

Secretary CHERTOFF. The answer to that is yes, and I'm going to give you—

Chairman LEAHY. Good. These families are certainly going to be encouraged to do everything they can to point out people that may hurt our country.

Secretary CHERTOFF. Let me give you facts and figures. In a 1-week period in November, 2007 when we had the checkpoint open in Swanton, we apprehended 23 illegal aliens.

Chairman LEAHY. Swanton is on the border. I'm talking about something that's about—

Secretary CHERTOFF. No. But in the sector.

Chairman LEAHY.—a 3-hour drive from the border.

Secretary CHERTOFF. This I–91 temporary checkpoint, which is about 100 miles from the border, apprehended 23 people at the checkpoint.

Chairman LEAHY. Apprehended for what?

Secretary CHERTOFF. Well, I'll go into some of the examples.

Chairman LEAHY. Well, give me the—how many of them were for immigration violations?

Secretary CHERTOFF. Well, there were 23 immigration violations and—and again, this is limited to a 1-week period—

Chairman LEAHY. Had they crossed the border?

Secretary CHERTOFF. Pardon? Yes, they crossed the border.

Chairman LEAHY. Then why weren't they caught at the border?

Secretary CHERTOFF. Because—

Chairman LEAHY. You all have people down at the other end.

Secretary CHERTOFF. Because we don't necessarily get everybody at the border. As you know, sometimes people cross the border between the ports of entry, but they wind up funneling through the checkpoint and we pick them up at the checkpoint.

Chairman LEAHY. So we're stopping tens of thousands of Vermonters to get these handful? What happened to them? Were they then put in jail?

Secretary CHERTOFF. No, they're then deported. But let me—

Chairman LEAHY. Every one of them was deported?

Secretary CHERTOFF. If they're illegal, sure.

Chairman LEAHY. So of those people—now, let's be sure on this. Of those people you apprehended, you're saying that most of them

were illegal immigrants. You apprehended in November, that 1 month, and they were all deported?

Secretary CHERTOFF. There were 23 illegal immigrants who were apprehended at the checkpoint.

Chairman LEAHY. In 1 month?

Secretary CHERTOFF. In, actually, a 1-week period.

Chairman LEAHY. One week. And every single one of them was deported?

Secretary CHERTOFF. Well, they're supposed to be, unless they have a legal claim, like an asylum claim.

Chairman LEAHY. Well, can you give me those?

Secretary CHERTOFF. I will get you—

Chairman LEAHY. Because—

Secretary CHERTOFF. But, Mr. Chairman, let me finish. Because it's not just illegal aliens. At various times at this particular checkpoint we arrested, for example, a native and citizen of Guatemala who had felony convictions for sexual assault of a child. We found a native and citizen of Canada at the checkpoint smuggling 95 pounds of marijuana. We had an individual, a national of Guatemala and Canadian who we discovered was out on bond for aggravated sexual assault. We had a national of Korea who was transporting four illegal aliens. We had a citizen of Canada transporting 150 pounds of marijuana. So, I mean, we are picking up drug dealers and other people at the checkpoints.

Chairman LEAHY. But isn't that something the State police should be doing, the sheriffs? I mean, I'm thinking if somebody really wanted to go down, it sounds to me like you're getting the idiots, because there are dozens and dozens of roads you could go down if you really wanted to get down there.

Secretary CHERTOFF. I have two short answers to that. One is, we do do side patrols. Second—and I know you know this, Mr. Chairman, because you were a U.S. Attorney—you do get idiots.

Chairman LEAHY. I was a State's Attorney. But go ahead.

Secretary CHERTOFF. But the truth of the matter is, it's worth getting the idiots who are smuggling marijuana or who are child molesters.

Chairman LEAHY. Well, yes.

Secretary CHERTOFF. That takes some of the—

Chairman LEAHY. But if they don't show up on the border where people should show up—because I noticed in your final rule that DHS and the State Department issued last week on WHTI, it dismissed all the comments calling for additional outreach of business, travelers, border residents. The Travel Industry Association, Travel Business Round Table, went so far as to say the new rules are not accompanied by a credible plan to inform travelers of changing requirements. I listen to radio stations out of Montreal saying, don't go into Vermont or Upstate New York, the lines are an hour, 2 hours, 3 hours long. Spend your money in Canada. We're spending our money putting these checkpoints that really end up infuriating people 100 miles or more from the border.

Tell me, let me just ask one more thing about that. We're going to have additional staffing on Canadian holidays when the U.S. ports of entry have been particularly overwhelmed. We have May 23, 24, 25 which is Victoria Day weekend holiday; June 24, St.

Jean Baptiste Day in Quebec; July 1, Canada Day; July 19, August 3, construction holidays in Canada. We're going to have extra—are we going to prepare for those?

Secretary CHERTOFF. Yes, we do generally.

Chairman LEAHY. Or does it only make a difference if it's our holiday?

Secretary CHERTOFF. No. We do generally actually mind any event, whether it's a holiday or a sporting event. And, you know, my instruction and the Border Patrol's undertaking has been to make sure we surge our capability when we think there's going to be heavy travel because of some holiday or event.

And I don't want to be mistaking this suggestion as we don't want to continue to hire. We did put money in the budget for 2009 for additional inspectors. We—you know, my—

Chairman LEAHY. You put money in the budget for a permanent checkpoint on Interstate 91.

Secretary CHERTOFF. Well, all I can tell you is, the current plan of the Border Patrol is to have—it's temporary. But I—if you're asking me whether I think checkpoints add value—

Chairman LEAHY. It's what your budget says.

Secretary CHERTOFF. Well, I don't have it in front of me so I don't know what the thinking was.

Chairman LEAHY. Four million dollars.

Secretary CHERTOFF. They changed their thinking. Here's the bottom line: having checkpoints does make sense. It is a useful tool. It's not an alternative to manning the ports of entry, but it recognizes the fact that people come between the ports.

Chairman LEAHY. So what you're saying is, in a little State like mine, everybody should just be stopped going down the Interstate, no matter whether they're going to visit a sick relative at the VA hospital or anything like that. We're all sort of presumed guilty until we prove ourselves innocent?

Secretary CHERTOFF. No. I'm saying that—

Chairman LEAHY. It sounds like Big Brother gone awry.

Secretary CHERTOFF. I have to say, Mr. Chairman, that—I mean, we have found drug smugglers, child molesters.

Chairman LEAHY. Mr. Secretary, we can—you can set up a road block on the George Washington Parkway and stop every single car coming in every single day. You're going to find some. Does that make it a sensible thing to do? Everything would come to a screeching halt around here. You could put a road block halfway across the Wilson Bridge in this area.

Secretary CHERTOFF. I guess I'd answer you, Mr. Chairman, this way. Where I used to come from, from time to time, they manned roadblocks for drunk drivers. Now, the vast majority of people who were stopped were not intoxicated, but the fact is that they did catch people who were intoxicated.

Chairman LEAHY. Those were temporary roadblocks. We're talking about a permanent installation.

Secretary CHERTOFF. But what I've indicated to you is the Border Patrol's current plan is to not operate it all the time. If the question is whether we ought to—how often we ought to do it or things of that sort, I mean, those are operational issues. If the question

is, as a matter of principle, does it make sense to have these things, I have to tell you that I think it does make sense.

Chairman LEAHY. Well, then we have hundreds of roads. I mean, we have dozens and dozens of roads you can take from the Canadian border to get down to either New York or Massachusetts from Canada. Why don't you just put roadblocks on every one of them and Federalize Vermont?

Secretary CHERTOFF. Well, we're limited by law to the 100 miles closest to the border. We pick a place—

Chairman LEAHY. You've got dozens of roads. I mean, I've got a dirt road that goes in front of my house in Middlesex, Vermont.

Secretary CHERTOFF. Right. Right.

Chairman LEAHY. That's within 100 miles of the Canadian border. Am I going to see a roadblock up there?

Secretary CHERTOFF. Now, we pick a road which the Border Patrol—

Chairman LEAHY. Oh. Thank you.

Secretary CHERTOFF. We pick a road which the Border Patrol thinks is likely to be a funnel through which people will come.

Chairman LEAHY. Well, we've had Canadians come up to my house in Vermont. Some of them are related to my wife.

Secretary CHERTOFF. Mr. Chairman, that's great. But I'm not sure what your point is, Mr. Chairman.

Chairman LEAHY. I think you understand my point. My time has really been used up and I'm going to yield to Senator Feingold. I just—well.

Senator FEINGOLD. Thank you, Mr. Chairman. I was enjoying the exchange.

Mr. Secretary, you've had a long morning, so let me just get right to these questions. Thank you for your service.

In February, the Washington Post reported that Customs agents have been searching the cell phones and laptops of U.S. citizens and international business travelers coming across the border and then copying the contents. In court papers, the government has taken the position that a laptop is just a "closed container" like a suitcase or a purse, and examining the contents of a laptop to learn the thoughts of the traveler is no different from examining a traveler's suitcase to see if it contains drugs or a weapon. But the Supreme Court has held that more intrusive border searches that implicate "dignity and privacy interests of the person being searched" can take place only if there is a reasonable suspicion of wrongdoing.

Has DHS conducted searches of the contents of laptops and cell phones belonging to U.S. citizens in cases where the Agency did not first determine that there was a reasonable suspicion of wrongdoing?

Secretary CHERTOFF. First of all, I think that the cases you're talking about involving reasonable suspicion applies to body searches. I think the searches with respect to documents at the border, whether they're reduced to paper form or electronic form, don't necessarily require a reasonable suspicion requirement.

We're entitled to—I think copying requires a slightly higher requirement. So the short answer—but of course, as a matter of practice, we only do it where there's a reasonable suspicion because we

don't do it to everybody. So with that suggestion there's a legal requirement, I think, that as a practical matter, when we look at a laptop or papers or something, it's because somebody is in secondary, which means by definition that we have a reasonable suspicion that is sufficient to—

Senator FEINGOLD. So even though you're not required to use that standard, according to your statements, you are, in effect, using that standard?

Secretary CHERTOFF. I think—I believe, in practice, that's what's happening.

Senator FEINGOLD. In your view, if a person's laptop contains diaries, personal letters, medical information, financial records, and photos, does a search of those contents by the government implicate any dignity or privacy concerns?

Secretary CHERTOFF. From a legal standpoint, if you're asking me do you need probable cause, the answer to that is no, at the border.

Senator FEINGOLD. I didn't ask you that. I asked you whether it implicates any dignity or privacy concerns.

Secretary CHERTOFF. Sure. There are absolutely privacy concerns. Therefore, we only look to the extent necessary to satisfy ourselves, for example, that there's not child pornography or, as we've occasionally found, instructions for how to build remote IEDs. But if, after looking at the material there's nothing in there that is either contraband or indicative of a threat, then we respect the privacy and we return the item to the individual.

Senator FEINGOLD. But does DHS ever copy or otherwise retain the contents of—

Secretary CHERTOFF. I believe we copy—

Senator FEINGOLD. Let me just finish the question.

Secretary CHERTOFF. OK.

Senator FEINGOLD. Retain the contents of a person's laptop during a search.

Secretary CHERTOFF. I believe that there are two types of things that happen. Sometimes if something is in a foreign language and needs to be translated or something of that sort, we make a copy for purposes of translation. If it turns out to be benign, we then destroy it. I think you understand that is probable cause. If we're going to seize it because it is illegal—contraband, child pornography—I think at that point, I believe—I'll verify it, but I believe—we use a probable cause standard.

Senator FEINGOLD. And then what sorts of retention or destruction policies are in place for information that had been copied?

Secretary CHERTOFF. If it's not pertinent to a violation of the law, in other words, benign, it's destroyed. It's either returned or it's destroyed if we made a copy for purposes of, you know, translation. If it's, in fact, contraband or part of a criminal case, then it gets retained, like any evidence would be when it's seized, in accordance to law.

Senator FEINGOLD. Accoring to the Washington Post, many of the people who have been subject to these searches are travelers of Muslim, Middle Eastern, and South Asian background or descent, including U.S. citizens. Also, according to the Post, a Customs training guide states that "It is permissible and indeed advisable

to consider an individual's connections to countries that are associated with significant terrorist activity." I think the word "connections" is quite vague, but I assume that is deliberate. So let me ask you, if a U.S. citizen traveler is of Pakistani descent, does DHS consider that to constitute a "connection" to Pakistan, which is, of course, a country that is associated with significant terrorist activity?

Secretary CHERTOFF. No. I think the issue of connections to a nation have to do with foreigners. However, that doesn't exclude the fact that if a person, a U.S. citizen, had a travel pattern that suggested, on an individualized basis, that they had something that needed to be looked at more closely, we would certainly take that into account. But the mere fact that someone is a U.S. citizen of any ethnic group is not a factor in—

Senator FEINGOLD. So being Pakistani alone would not be a trigger?

Secretary CHERTOFF. If you are a Pakistani national, that might be a consideration, as with any foreign nationality. But that would be, for example, a citizen of another country. U.S. citizens are not treated differently based upon their ethnic background, but their individualized behavior could be a basis for singling them out, or if they matched a physical description it could be a basis for singling them out.

Senator FEINGOLD. And you're saying it's narrowed to those circumstances?

Secretary CHERTOFF. I think, yes, that's basically—

Senator FEINGOLD. I would like whatever assurances you can provide that that's the case, because I've heard horror stories that suggest otherwise, but I have not been able to personally document them.

Secretary CHERTOFF. That's—I'm giving you—I'm telling you what the policy is. Can I tell you that no one has ever transgressed? I mean, my experience with law enforcement suggests that I wouldn't be able to give you that assurance. But that's the policy.

Senator FEINGOLD. Another issue. The REAL ID regulations require that all REAL ID cards use the same type of machine-readable bar code to store personal information on those cards. That means that anyone who has a machine that can read that bar code can collect the personal information on REAL ID cards and log individuals' activities. Sometimes this is called skimming. It means government or private entities can track Americans' locations and activities over time.

I think this is a significant privacy issue. I've heard concerns that all this information could even end up being for sale. Yet, the DHS regulations do not prohibit private sector use of this information or limit its use to law enforcement purposes. It just leaves it to the States to deal with the problem. Why is DHS not taking more proactive steps to address it?

Secretary CHERTOFF. I disagree with the characterization of what you can do with a Machine Readable Zone. I think that's dead wrong. I think there's a lot of misinformation out there. Let me tell you what a Machine Readable Zone has. It has exactly the same information as on the face of the license, therefore you can either

read it with an MRZ read or you can read it with your eyes. You cannot skim a Machine Readable Zone because skimming, to the extent it occurs, requires an RFID chip, and a Machine Readable Zone is not an RFID chip. We are not requiring RFID chips.

So there is no way you could track someone's comings and goings with a driver's license unless you followed them around, which you can do without the REAL ID. So I have to say the idea that—and I've read this over and over again, I've seen the ACLU say it, and it's a blatant falsehood. It is not the case that the REAL ID license, without the RFID, can be used to track people. There is a way to track people. If I hacked into your credit card account, I could track you based on every time you use your credit card. But that has nothing to do with us.

Senator FEINGOLD. You can track and record this much more easily than if it were not on a bar code. Isn't that true?

Secretary CHERTOFF. I disagree with that.

Senator FEINGOLD. You don't think that's true?

Secretary CHERTOFF. I do not think that's true.

Senator FEINGOLD. Well, we'll take this up on another occasion. Thank you very much, Mr. Secretary.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Secretary, it's been a long day. I won't go into questions on the—well, first, I should ask you, do you want to say anything further before I conclude?

Secretary CHERTOFF. No. I'm ready for lunch.

Chairman LEAHY. You've had so much fun, you don't want to continue?

Secretary CHERTOFF. It's been fun, but all good things must come to an end.

Chairman LEAHY. I understand. I hope the same about the permanent $4 million installation on I–91.

But moving along, I was going to ask you questions about extending EB–5 Immigrant Investor Regional Center Program that expires in September. I hope you will work with me to continue it beyond September. It's an important program. All States can continue to benefit from the job creation and capital investment the program brings. At a time that we're going into a recession, it's good to have a program that actually does create jobs.

As we get closer to the now-delayed implementation of WHTI, I hope the Department will listen to the warnings from those who live and work on our northern border: this must be done right. I can give you anecdotal stories, but you have to understand, this is the matter. Those of us along the northern border feel very strongly. It's not a Democratic or Republican view, it's the view of all of us, businesses that go back and forth, the travel industry, those who have families there, even to the extent of having to worry about one town where the border comes down the middle of the road. There are questions about whether somebody can cross the road to baby-sit their relatives' children, things like this.

Let's do it right. Canada is a great country. We share a lot of our culture in comity with them. I would like to see more money spent to improve our intelligence on both sides of the border for those who are threats and who lose hundreds of billions of dollars' worth

of jobs because we do something that may be more symbolic than substantive. I appreciate the fact, on a very newsworthy case, that you have acted upon that. I would hope that you would push back in your own Department to find out how many other cases that have not made the news, have not been researched by the Washington Post, doing the work that should have been done by somebody in DHS that's looked at. I'd like to know what's happening on the Katrina trailers, why we still have those that are harmful to people's health long after that time. It's been a terrible failure.

I believe that the hundreds of thousands of legal, permanent residents who are in danger of not being naturalized in time to vote in November—Senator Kennedy used a figure of over half a million. I want them to know that they have a firm commitment from their Federal Government that there's a reality of their applications being processed in time. Obviously, we all understand if you have somebody in there who's made a false application or something, it won't go through.

But let us assume most of them are trying to follow the law. One of the greatest things, I know, when my grandparents told me after they became citizens in this country, having left Italy where they really didn't have a chance to vote, how great it was to be able to vote. I suspect the same feeling is here, that these people want to vote. You've noted you had firsthand experience how important hard-fought, comprehensive immigration was.

I sat in many of those meetings with you, as you know, Mr. Secretary. I also told the President I completely agreed with him on his effort for comprehensive immigration reform. I wish that it had gone through. But I think, in light of your unprecedented enforcement activities and these fee increases, we should have been better prepared for the huge increase in applications, better prepared to deal with it in a timely manner.

Now, in answer to the question of Senator Feingold, you, I think, are down-playing some of the severity of the REAL ID mandate. I think it would be better to repeal that. It was put in with pressure from the administration. You speak of a congressional mandate, but that was slammed through on legislation that was called "must pass", with strong support from the administration.

I think we ought to engage in a fair, more productive negotiated rulemaking with the States. It would be better than to override environmental laws, override States' rights, and all these other things. Maybe people want to have a national ID card; in my State, they don't. But maybe that's what we're coming to. I hope not. But before we tell the States, do it this way, do it our way or no way, and oh, by the way, increase your taxes so you can pay for this thing we're mandating, I think there's a better way, I really do. So, I'll pass that on for what it's worth.

Secretary CHERTOFF. Mr. Chairman, I want to respond on the WHTI thing. I think we are as committed as you are to try to do this seamlessly. I think we have the capability to do it. I think now we've agreed upon a June, 2009 deadline. We've got the investments made in a number of States to do the driver's licenses. The Canadians are now putting money into this. So I'm hopeful, if we can now have a unity of effort to get this done, we can wind up

in a little over a year with something that will not only be more secure, but actually is going to speed it up at the border.

Chairman LEAHY. Well, let's talk about this driver's license. Let me give you, a group of school kids come down on a school bus.

Secretary CHERTOFF. We've exempted them. We actually said that—

Chairman LEAHY. What about the senior citizen who never got a driver's license?

Secretary CHERTOFF. You know, driver's license—we're accepting—a lot of States have a non-driver's ID. We're accepting that. I think what we have done, and this has been an iterative process with not only the States, but with the Provinces and with the Canadian government, I think we have a reasonable, practical, and relatively inexpensive plan. I come back to, you know, we had a 9/11 Commission, we spent I don't know how much money having them do their report.

This is one of their top recommendations. I kind of committed to doing this. I think we're doing it in the right way. I think that if we are consistent in our message, we're going to get there and everyone is going to be better off. I think we're going to make it quicker to cross the border because it will actually speed the time that every individual has to spend at a border post.

So I think I'm with you in wanting to keep the open flow of trade and traffic. I just want to make sure we're redeeming the promise we made on the 9/11 recommendation.

Chairman LEAHY. Well, I expect we'll have more conversations about this before we get there.

Secretary CHERTOFF. I'm sure we will.

Chairman LEAHY. The legislation requires us to wait until July of 2009, with bipartisan legislation, as you know, the Leahy-Stevens legislation. We have many other Senators from both parties that co-sponsored. I also hope that someone's looking at the situation, wearing my other hat as the Chairman of the Subcommittee that helps to fund the State Department, that we not end up with computers that cannot talk to each other. As you know, that was the original concern. It won't do any good if you work out the WHTI problem and then they stop the second line and say, well, now, wait a minute. I don't care what you went through there, now you've got to go through it all over again.

I think we are citizens of a very great and wonderful country. A lot of people around the world think that we have suddenly become xenophobic, and almost arrogant in the way we treat people coming here. I have a lot of friends overseas who tell me, look, we'd love to go to the United States. Our euro is worth so much more because your dollar has slipped so badly. But we just don't want to go through the hassle. We don't want to be shouted at as we're going through, treated like we're some kind of criminals going through Immigration, going through—we finally get a mile away from wherever our port of entry, and everybody's very, very nice. But we're made to feel like some kind of criminals as we go through.

I've seen this myself with the way people have been treated. If I'm recognized, everybody's very nice to me. But that's not the way it should be. They should also be nice to the person who's coming

in from Italy, or Germany, or Ireland, or wherever else ahead of me. In fact, I think it's even worse that they're really giving somebody—just, frankly, berating them for maybe a bit of a language problem, berating them, and then all of a sudden being very nice to me. I think that's even worse. So, I pass that on for what it's worth.

Secretary CHERTOFF. I agree with you.

Chairman LEAHY. Thank you.

Secretary CHERTOFF. Thank you, Mr. Chairman.

Chairman LEAHY. We stand in recess.

[Whereupon, at 12:06 p.m. the hearing was adjourned.]

[Question and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Question#:	1
Topic:	VSUs
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: The Homeland Security Act required that DHS establish Visa Security Units (VSUs) around the world to ensure that the State Department isn't just rubber-stamping visa applications the way it did for the hijackers before 9/11. There are over 220 posts that issue visas and nearly 7 years after 9/11, DHS has only established about 10 security units in 9 countries. That number is shamefully low. There was no VSU in Cairo at the time that that Mohammed received his student visa, and if there had been, he would almost certainly have been denied entry into the U.S. because of his previous arrest.

Why haven't you made it a higher priority to get Visa Security Units established, at least in high-risk countries?

Why aren't you getting more cooperation from the State Department, particular from U.S. Ambassadors overseas, in setting up these security units more rapidly?

It's been nearly 7 years. How long does Congress have to wait to get these security units operational? Will it take additional legislation?

Question: Why haven't you made it a higher priority to get Visa Security Units established, at least in high-risk countries?

Response: ICE's Visa Security Program (VSP) is a high priority. In an effort to establish VSP operations in high-risk visa adjudicating posts worldwide, ICE VSP prioritized expansion overseas in its VSP Five-Year Expansion Plan. The plan spans FY2009 through FY2013 with a goal to cover approximately 75% of the highest risk visa activity posts by FY2013.

In FY2009, the VSP Five-Year Expansion Plan projects deployment to seven (7) additional high-risk visa issuing posts. ICE requested $3.4 million in the President's FY 2009 Budget for additional expansion, and has determined that existing overseas resources cannot be shifted to VSP operations.

Question: Why aren't you getting more cooperation from the State Department, particular from U.S. Ambassadors overseas, in setting up these security units more rapidly?

Response: VSP and DOS HQ have made good progress in developing a collaborative working relationship. Recently, DOS and ICE VSP released a cable to all posts that

Question#:	1
Topic:	VSUs
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

highlighted the joint accomplishments of DOS and ICE VSP efforts overseas. The cable also expressed DOS and ICE commitment to the success of the VSP. Additionally, ICE VSP and DOS coordinate site selections and visits to posts under consideration for VSP deployment, and continue to work together to address issues of mutual concern.

Question: It's been nearly 7 years. How long does Congress have to wait to get these security units operational? Will it take additional legislation?

Response: ICE VSP is currently operational to the maximum extent possible and has been deployed to many posts. ICE and State have developed an excellent cooperative working relationship and both are committed to the success of the VSP. ICE VSP and State have coordinated on VSP site selections and visits to posts for potential VSP deployment is under consideration. However, ICE VSP does face challenges related to limited space at overseas missions. We also recently issued a joint cable with the State Department with details about how the VSP program works and highlighting the value added in bringing a law enforcement/counterterrorism perspective to the visa process. We believe this will give Ambassadors greater information on the value of the program.

Question#:	2
Topic:	287g agreements
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: In 1996, I authored the 287g program. It took 10 years for the federal government to finally sign a Memorandum of Understanding with the State of Florida and Alabama. Today, there are several agreements in place, but many more are waiting for the Department of Homeland Security to approve their requests for agreements. In fact, a city in Iowa requested a 287g agreement in December 2006 and still hasn't heard a word from the Department.

How many agreements are currently in place?

How many state and locals that have requested an MOU are waiting for a response from DHS?

What requests have recently been granted, and when did the entities officially request the help from DHS?

Why is the cost so high to put MOUs in place? How can we reduce these costs and get more agreements signed between the feds, states and locals?

Question: How many agreements are currently in place?

Response: As of May 6, 2008, ICE has entered into 47 MOAs with state and local law enforcement agencies.

Question: How many state and locals that have requested an MOU are waiting for a response from DHS?

Response: As of May 6, 2008 ICE is actively negotiating seventeen Memorandums of Agreement. The 287(g) program is one of several tools available in the suite of services known as ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ICE ACCESS). ICE has determined that strategic partnerships with state and local law enforcement agencies are mutually beneficial. ICE is discussing potential ICE ACCESS programs in 75 additional jurisdictions. These partnership discussions include potential application of the 287(g) program.

Question#:	2
Topic:	287g agreements
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: What requests have recently been granted, and when did the entities officially request the help from DHS?

Response: Below is a chart listing Memoranda of Agreement that were signed during FY08.

Date Request Received	*Date MOA Signed*	*STATE*	*Law Enforcement Agency*
3/5/2007	*3/10/2008*	*AZ*	*City of Phoenix PD*
4/5/2007	*3/10/2008*	*AZ*	*Yavapai County Sheriffs Office*
5/1/2007	*3/10/2008*	*AZ*	*Pima County Sheriff's Office*
10/15/2007	*3/10/2008*	*AZ*	*Pinal County Sheriff's Office*
8/27/2007	*3/10/2008*	*VA*	*Manassas Park PD*
4/19/2007	*3/5/2008*	*VA*	*City of Manassas*
2/23/2007	*2/29/2008*	*GA*	*Hall County Sheriff's Office*
8/27/2007	*2/26/2008*	*VA*	*Prince William County PD*
8/27/2007	*2/26/2008*	*VA*	*Prince William County SO*
4/13/2007	*2/6/2008*	*MD*	*Frederick County SO*
11/7/2006	*2/5/2008*	*OH*	*Butler County Sheriff's Office*
4/10/2007	*2/4/2008*	*GA*	*Whitfield County Sheriff's Office*
1/25/2007	*2/1/2008*	*NC*	*Durham Police Department*
9/4/2006	*10/16/2007*	*SC*	*York County Sheriff's Office*

Question: Why is the cost so high to put MOUs in place? How can we reduce these costs and get more agreements signed between the feds, states and locals?

Response: ICE costs related to implementing and maintaining MOAs are high due primarily to the costs associated with Inter-Governmental Service Agreements (IGSA), bed space, transportation costs, detention management team costs and removal costs. These costs are illustrated in the chart below:

Question#:	2
Topic:	287g agreements
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Average Cost for Implementing and Maintaining 1 new 287(g) MOA	
Development IT Infrastructure Training Materials Travel/Lodging/Per Diem for Instructors and Students (when travel to training location is needed)	400,000.00
OI Supervision DRO Supervision	1,361,116.00
69% of Processed Cases IGSA Transportation Bed Space (28 days average length of stay = 255 Beds) x $97 per day Bed Management Teams Removal Costs ($1,000 average)	15,717,356.00
Total Estimated Costs	17,478,472.00

ICE will continue to work to identify areas in which additional efficiencies can be achieved to help lower costs both to ICE as well as other taxpayer-funded entities. For example, ICE is working with states to explore programs such as those in place in Arizona and New York that allow certain first-time non-violent offenders to be given parole in exchange for agreeing to removal.

Question#:	3
Topic:	GAO
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: In 2007 testimony before the Subcommittee on Management, Investigations and Oversight, Committee on Homeland Security, House of Representatives, Norman Rabkin, Managing Director, Homeland Security and Justice Issues, summarized GAO's recent difficulties in working with DHS. Specifically, Rabkin cited challenges GAO has faced in gaining access to DHS programs and activities, such as redundant layers of coordination and unexplained delays.

Why is DHS putting up barriers to GAO's requests?

What has DHS done since Rabkin's April 2007 testimony to ameliorate these problems?

Response: DHS is by no means setting up barriers to GAO requests. To the contrary, we have been making efforts to improve the relationship between GAO and the Department by establishing dialogue between the Homeland Security and Justice Managing Director Norm Rabkin and both the Deputy Under Secretary for Management Elaine Duke and the CFO, David Norquist to talk about both GAO issues and new Departmental initiatives.

The Department is in the process of revising its Management Directive dealing with GAO relations. During this effort, we have been in contact with GAO to gain their perspectives and input into the revision as DHS refines a more timely and effective means to support audit efforts. We have incorporated their comments as closely as practicable in the latest version of the document.

We have also sought GAO input into our DHS Integrated Strategy for High Risk Management, a document we have developed in conjunction with OMB and GAO to ultimately remove the Department from GAO's High Risk List.

Another example of our collaboration with GAO is with respect to performance measures. Over the past several months we have been consulting and meeting with GAO in an effort to establish agreed to performance expectations on our major management and programmatic areas.

These efforts should allow continued effective collaboration between GAO and the Department, providing an improved working relationship and communication between the two agencies.

Question#:	4
Topic:	aviation security
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: In September 2000, the GAO released a report on Aviation Security with regards to the law enforcement officers carrying weapons on airplanes. That report noted the deficiency in the FAA regulations to provide for adequate verification of law enforcement officers' credentials. There is still a potentially major security hole in the practice of verifying credentials for armed officers. Without a suitable policy, counterfeit credentials could allow dangerous passengers to board a domestic flight without having passed through a security screening.

Does TSA believe that the current policy and procedure for allowing armed federal employees on domestic flights is comprehensive and secure?

Regardless of which agency has jurisdiction over such a policy, what is TSA doing to prevent such security breached?

Has TSA considered issuing smart chips or other technology to bona fide law enforcement personnel to verify the legitimacy of critical government identification?

Question: Does TSA believe that the current policy and procedure for allowing armed federal employees on domestic flights is comprehensive and secure?

Response: The Transportation Security Administration (TSA) recognizes the need for certain Law Enforcement Officers (LEOs) to carry firearms aboard United States commercial aircraft in performance of their duties. Monitoring Law Enforcement Officers Flying Armed (LEOFA) aboard commercial aircraft continues to represent a critical part of TSA's multi-layered aviation security approach. The Code of Federal Regulations (CFR) establishes the requirements for LEOFA in 49 CFR § 1544.219: Carriage of Accessible Weapons. The Transportation Security Administration's (TSA) policies and procedures are compliant with these regulatory requirements. 49 CFR § 1544.219 stipulates that LEOs who request to fly armed must:

- Be a Federal law enforcement officer or a full-time state, county, or municipal law enforcement officer who is a direct employee of a government agency;
- Be sworn and commissioned to enforce criminal statutes or immigration statutes;
- Be authorized by the employing agency to have the weapon in connection with assigned duties;

Question#:	4
Topic:	aviation security
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

- Complete the training program *Law Enforcement Officers Flying Armed*; and,
- If the armed LEO is a State, county, or municipal law enforcement officer, he or she must present an original letter of authority, signed by an authorizing official from his or her employing agency, service, or department, confirming the need to travel armed and detailing the itinerary of the travel while armed.

Federal LEOs possess identification credentials with common inherent security features. As the Federal LEO progresses through layered security, identification credentials may be presented to airline employees, state or local uniformed officers, Transportation Security Officers (TSOs) and, ultimately, to the captain of a commercial aircraft for situational awareness and verification.

While there is a high level of confidence in the monitoring of armed Federal LEOs, TSA continues to seek improvements that could be made in regards to state and local officers carrying firearms aboard aircraft.

Question: Regardless of which agency has jurisdiction over such a policy, what is TSA doing to prevent such security breaches?

Response: The Office of Law Enforcement/Federal Air Marshal Service (OLE/FAMS) is working with other components within TSA to provide solutions to improve the evolving policies and procedures allowing armed LEOs on domestic flights.

The current procedure is stipulated in 49 C.F.R. § 1544.219 Carriage of Accessible Weapons and TSA's Standard Operating Procedure. This procedure allows for State, county, and municipal LEOs to fly armed by presenting to the air carrier an original letter of authority from his or her employing agency, agency credentials, a badge, and a second form of government identification.

An OLE/FAMS working group meets monthly with representatives from Federal, State, county and municipal police agencies to develop improved safeguards. The group determined that processes outlined in section of 49 C.F.R. § 1544.219, requiring a State, county, or municipal LEOFA to present an original letter of authority to the air carrier from the LEO's employing agency could be improved.

The working group's proposed solution would replace the letter currently required and would require State, county, and municipal LEOs' agencies to send a secure message using the National Law Enforcement Telecommunication System (NLETS), to the TSA. This message will contain information in the currently required letter insuring validation originates at the parent agency.

Question#:	4
Topic:	aviation security
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

The NLETS is an international, computer-based message system that allows State, local and Federal law enforcement and justice agencies to share information. The mission of NLETS is to provide, in a secure environment, an international justice telecommunications and information service. Each law enforcement agency is issued a unique Originating Agency Identifier (ORI), a nine-digit code used by agencies on the law enforcement network NLETS.

The requirement for the LEO's employing agency to send a message via NLETS, using the unique ORI, would add an additional layer of security and diminish the possibility of counterfeit or unauthorized letters. Implementation of this system would require an amendment to the present CFR, coordination within the law enforcement community, additional resources, and development of a TSA infrastructure to receive, monitor, and disseminate notifications to airports.

Federal LEOs are not required to obtain and present a letter of authority from their employing agency. In the event that verification is necessary, OLE/FAMS has developed a 24/7 contact list of Federal law enforcement agencies allowing for verification of Federal LEOs seeking entry to the sterile area of an airport.

Question: Has TSA considered issuing smart chips or other technology to bona fide law enforcement personnel to verify the legitimacy of critical government identification?

Response: In April 2007, TSA established a nationwide standard for information LEOs must provide when flying armed. The standard information TSA will collect from LEOs desiring to fly armed is as follows;

- Date/time,
- LEOs full name,
- Agency name and address,
- Type of agency (Federal, state, local, or Federal Flight Deck Officer),
- LEO's badge and/or credential number,
- Cell phone number at that moment,
- Name of person being escorted (if applicable),
- Flight information,
- Emergency contact information, and
- Whether the individual has completed LEOFA training as required by 49 CFR § 1544.219: Carriage of accessible weapons.

Question#:	4
Topic:	aviation security
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

The current armed LEO checkpoint process is paper-based. A standardized form was approved by TSA for publication and distributed to all airports on February 27, 2008. An armed LEO is required to sign the standardized log prior to entering the sterile area of an airport. The information collected at the checkpoint is maintained as a paper record and is not communicated beyond the checkpoint.

A fully developed browser based electronic logbook (e-Logbook) has been developed and initial tests have concluded. The e-Logbook application could be executable from any properly configured workstation within the closed and secure TSA certified and accredited network. Execution would require permissions applicable to User ID/Password authority and verification procedures. The process can be utilized to capture the requisite information of all armed LEOs entering the sterile area of an airport.

The e-Logbook test effort began on March 14, 2008, at Dulles International Airport (IAD), was expanded to Reagan National Airport (DCA) on April 3, 2008, and subsequent testing at IAD and DCA occurred on April 4, 2008.

Although e-Logbook test records continue to use notional Law Enforcement Officers Flying Armed (LEOFA) data, test program efforts are permitting e-Logbook program designers to fine tune data entry, data flow, the draft Concept of Operations, and the draft supporting Standard Operating Procedures. Using information obtained from these tests, TSA will look to establish a program capturing "real world" LEOFA data electronically. Once established, the e-Logbook will serve as the platform for later generation biometric based identity verification efforts.

This effort is in keeping with a P.L. 110-53 (Implementing Recommendations of the 9/11 Commission Act of 2007) requirement for a phased approach toward ultimately establishing a biometric based identity verification requirement.

TSA has initiated a series of working group meetings to solicit ideas and mission specific approaches with Federal, state, county, and municipal law enforcement representatives. Federal Security Directors are briefed to assist airport leadership in anticipating infrastructure and manpower requirements to satisfy eventual program goals. TSA continues to work closely with the Department of Homeland Security and key security partners in this initiative.

TSA believes using "smart chips" or other technology based identification verification must be the cornerstone on which future LEOFA efforts will be based. Given the available technologies, TSA considers the best solution would be a Homeland Security

Question#:	4
Topic:	aviation security
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Presidential Directive-12 (HSPD-12) compliant, Federal Information Processing Standards FIPS-201, biometric based Personal Identity Verification Systems (PIVS).

Question#:	5
Topic:	employee survey
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: According to a survey conducted by the Partnership for Public Service and American University, DHS ranked 29th out of 30 Federal departments and agencies to work for in 2007. Specifically, DHS ranked very poorly in such areas as Strategic Management, Effective Leadership, and Employee Skills/Mission Match.

How do you explain DHS's performance in the 2007 survey?

What is your strategy for addressing the shortcomings underscored by the survey?

Response: The report to which you refer, Best Places to Work, was based on a small number of questions from the 2006 Federal Human Capital Survey administered by the Office of Personnel Management (OPM).

Five years ago (and only three years before the survey to which you refer was administered) DHS was formed by combining 22 disparate agencies. Although even high performing corporations are negatively impacted by mergers, DHS began with significant challenges. As noted in the Best Places to Work report, the Department of Justice was able to improve its score by 21%, in part by losing the Immigration and Naturalization Service (which was one of the lowest rated sub-Components) to DHS when it was formed. The Immigration and Naturalization Service employees are now a part of three of our major Components — Customs and Border Protection, Citizenship and Immigration Services and Immigration and Customs Enforcement.

DHS is a large agency, with over 200,000 employees who work for a diverse array of Components with distinct missions. Unlike other large agencies that scored high on the Best Places to Work rankings, DHS is not a monolithic agency with employees engaged in a similar line of work (e.g., NRC, GAO, NASA, DOJ, SSA). Additionally, in the Best Places to Work rankings, "large" agencies are defined as those with 2,000 employees or more. Some of our smallest Components have more than 2,000 employees. Improving morale in an agency with fewer than 10,000 employees, for example, is far easier than improving morale in an agency as large and diverse as DHS.

I am pleased to report that our scores are moving in the right direction and encourage you to review the attached report from our 2007 Annual Employee Survey (AES) that was conducted more recently (October 26-December 21, 2007). This survey contained 45 questions from the 2006 OPM survey, and included more respondents. Approximately 140,000 DHS employees (all our permanent civilian employees) were invited to participate and 65,753 completed surveys. Agency performance is measured against four

Question#:	5
Topic:	employee survey
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

OPM Human Capital Assessment and Accountability Framework Indices - leadership and knowledge management; results-oriented performance culture; talent management and job satisfaction. DHS scores show measured improvement in two of the four indices – leadership and knowledge management (from 46% to 48%) and results-oriented performance culture (from 42% to 44%). Positive response rates for talent management (49%) and Job Satisfaction (58%) stayed the same. Positive responses for two questions, "In my work unit, differences in performance are recognized in a meaningful way" and "My workload is reasonable" increased by 7%.

The report from the 2007 AES indicates that there are substantial variations in positive response rates across the Department. While our larger Components tend to have a greater impact on the overall DHS score (the Transportation Security Administration, Customs and Border Protection and Immigration and Customs Enforcement make up 80% of the weighted responses), we have smaller Components — the Federal Law Enforcement Training Center, Office of the Inspector General, U.S. Coast Guard, Science and Technology Directorate and U.S. Secret Service — with scores that are quite positive. Rather than impose one approach to improving morale on the entire Department, we are evaluating programs, and where it makes sense developing and implementing those programs Department-wide. Action planning to address weaknesses identified in the employee survey is taking place at both the Department- and Component-levels. The attached 2006 Federal Human Capital Survey Action Plan snapshot outlines the activities undertaken at the Department-level and is focused on three specific areas — communication, leadership and performance management. The DHS Component Action Items snapshot outlines Component activities tailored to address individual Component weaknesses as identified by the 2006 Federal Human Capital Survey.

Action plans are reviewed quarterly. We have just finished the fourth quarterly review of the action plans initiated in March 2007. The effectiveness of these initiatives will be judged against 2007 survey results and activities modified or discontinued, accordingly. New initiatives will also be developed in concert with further analysis of the survey results and new action plans will be put in place. Component-specific action plans are reviewed quarterly by the CHCO and given a score of green, yellow, or red, depending upon progress.

We are mindful that the 10 months between the 2006 and 2007 surveys is not a substantial amount of time to realize large positive gains from year to year. However, I am confident that through active leadership engagement, manifested through initiatives reflected in action plans at both the Department- and Component-levels, that overall scores will continue to improve.

Question#:	6
Topic:	transit zone
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: Interdiction efforts in the transit zones face continuous resource constraints. United States interdiction agencies must monitor a transit zone of 42 million square miles that spans the Caribbean Sea, the Gulf of Mexico, and the eastern Pacific Ocean. Resources designated to interdiction in the transit zones are stretched tighter and tighter. While Coast Guard ship hours have increased, Customs and Border Patrol (CBP) aircraft hours have decreased significantly, which reduces our ability to locate and stop the traffickers in the Transit Zone. Facing these resource constraints, what efforts will be effective in raising the removal rate and interrupting more drug shipments in the transit zone?

Response: A predictable increase in the removal rate is dependent on increasing capability and capacity along the entire interdiction continuum, from development of actionable intelligence to end game and prosecution. Increasing P-3 flight hours above current levels is one of many ways to contribute to an increased removal rate. As the P-3 Service Life Extension Program (SLEP) continues to move through its most challenging maintenance months, CBP is consistently operating five aircraft per month during the current replacement wing acquisition phase of the program. Over the next 12 months, CBP will increase the number of aircraft available to approximately eight per month until we begin the wing installation phase of the program in the fourth quarter of fiscal year 2009. Thus, by the middle of fiscal year 2009 CBP will be able to fully support the JIATF South 7,200 hour support requirement. CBP will also use its DHC-8 multi-role patrol aircraft to augment P-3 operations in the Gulf of Mexico and the Caribbean.

CBP plans are to maintain a minimum of nine available aircraft through the duration of the wing installation phase, targeted for completion during the 3rd Quarter of FY 2015. This estimate is dependent on the industrial capacity of the contractor manufacturing the replacement wing sets and the industrial capacity of the contractor selected to perform the new-wing installation. The wing installation contract will be competed and is expected to be awarded by October 1, 2009.

Though smaller than a P-3, the DHC-8 has an extremely effective sensor package. Recent target identification and sorting software upgrades made to one of CBP's DHC-8s by the Naval Sea Systems Command (NAVSEA) have been approved for installation on all seven existing and purchased DHC-8 aircraft and the eight CBP P-3 long range trackers. Once the P-3 SLEP is complete, CBP expects to sustain P-3 availability sufficient to support JIATF South requirements.

Question#:	6
Topic:	transit zone
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

CBP conducted a joint demonstration of a maritime Predator B unmanned aircraft system (UAS) in March of 2008 with the USCG. Based on the results of the demonstration, CBP and the USCG are initiating discussions on joint efforts to define technical requirements for a maritime radar and other sensors, as well as potential joint operations. The Predator B has an operating range in excess of 3,000 miles and can carry a robust sensor suite for up to 30 hours. CBP plans to use the Predator B to augment both long range surveillance and joint CBP/USCG interdiction operations in the source and transit zones. CBP intends to acquire its first maritime Predator B in FY 2009 and the President's budget request supports the timely acquisition of the maritime Predator and its associated support systems.

Question#:	7
Topic:	drugs
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: The Department of Homeland Security has focused significant personnel and assets on the southwest border to prevent illegal narcotics from entering the U.S. In addition, DHS serves as a partner agency in the Southwest Border Counternarcotics Strategy programs and will partner in the Merida Initiative with Mexico if is approved by Congress. However, the Mexican border remains the principal point of entry for illegal drug smuggling. In fact, more drugs were seized at the Mexican border in 2007 than in any previous year. What additional steps has your Department taken to stop drugs at the southwest border?

Response: The Department of Homeland Security ("DHS or the Department") remains steadfast in its commitment to stopping the entry of illegal drugs into the United States and has dedicated significant assets and resources to this effort. Specifically, DHS has taken a layered approach to securing the southwest border through intelligence, interdiction, and enforcement.

The Department stands firm in providing actionable and timely drug intelligence to the front-line interdictors and investigators, most notably the U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE). The Office of Intelligence and Analysis (I&A) is working to establish an intelligence organization that ensures integrated and coordinated Department-wide intelligence support. Key DHS intelligence initiatives include: a National Border Intelligence Center to support all DHS missions; CBP's intelligence units that provide support for field operations; and I&A's deployment of a Homeland Security Intelligence Support Team to the El Paso Intelligence Center to further develop a concept of operations for improving DHS intelligence support to border law enforcement.

In addition, the Department's Secure Border Initiative (SBI) plays an integral role in the Department's counterdrug mission by providing a comprehensive balance of Federal agents, detection technology, infrastructure support, and communication coordination enhancements among foreign, Federal, state, and local governments. Through SBI, CBP reported an increase in cocaine (+45 percent) and marijuana (+30 percent) seizures from FY 2006 to FY 2007.

Finally, in response to drug trafficking organization criminal activity and the associated violence along the southwest border, ICE took the lead in creating Border Enforcement Security Task Forces. Each BEST leverages intelligence from participating interagency partners to combat cross-border crime and violence. In FY 2007, the BESTs were

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Primary:	The Honorable Charles E. Grassley
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responsible for 519 criminal arrests, 1,145 administrative arrests, 283 indictments, 155 convictions, the seizure of 2,066 pounds of cocaine, and 52,518 pounds of marijuana, the discovery of 2 tunnels, the seizure of 237 weapons, and the seizure of approximately $2.9 million in U.S. currency and monetary instruments.

All of these efforts are part of a robust DHS drug interdiction and intelligence program that is vigilantly watching for signs of changing trafficking patterns. The Department is prepared to meet future challenges by working with the Congress and our Federal, state, local, and tribal partners.

Question#:	8
Topic:	drugs and terror
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: The Office of Counternarcotics Enforcement within DHS has been designated to work within the Joint Terrorism Task Force construct to track and sever connections between illegal drug trafficking and terrorism. Afghanistan produces 90% of the world's heroin. The poppy trade is a $3.1 billion industry in Afghanistan, most of which funds the Taliban and other terrorists. Unfortunately, the opium trade amounted to half of Afghanistan's GDP in 2007, according to the UNODC. What specific programs address the connection between drug trafficking and terrorist financing in the Afghan region?

Response: In order to stop the flow of illegal proceeds from reaching terrorist organizations from the sale of narcotics including heroin, the Federal government has implemented a five pillar strategy to attack the illicit narcotics industry in Afghanistan: public information, alternative development, elimination/eradication, interdiction, and law enforcement/justice reform to support the Government of Afghanistan's own counternarcotics strategy. With assistance from across the interagency, the U.S. Department of State leads U.S. counternarcotics efforts in Afghanistan and in 2007 developed an implementation plan to simultaneously increase the incentives to not participate in narcotics production and distribution, and amplifying the scope and intensity of interdiction and eradication operations. The proceeds from Afghanistan's drug trade fuel the insurgency and drug-related corruption undercuts international reconstruction efforts. Attacking the nexus between terrorism and the drug trade in Afghanistan remains at the center of U.S. efforts in Afghanistan and is vital to U.S. national security.

In order to reduce the flow of illegal proceeds from reaching terrorist organizations from the sale of opium, the USG supports reductions in poppy cultivation through programs providing incentives and disincentives to the drug trade, as delineated by the U.S Counternarcotics Strategy for Afghanistan. Incentives include programs to provide quick-impact development assistance through the Good Performer's Initiative (GPI) and USAID funded alternative development efforts. INL also funds public information outreach to deter poppy farming and to explain the consequences of participation in the drug trade. This effort includes the Counter Narcotics Advisory Teams (CNAT), which are designed to assist local officials in deterring poppy cultivation. Disincentives to poppy growth include eradication and interdiction efforts in Afghanistan. Internationally, the U.S. Department of State has been designated the lead Federal agency for funding the opium poppy eradication efforts in Afghanistan. INL supports the fielding of a central government-led Poppy Eradication Force (PEF) to conduct eradication in areas where governors are unable or unwilling to lead credible eradication efforts. INL, working

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closely with the Drug Enforcement Administration and the Department of Defense are building infrastructure, providing training, and life support to create a self-sustaining, capable Counter Narcotics Police of Afghanistan (CNPA). Creation of such a force will be able to interdict drug shipments, disrupt trafficking operations, dismantle processing labs, and arrest and build prosecutable cases against mid and high value targets. By adversely affecting a traffickers operations and network, there is an upset to the flow of money, monetary transactions, and terrorist financing that could have resulted from drug proceeds, as well as a net loss to the trafficker's operation, introducing increased risk to the trade.

Domestically, the Department of Homeland Security (DHS) is committed to stopping the entry of illegal narcotics into the United States and tracking and severing the connections between drugs and terrorism. In this effort, the DHS Office of Counternarcotics Enforcement operates the Drug-Terror Nexus (DTX) Project. The purpose of the DTX Project is to identify and analyze the specific relationships that exist between drug trafficking and terrorism and to encourage the law enforcement community to target those relationships. The DTX Project is able to: identify cases in which there appears to be a drug-terror nexus, conduct preliminary evaluations of this information, and disseminate the information to other concerned parties, from tacticians to policymakers. At the border, U.S. Customs and Border Protection (CBP) also supports this effort. CBP intercepts illicit material and contraband illegally entering or exiting the country. To prevent illicit financial proceeds from reaching terrorist or criminal groups outside the U.S., CBP has developed two outbound programs that specifically relate to terrorism and terrorist financing, the Currency Program and Exodus Program. In addition, U.S. Immigration and Customs Enforcement (ICE) actively participates in the Federal Bureau of Investigation's (FBI) Terrorist Financing Operation Section (TFOS). ICE and FBI work collaboratively to determine whether their respective investigations are related to terrorism or terrorist financing.

Other interagency efforts include the Treasury Department's Terrorist Finance Tracking Program (TFTP). TFTP has been a force multiplier in identifying, tracking, and pursuing suspected Middle-Eastern terrorists, like al-Qa`ida, Hamas, Taliban, Hezbollah, and their financial supporters. This program tracks terrorist money and assists in broader U.S. Government efforts to uncover terrorist cells and map terrorist networks here at home and around the world. By following the money, the U.S. has been able to identify and locate operatives and their financiers, chart terrorist networks, and help keep money out of their hands. In addition, the Department of Treasury also has utilized both the Foreign Narcotics Kingpin Designation Act (Kingpin Act) and Specially Designated Global Terrorist (SDGT) program to list Afghan individuals and organizations tied to narcotics and terrorism. Finally, the Director of National Intelligence (DNI) is working with

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partner agencies in the Foreign Terrorist Asset Targeting Group (FTATG). The FTATG engages in joint discussion with National Security Council (NSC) members and conducts intelligence assessment of individuals and groups financing terrorism.

Question#:	9
Topic:	MOUs
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: Federal law enforcement agencies often share concurrent or competing authority when conducting investigations into violations of federal law. The competing interests are usually ironed out by interagency agreements set forth in detailed Memorandums of Understanding (MOUs) signed by the agency heads. It has come to my attention that law enforcement agencies under the Department are bound by three MOUs that are significantly outdated.

These MOUs involve serious topics such as money laundering investigations, investigative guidelines for firearms offenses, and title 21 narcotics enforcement. The money laundering MOU was signed in 1990. The narcotics enforcement MOU was signed in 1994. The firearm investigation MOU was signed in 1978, 30 years ago. It is my understanding that there is tension between Immigration and Customs Enforcement (ICE)—the enforcement arm of DHS—and various law enforcement agencies within the Department of Justice.

I am concerned that current efforts such as the Southwest Border Initiative will stumble if we have interagency fighting over who gets to investigate what.

Do you believe law enforcement can effectively coordinate multi-agency investigations with MOUs that are 30 years old?

Can you tell me what is being done to update these memorandums of understanding?

We need leadership at both DHS and the Department of Justice to come together and update these MOUs to ensure our agents work cooperatively. Will you commit to get this done?

Question: Do you believe law enforcement can effectively coordinate multi-agency investigations with MOUs that are 30 years old?

Response: Although the outdated MOU poses challenges the Department of Homeland Security (DHS) has managed to address the threats we face.
We believe the role of MOUs is in coordinating the interaction of agencies at an operational level in order to coordinate activities and maximize our impact on criminal organizations at the operational level. MOUs are generally not undertaken lightly and, as such, are expected to endure through legislative and executive changes without

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negatively impacting the involved agencies or the work they do to protect our nation. When DHS was created, the Homeland Security Act Savings Clause (6 U.S.C. § 552) transferred all MOUs relating to investigative matters from the former U.S. Customs Service and Immigration and Naturalization Service MOUs to DHS.

With regard to the specific MOUs you have mentioned, DHS recognizes the need to update the current firearms MOU with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); however, we do not believe there is a need to update the Money Laundering MOU.

Question: Can you tell me what is being done to update these memorandums of understanding?

Response: Specifically with regard to the firearms MOU, DHS believes that an updated MOU and proper guidance to ATF and ICE investigative field offices will be invaluable in clarifying roles and responsibilities, while respecting both agencies' equities. Recently, the United States and Mexico have experienced a substantial increase in the trafficking of firearms along the southwest border which has fueled border violence within both nations. As part of their respective missions, both ATF and ICE have focused a substantial portion of their resources towards addressing this serious problem. These agencies face the daunting task of disrupting and dismantling arms trafficking networks sourcing firearms and ammunition in the United States.

ATF and ICE have complementary roles in addressing firearms smuggling to Mexico. Consistent with existing legal authorities and the current MOU, ICE is the sole investigative agency responsible for illegal export and cross-border smuggling of arms, ammunition and implements of war. In turn, ATF is responsible for administration and enforcement of the importation of arms, ammunition and implements of war, as well as the administration and enforcement of licensing, sales, possession and related domestic violations. The most comprehensive U.S. government investigative approach to the problem of southwest border violence can only be achieved through coordinated interagency efforts leveraging both agencies' complementary authorities and expertise.

To this end, ICE and ATF recently met to address the issue of possibly updating the MOU. Through these meetings, which have been quite promising, the two agencies have also discussed deconfliction issues and potentially drafting joint field guidance to ensure all field personnel are working together to address firearms trafficking activities.

With regard to the money laundering MOU, DHS continues to support the guidance and principles in this agreement. This MOU was primarily designed to encourage

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cooperation among the agencies, reduce duplicative investigations and uncoordinated efforts, and to enhance prosecutions. This MOU was not intended to be a static document which delineates the investigative roles and responsibilities of each agency, but instead, a recitation of guidelines and principles for each agency to follow in its investigation and prosecution of money laundering matters. Although new statutes have been created that certainly relate to money laundering investigations, such as 31 U.S.C. § 5332 (bulk cash smuggling) and 18 U.S.C. § 554 (smuggling out of the United States), jurisdiction over these two *smuggling* crimes is clear. By definition, "smuggling" requires something to cross U.S. borders – anything crossing U.S. border falls squarely within DHS jurisdiction. If there were to be any jurisdictional concerns relating to these two statutes, DHS jurisdiction is also adequately addressed in the 1990 MOU through section III(A)(2)(a) & (b), which lists the former Customs Service, now ICE, as the agency having investigatory jurisdiction with regard to 18 U.S.C § 545 (smuggling into the United States) and all things related to currency and monetary instrument reports (as does bulk cash smuggling). As ICE has clear investigative jurisdiction, there is no need to update this MOU. With regard to the drug MOU, there are currently no efforts underway to renegotiate this agreement.

Question: We need leadership at both DHS and the Department of Justice to come together and update these MOUs to ensure our agents work cooperatively. Will you commit to get this done?

Response: DHS will commit to working cooperatively with the Department of Justice to update such MOUs through productive, goal-oriented discussions, when such an update is in the best interests of DHS, the Department of Justice, and the American public.

Question#:	10
Topic:	CFATS
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: The Department of Homeland Security issued final regulations known as the Chemical Facility Anti-terrorism Standards (CFATS) on April 9, 2007. These regulations were required by Congress and are meant to address security of dangerous chemicals at facilities across the country. These regulations became a concern to me when they included stored quantities of propane as a "chemical of interest". Because of an initial decision by DHS to require facilities to register if they had propane in excess of 7,500 pounds, many rural homeowners, agricultural producers, and small businesses in rural areas would have been subject to the regulations. By its own admission, DHS believed the cost to comply with this would have ranged from $2,300 to $3,500. In June of 2007, I wrote to you expressing my concerns, but was merely thanked for my letter and heard little constructive feedback in the July 24, 2007, reply.

In August of 2007, I was joined by a bi-partisan coalition of 16 Senators who wrote to the Office of Management and Budget (OMB) expressing our concerns with this proposed rule. Ultimately, DHS amended the regulation and raised the propane threshold to 60,000 pounds of propane, exempting most rural homeowners, agricultural producers, and small businesses. While this limit still impacts a large number of agricultural producers, it's a step in the right direction. DHS needs to keep Congress in the loop on the impact these adjusted regulations will have. I authored a provision in the Senate version of the Farm Bill that would require DHS to report this impact to Congress. Given that the Farm Bill is in a state of flux, I ask that DHS provide the following once the information is collected from the Top Screen analysis:

The number of facilities that completed the Top-Screen consequence assessment due to possession of amounts of propane that meet or exceed the listed screening threshold quantity.

The number of agricultural facilities that completed the Top Screen due to the listed screening threshold quantity for propane.

The number of propane facilities the Secretary initially determined to be high-risk.

The number of propane facilities required to complete a Security Vulnerability Assessment, Site Security Plan, or that submitted an Alternative Security Program.

The number of propane facilities that appeal the determination of a finding under the final rule.

To the extent available, the average cost of completing the Top-Screen requirement, the

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average cost of completing a Security Vulnerability Assessment, and the average cost of completing and implementing a Site Security Plan.

Response: Implementation and execution of the Chemical Facility Anti-terrorism Standards (CFATS) regulation requires the Department to identify which facilities it considers high-risk. The Department developed the Chemical Security Assessment Tool (CSAT) to identify potentially high-risk facilities and to provide methodologies that high-risk facilities can use to conduct Security Vulnerability Assessments (SVAs) and to develop Site Security Plans (SSPs). CSAT is a suite of online applications, including user registration, the initial consequence-based screening tool (or Top-Screen), an SVA tool, and an SSP template. Through the Top-Screen process, the Department can initially identify which facilities do or do not have a significant potential to be the source of significant adverse consequences to human life or health (that is, those that are or are not high-risk) and can then "screen out" those facilities across the country that are not high-risk.

The Department required facilities that possess a chemical of interest at or above the listed Screening Threshold Quantity in Appendix A to the CFATS rule to complete the Top-Screen within 60 calendar days of the publication of Appendix A (or within 60 calendar days of coming into possession of a chemical of interest at or above the applicable Screening Threshold Quantity *after* publication of Appendix A). Because Appendix A was published on November 20, 2007, the due date for initial Top-Screen submissions was January 22, 2008. By that date, the Department had received 23,264 Top-Screen submissions from chemical facilities. More than 30,000 Top Screens have been received to date.

For implementation of the CFATS program, the Department is using a phased approach to roll out the regulation at the facility level. In advance of the release of Appendix A, the Department began Phase 1 of CFATS implementation at certain facilities that the Department believed, based on available information, would likely be high-risk. Following initial outreach at the corporate level, the Department sent letters to approximately 90 facilities, informing them of their selection for participation in Phase 1 and advising them of the requirement to submit a Top-Screen. The facilities were to complete the Top-Screen in advance of the release of Appendix A and were offered technical assistance from Department inspectors. The Department, after receiving the majority of Phase 1 Top-Screens, reviewed these submissions for initial high-risk determinations. A number of Phase 1 facilities initially determined to be high-risk received written notification from the Department in March 2008 informing them of the Department's determination and instructing them of the requirement to complete an SVA for departmental review. The Department is offering technical assistance to those Phase

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1 high-risk facilities as they conduct the SVA process, which were due from those select Phase 1 facilities May 30, 2008.

In addition to the above, publication of the final Appendix A initiated Phase 2, the full implementation of the CFATS program. Phase 2 covers all facilities that possess chemicals of interest at or above the listed Screening Threshold Quantities listed in Appendix A – the bulk of the facilities that submitted Top-Screens previously mentioned. Those facilities subsequently determined by the Department to be high-risk will soon receive preliminary tiering decisions and instructions on how, and by when, to complete SVAs. Upon receipt of a facility's SVA, the Department will review it to make final high-risk and tiering determinations, and covered facilities will be required to develop SSPs. The Department will review those SSPs and conduct onsite facility inspections to ensure compliance with the submitted plan.

The data requested in this Question for the Record are not yet available because the analysis is ongoing – but nearing completion. As the analysis is completed and initial preliminary tiering notifications are made, we would be happy to provide a full briefing on CFATS implementation, specifically addressing the questions related to propane. Additionally, the average cost information requested will be available as the different modules of the CSAT suite of tools are provided and used over time, and we would be happy to provide that information as it becomes available; however, some of the other questions in this QFR will not have answers for some time since they depend on events that have not yet taken place. For example, it will not be possible to provide the number of facilities submitting Site Security Plans (SSPs) until all SVAs have been submitted and the Department makes final decisions on which facilities are high-risk and are therefore subject to the SSP requirement. DHS believes it is possible that many facilities initially considered high risk will not be finally considered high risk after their SVAs are reviewed.

Question#:	11
Topic:	Sex tourism
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Grassley
Committee:	JUDICIARY (SENATE)

Question: As you know, on July 27, 2006, the President signed into law a bill many of us here on Committee worked hard on, the Adam Walsh Child Protection and Safety Act. I am a strong believer in this legislation and was pleased to learn that protecting children from predators is high on the list of priorities at the Department. Our children need to be able to grow up free from concerns about child predators and strong enforcement is the key to making this a reality.

That said, I have concerns about our efforts to curb a growing trend in sex trafficking and sex tourism. The Victims of Trafficking and Violence Protection Act of 2000 required the Secretary of State to report to Congress about trafficking in persons and sexual exploitation around the world. The 2007 Trafficking in Persons Report recognized this problem noting that each year more than one million children are exploited in the global commercial sex trade. I find this number staggering and worry that as a byproduct of our efforts domestically, we may be driving our problem outside our country. I believe we have an obligation to ensure that we protect our children at home and those abroad. Given that agents from Immigration and Customs Enforcement (ICE) investigate crimes against children combined with DHS's mission to secure our ports of entry, I request a response to the following:

Would DHS support such efforts to prevent persons convicted of sex trafficking from obtaining a passport to travel overseas?

Would DHS support efforts to identify convicted sex offenders to nations abroad prior to their travel outside the United States?

Has DHS taken steps to prevent and deter convicted sex offenders and sex traffickers from traveling abroad? .

What efforts has DHS taken to mitigate and prevent child sex tourism abroad by U.S. citizens?

Question: Would DHS support such efforts to prevent persons convicted of sex trafficking from obtaining a passport to travel overseas?

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Primary:	The Honorable Charles E. Grassley
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Response: First, I commend you for looking into ways to address such a serious issue. As with any legislative change, the proposal would need to be carefully considered and balanced against individual rights. Depending on how the proposal is framed there may be concerns about implementing such restrictions to the extent they could infringe on a U.S. person's due process rights and right to travel. With regard to passport restrictions, we note that any such program would have to be coordinated through the Department of State, which controls the issuance of passports and visas, and the FBI, which maintains the National Sex Offender Registry. The Department of Justice should also be included in any program involving sex trafficking. I look forward to working with the committee on these important issues.

Question: Would DHS support efforts to identify convicted sex offenders to nations abroad prior to their travel outside the United States?

Response: As stated above, this issue would need to be carefully considered and I look forward to working with the committee on this issue. In fact, ICE has been working cooperatively with congressional staff to provide technical assistance on H.R. 5722, which deals specifically with this issue. Again, we caution the framing of this requirement to ensure the person's privacy rights are not infringed upon more than necessary to accomplish this goal and also recommend that this be limited to certain convicted sex offenders, for example, child sex trafficking and child sex tourism, as opposed to all convicted sex offenders, a very broad category.

Question: Has DHS taken steps to prevent and deter convicted sex offenders and sex traffickers from traveling abroad?

Response: The ICE Offices of Investigations and International Affairs proactively investigate potential child sexual exploitation crimes, ranging from possession and distribution of child pornography to child sex tourism. These investigations and our corresponding programs established and investigated throughout the United States and our 52 Attache offices worldwide, focus on all persons prone to commit such crimes, including those who have prior convictions for child sex offenses. On the international front, ICE, through the Offices of Investigations and International Affairs, has been working cooperatively as a Founding Member of the Virtual Global Taskforce (VGT) with the UK, Canada, Australia, Italy, and Interpol. The VGT is a taskforce dedicated to proactively identifying child predators. In addition, through the G8, OI and OIA are currently working in cooperation with Italian authorities to establish a child sex tourism initiative focused on international efforts to deter and prevent child sex tourism around the world. Finally, both OI and OIA are providing their expertise to assist in the

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development of child sex tourism deterrence operations in high-risk areas such as Cambodia, Thailand, Mexico, and Eastern European countries.

Question: What efforts has DHS taken to mitigate and prevent child sex tourism abroad by U.S. citizens?

Response: As stated above, the ICE's Offices of Investigations and International Affairs work cooperatively with our foreign partners on new and innovative methods of investigating and prosecuting child predators around the world. ICE recognizes the growing threat of child sex tourism as U.S. laws evolve and U.S. law enforcement becomes more proactive. ICE continues to work with its foreign partners in joint investigations as well as training programs and outreach activities, particularly in identified high-risk areas of the world.

ICE has consistently taken a proactive stance in engaging our foreign partners in the investigation and apprehension of American child predators. With the assistance of our foreign partners, ICE Attache offices in Southeast Asia and Western Europe, particularly Thailand, Cambodia, and Romania, have had numerous successful investigations and prosecutions of Americans traveling abroad with the express purpose of sexually exploiting children. In such situations, the offenders are extradited or deported to the United States for prosecutions which generally result in lengthy prison sentences.

Jurisdiction for prosecution of child sex tourism with a nexus to the United States extends extraterritorially. With the assistance of our foreign partners, ICE is signaling to the world that the United States takes responsibility for its citizens and will prosecute them for these heinous actions, anywhere in the world.

Question#:	12
Topic:	EB-5 Regional Centers
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: The EB-5 Regional Center program is set to expire in September of 2008. This program has been responsible for the creation of thousands of jobs and millions of dollars of capital investments in America's communities. I have long supported this program, and recently introduced a bill with Senator Specter to make permanent this successful program, among other improvements. But I know that with the expiration looming, many people involved in the Regional Center program, as well as potential investors, are feeling uncertain about the program's future.

Without asking you to comment on the other improvements in the bill, do you support the continuation of the Regional Center program?

Response: The Immigrant Investor Program, also known as "EB-5," has since 1990 reserved approximately 10,000 employment-based immigration visas each year for aliens who invest $1 million (or $500,000 in high-unemployment or rural areas) and create full-time jobs for at least 10 U.S. citizens or lawful permanent residents.

Of the available EB-5 visas, 3,000 are set aside annually for an Investor Pilot Program involving investment in a "regional center" to promote economic growth, as designated by USCIS. The Investor Pilot Program within the EB-5 program was established by Congress in 1992 and has been amended and extended several times since then. Under current law it is scheduled to expire on September 30, 2008. The EB-5 program is permanent, and the total number of visas available to EB-5 immigrants would thus be unaffected by expiration of the Pilot Program.

Since 2003, at least 21 EB-5 regional centers have been either approved or reaffirmed by USCIS. Currently, active EB-5 regional centers are in some of the following states: California, Pennsylvania, South Dakota, Vermont, Washington, Iowa, Louisiana, Texas, Wisconsin, Alabama, Virginia, Maryland and the District of Columbia. The regional centers have provided large scale "pooled" investment of capital for commercial economic development and job creation targeted in economically weak communities across the United States such as in economically distressed and rural areas and have been established in conjunction with state and local economic development authorities.

The bill would make regional centers a permanent program and make other changes to the program, including setting certain fees, establishing a separate account for EB-5 fees, and require concurrent filing of immigration petitions under the program and applications for adjustment of status to be permitted. Although, the Administration does not have a

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formally expressed position at this time on extension of the Investor Pilot Program, we favor reauthorization of the program in general but have concerns about the fiscal provisions. We look forward to working with Congress on the specifics of any legislation to reauthorize the regional center program.

Question#:	13
Topic:	material support
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: Congress has now twice given you the authority to alleviate the effects of the material support and "terrorism" related bars in the Immigration and Nationality Act. Despite repeated assurances, the Department has not implemented a process to grant waivers to individuals affected by these bars. And despite the additional authority granted by Congress in December as part of the Consolidated Appropriations Act of 2008, since that time the Department has been denying green card applications of individuals who could have benefited from the authority provided by that legislation. Only when the Washington Post highlighted Saman Kareem Ahmad's case did you take action to suspend the green card denials for Mr. Ahmad and other similarly situated individuals who may benefit from the legislation that was passed as part of the Consolidated Appropriations Act.

Please provide a concrete time-frame -- in weeks, not months -- for implementing the statutory authority Congress gave you more than three months ago to alleviate the worst consequences of the material support and terrorism-related bars.

Response: As of the end of March 2008, the Secretary of Homeland Security and Secretary of State's exercises of discretionary authority not to apply the terrorist-related provisions of the INA have benefited over 5,000 applicants for refugee status, asylum, or adjustment of status. The Consolidated Appropriations Act of 2008 (CAA) expanded the discretionary authority not to apply certain terrorist-related provisions as they relate to undesignated or "Tier III" terrorist organizations, or to an individual alien. Additionally, section 691(b) of the CAA named certain groups that are not to be considered terrorist organizations under the Act based on activities occurring before December 26, 2007. USCIS has been applying the automatic relief provision for the ten groups named in section 691(b) of the CAA.

The use of the discretionary exemption authority requires action by the Secretary of Homeland Security or the Secretary of State in consultation with the other and the Attorney General. USCIS is coordinating closely with DHS to ensure that the Secretary of Homeland Security has the information necessary to decide on the appropriate use of his authority. To ensure appropriate consideration of all groups of cases for which the Secretary may choose to exercise his discretionary authority under the Act, as amended by the CAA, USCIS issued a hold directive on March 26, 2008. Pursuant to this directive, USCIS has placed a hold on certain categories of cases involving association with, or provision of material support to, certain terrorist organizations. Additionally, USCIS has completed an initial review of all adjustment of status cases denied after May

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24, 2007, on the basis of a terrorist-related ground of inadmissibility. Those cases meeting the hold criteria were reopened and placed on hold; those cases not meeting the hold criteria remain denied. Notice of the action taken by USCIS was sent to each affected applicant. The cases will remain on hold while DHS assesses additional categories of cases for consideration of a discretionary exemption under INA section 212(d)(3)(B)(i), as amended by section 691(a) of the CAA. USCIS has drafted procedures for the adjudication of those cases affected by the additional exercise of authority made by the Secretary of Homeland Security and the Secretary of State on June 3, 2008, regarding individuals not otherwise covered by the automatic relief provisions of section 691(b) of the CAA. When those procedures are issued, the affected cases will be released for adjudication. As DHS makes determinations on additional categories of cases, affected cases currently on hold will also be adjudicated. For cases in which jurisdiction has not vested with the Executive Office for Immigration Review, USCIS will also consider requests to reopen or reconsider decisions issued before the CAA's enactment where the change in law regarding the identified groups no longer being considered terrorist organizations may now benefit the applicant.

The USCIS Refugee Affairs Division is working with its DOS partners to identify refugee cases denied overseas that would be appropriate for re-presentation to USCIS given the changes made by the CAA and USCIS' new hold policy.

Question#:	14
Topic:	terrorist organization
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: It has been reported that USCIS officials have used basic internet searches to make a determination about whether past or present organizations should be deemed "terrorist organizations". For example, in Mr. Ahmad's case, USCIS determined that the pro-American, anti-Saddam Hussein group the Kurdistan Democratic Party was a terrorist organization.

What procedures does DHS use in designating a group such as the Kurdistan Democratic Party as a "terrorist organization"?

Response: For immigration purposes, the Immigration and Nationality Act (INA) defines an undesignated terrorist organization as a "group of two or more individuals, whether organized or not, which engages in, or has a sub-group which engages in," any of the expansive list of activities contained in INA section 212(a)(3)(B)(iv). Under this definition, two or more individuals found to have unlawfully committed an act using any explosive, firearm, or other weapon or dangerous device under circumstances indicating an intention to cause death or serious bodily injury, and for other than mere personal monetary gain, constitute a "terrorist organization." As noted by the Board of Immigration Appeals, "Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as 'freedom fighters.'" *See Matter of S-K-,* 23 I&N Dec. 936, 941 (BIA 2006), *remanded by Matter of S-K-,* 24 I&N Dec. 289 (A.G. 2007) (noting that the remand "does not affect the precedential nature of the Board's conclusions"), and *granting relief in,* 24 I&N Dec. 475 (BIA 2008).

Unlike the other sections of the "terrorist organization" definition, INA Section 212(a)(3)(B)(vi)(III) does not contemplate a formal designation process, leaving the determination to be made on the facts of each case. Whether a group is a "terrorist organization" is determined on a case-by-case basis by examining the activities of the organization in question. No agency designation or determination process is required under the statute in order to determine that a group is an undesignated "terrorist organization." Accordingly, USCIS does not maintain a list of groups that have been determined to be "terrorist organizations" under INA Section 212(a)(3)(B)(vi)(III). However, USCIS has established a mechanism to share information and discuss determinations on this issue to promote consistency within the organization.

USCIS adjudicators rely on a number of resources to determine whether a group meets the definition of a Tier III terrorist organization under INA section 212(a)(3)(B)(vi)(III). In addition to the statute, case law, and agency guidance, USCIS adjudicators use various

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Topic:	terrorist organization
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

sources to research the activities of relevant organizations. These sources may include U.S. Government resources, as well as open source materials published by other credible entities.

Question#:	15
Topic:	REAL ID - 1
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: In light of lengthy delays for implementation brought about in part by the resistance from many States to this unfunded mandate, it appears that REAL ID now stands as an obstacle to timely enhanced ID security, rather than a path to it.

Leaving aside that the REAL ID Act is a congressional mandate, why, as a matter of better policy, should we not repeal the unfunded mandates of REAL ID and approach this as a negotiated rulemaking matter with the States as it was originally conceived?

Response: REAL ID is a statutorily-mandated nationwide effort that will improve the integrity and security of State-issued driver's licenses (DL) and identification cards (ID), which in turn will help fight terrorism and reduce fraud. The need for secure documentation was a core 9/11 Commission recommendation. State-issued driver's licenses and IDs serve many purposes in today's society, including being a primary identifier for individuals attempting to access a Federal facility, board Federally-regulated commercial aircraft, and enter nuclear power plants. Terrorists know this, and actively seek this form of identification.

As a result of 9/11 and the REAL ID Act, many States have individually made significant investments to improve DL/ID processes, cards and card issuance security. Over time, REAL ID implementation will add layers of security to State processes and the cards they produce.

From the point the Notice of Proposed Rulemaking (NPRM) was released, to the release of the Final Rule, DHS made extensive efforts to provide stakeholders, in particular the states, with multiple opportunities for providing comments and input. In 2007 DHS hosted a town hall meeting in California that was available nationwide via webcast to hear directly from the public, and assembled the members of the 2005 Department of Transportation- led negotiated rulemaking committee in order to gather input and comments directly from those groups. In addition, DHS consulted extensively with the states to develop the rule. DHS met with representatives of nearly all state and territory DMVs and visited nearly two dozen states to tour their DMV operations and discuss implementation of the REAL ID Act. Additionally, this final rule follows a NPRM published on March 9, 2007, that garnered over 21,000 comments that DHS analyzed prior to developing this final rule. The final rule reflects the product of extensive outreach to key stakeholders from state motor vehicle offices, state legislators, governors' offices, and the associations representing these state groups, as well as discussions with groups representing privacy and civil liberties concerns.

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DHS believes that repeal of REAL ID, discrediting the significant efforts that have been undertaken to date, and beginning extended, additional rounds of negotiated rulemaking, would unnecessarily delay, perhaps indefinitely, the critical enhancements that must be made to driver's licenses and identification documents, and diminish our capability to fight terrorism and fraud.

Question#:	16
Topic:	REAL ID - 2
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: In its final regulations for implementing the Real ID Act, the Department reduced the projected costs of the program partially by claiming that the federal government would pay for the construction and maintenance of the verification databases contemplated in the Act. However, DHS is currently allocating roughly $80 million in Real ID grants to the states, and is requesting that the states use that money to build these same verification systems.

What is the Department's position on who bears the fiscal responsibility for building Real ID's verification system and for implementation of the program overall?

Response: The issuance of driver's licenses and identification cards is a State function, where costs will continue to be borne primarily by each State. Neither the REAL ID Act nor this rule alters this responsibility. That said, the Department of Homeland Security (DHS) recognizes that States will incur significant costs in implementing REAL ID, and has sought to reduce the anticipated financial impact in several ways.

First, DHS has instituted a grant program, funded by Congress, for REAL ID. In June, $79.575 million will be awarded, and the President's budget request for FY 2009 included up to $150 million in FEMA National Security and Terrorism Prevention and State Homeland Security Grants.

Second, the President requested $50 million in appropriated funds for development of the verification hub, a critical capability for verifying information provided by applicants for driver's licenses and identification cards. This request builds from approximately $17 million in FY 2008 that will be used to begin development of the verification hub. During the Notice of Proposed Rulemaking comment period and in many subsequent conversations, States consistently expressed the concern that they were not capable of developing and deploying an electronic document verification system and urged DHS to assist in establishing this capability. In response, DHS pledged to work with States on the establishment of a verification hub that would be governed by the States, for the States. The verification hub will act as a central router to provide timely, accurate, and cost-effective verification to all sources through a single mechanism. The alternative – having each State connect directly to every other State and to Federal sources separately – is inefficient and cost-prohibitive.

Last and most importantly, DHS reduced the estimated implementation costs to States by 73 percent in the final rule and gave States additional time and flexibility to comply.

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Topic:	REAL ID - 2
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Many States have already made significant progress toward meeting the Material Compliance benchmarks that would qualify them to receive a second extension until May 2011.

Question#:	17
Topic:	privacy
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: In light of all of the recent stories about personal data privacy breaches – such as the theft of personal information from the National Institutes of Health and passport files being compromised – it is particularly important that Real ID be implemented with strong protections for the privacy of personal data. This is especially true because Real ID requires the creation of a national database of driver information to be shared between states. Yet, the final DHS regulations contain no plan to secure the information in this massive database. In fact, the Department seems to contemplate that the American Association of Motor Vehicle Administrators will operate the database required under the Act – with absolutely no regulatory requirements for data security. This private association has no accountability to any of our citizens, as it is not bound by the Privacy Act or the Drivers' Privacy Protection Act.

Please explain your justification for the absence of any plan for protecting the personal data that will be accessible in the planned database.

Response: DHS recognizes the importance of protecting privacy and ensuring the security of the personally identifiable information (PII) associated with implementation of the REAL ID Act (Act). The Department is committed also to ensuring that implementation of the final rule protects and does not erode privacy.

The final rule does not create a national database as the question presumes. Instead, it creates a network of databases owned and operated by State governments. Therefore, the States are best situated to implement effective privacy protections. Accordingly, section 37.33(b) of the final rule explicitly calls on the States to protect PII collected pursuant to the Act. Section 37.41 requires each State to document their methods of doing so in a written security plan, which includes a number of privacy and security elements that must be present in order to effectively protect the PII in State databases.

In conjunction with the final rule, moreover, the DHS Privacy Office issued a Privacy Impact Assessment (PIA) addressing the privacy issues posed by the Act and final rule. In addition to this analysis, the PIA included its *Best Practices for the Protection of Personally Identifiable Information Associated with State Implementation of the Real ID Act*, a guide to the States on how to address the privacy and security of information related to REAL ID. Both the PIA and Best Practices are posted at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_realidfr.pdf.

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The final rule stated that DHS was exploring the use of a pointer system or verification hub in order to facilitate the checks against Federal systems, and the State-to-State checks to ensure that each individual has only one valid REAL ID.

DHS is evaluating how best to conduct these checks. Under a pointer system, only a small amount of PII is necessary in order to direct the pointer to the State that holds the driver's record. The pointer or verification hub would be wholly State-owned and operated. The hub would not store any information beyond what is necessary to route verification queries to the appropriate State or Federal agency for a response. The State-to-State exchange would enhance privacy by providing States with a method to check for duplicate registrations in multiple States, therefore limiting the ability for "bad actors" to obtain multiple licenses for fraudulent purposes.

As stated in the preamble to the Final Rule, DHS will work with the States to ensure that security measures are in place to prevent unauthorized access to or use of the information if a pointer system is used. DHS stated that it would encourage all State operations to meet the equivalent of Federal Information Security Management Act (FISMA) standards.

Taken together, the protections contemplated by the final rule promote privacy far more effectively that what is required today under Federal or most State laws. The Department and the program will continue to work with the States and the DHS Privacy Office to ensure the privacy protections contemplated by the final rule are implemented as the States begin issuing REAL IDs.

Question#:	18
Topic:	private landowners
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: The Department has recently struggled with private landowners on our southern border over access to their lands for the purpose of building a border fence. Last December, a U.S. Border Patrol agent asked Baldermero Muniz, who is 84 years old and does not read or write, to sign a paper allowing the government to survey his land overlooking the Rio Grande River. When Mr. Muniz refused, the government sued him. Officials from the Department also sent warning letters to 135 private landowners, municipalities, universities, public utility companies and conservation societies that had refused to let surveyors on their land, giving them 30 days to change their minds or face legal action.

Given that the Consolidated Appropriations Act that was passed in December mandates consultation with, among others, private landowners in relation to fence construction, what changes has your Department made in its approach to dealing with private landowners who express resistance?

The Consolidated Appropriations Act also gives the federal government discretion in considering alternative infrastructure. How is the Department fulfilling its obligations here? Are lower-impact alternatives to fencing being proposed and considered on private lands, and if so, what are they?

Response: The Department of Homeland Security (DHS) has worked diligently to provide opportunities for interested stakeholders to express concerns and provide feedback regarding our project plans, and are committed to continue consultation with the relevant Federal agencies, State, local governments, Indian tribes, property owners, and other stakeholders. DHS does not view the consultation language found in the Consolidated Appropriations Act of 2008 (Public Law 110-161) as creating new requirements, as the assessment of effects on local communities and regular consultation were already part of our standard planning process. These consultations enable U.S. Customs and Border Protection (CBP) to make informed decisions in deploying tactical infrastructure in the most effective and prudent way.

Recently, the U.S. District Court for the Southern District of Texas affirmed that the Government had been engaging in good faith negotiations with landowners. In the Muniz case, the Government filed a case to acquire a temporary Right of Entry for Survey and Site Exploration (ROE-S) from Mr. Muniz in order to make final determinations of what land would be required to support final construction of border security infrastructure (fence, roads, lighting). In that case, the District Court held that

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the Government engaged in a bona fide effort to negotiate with the defendant, and therefore, the objections raised were overruled.

In all cases, the U.S. Army Corps of Engineers (USACE) in support of CBP is maintaining a chronological negotiator's report as a legal record of all communications and communication attempts made by the government with the landowner. This document is presented to the court in condemnation cases to support that bona fide negotiation efforts indeed took place.

The Office of Border Patrol Sector Chiefs and their staff selected fence locations based on operational assessments relevant to their area of responsibility. In general, locations were chosen based on alien traffic patterns, surrounding infrastructure to include egress and ingress points, future development and infrastructure, proximity to transportation hubs amongst other strategic considerations. Where possible, DHS has already adjusted plans based on consultations. In addition, DHS continues to be open to input regarding potential alternatives and mitigation efforts that still meet the Border Patrol's operational needs. However, DHS cannot engage in endless discussions.

Question#:	19
Topic:	fencing
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: On April 7, 2008, the New York Times reported that the Department was contemplating building border fence at the northern end of the Sabal Palm Audubon Center in Brownsville, Texas. Placing the fence in this location would effectively cede 555 acres of environmentally significant land to Mexico. A Department spokesperson was quoted as saying, in response to a question about whether the fence would be placed such that it would cut off the Center from the United States, that "I can't rule that out, but I cannot also definitely tell you that that will be the case."

When will the Department reach a decision on the location of border fence in this area?

Response: The Office of Border Patrol, within U.S. Customs and Border Protection (CBP), has identified the need for fencing in the area north of the Sabal Palm Audubon Center in Brownsville, Texas. CBP currently has plans to align fence along the northern toe of the IBWC levee in that area. No final decisions have been made yet regarding the precise location of fencing in the area and consultations are continuing between CBP and the Audubon Center regarding their concerns.

The placement of border fencing does not affect the international boundary between the United States and Mexico. Additionally, CBP will not effectively cede any land to Mexico as the Border Patrol will still monitor and patrol the area, as they do now with the existing levee in place. The road across the levee already provides for limited access to the Center, and CBP will maintain current access to landowners as necessary.

Question#:	20
Topic:	Iraqi refugees
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: Our mission in Iraq depends heavily on the service of Iraqi translators who risk their lives helping U.S. troops. By associating themselves with U.S. forces, these Iraqi translators become high-profile targets for insurgents. More than 250 interpreters have been killed since the beginning of the war. In January, President Bush showed his support for such a program when he signed the Defense Authorization Bill, allowing up to 5,000 Iraqis to receive special immigrant visas each year for the next five years, up from the 500 visas allowed previously.

What is the DHS currently doing in coordination with the State Department to implement the legislation passed as part of the Defense Authorization bill? When will the 5000 visas provided by that legislation be available for Iraqis who have helped the United States?

Response: There are two distinct programs for Iraqi special immigrant visas (SIVs). The first program, established in FY 2006, benefits Iraqi and Afghan translators and their family members, authorizing 500 visas for principal applicants (the actual employees) in FY 2007 and FY 2008 (Section 1059 of the National Defense Authorization Act for Fiscal Year 2006, Public Law 109-163). Section 1244 of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Public Law 110-181, established a separate SIV program authorizing 5,000 numbers per fiscal year for certain Iraqis employed by or on behalf of the U.S. Government in Iraq, and their spouses and children. A legislative fix signed by the President on June 3, 2008 (Public Law 110-242), allows these SIVs to be provided beginning in the current fiscal year, rather than FY 2009 as provided by the NDAA. It also authorizes the conversion of approved petitions for SIV status under the section 1059 translator SIV provision filed prior to October 1, 2008 into approved section 1244 petitions without regard to Section 1244 qualification criteria (conversion of Afghan petitions will be authorized even though 1244 numbers would otherwise be for Iraqis only).

DHS is working expeditiously in cooperation with the Department of State (DOS) to fully implement section 1244. A provision in the FY 2008 appropriations bill requires the DOS to establish limited consular services in the Embassy in Baghdad within 180 days of the bill's enactment; and DOS is already implementing this. DOS processing of SIVs in Baghdad depends on the security situation. Embassy Baghdad is in the final stages of approving three panel physicians and is exploring its ability to house and accommodate additional and TDY assistance. Other locations outside of Iraq for

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processing these SIVs depend on the ability of Iraqis to obtain permission to enter the country where they wish to apply for the visa.

With respect to DHS implementation, appropriate guidance and petition filing instructions will be provided to our adjudicators and the public via the USCIS website and other appropriate means. USCIS expects to issue such guidance in early July. Section 1244 petitioners will require thorough review and approval from the DOS Chief of Mission in Iraq or designee prior to submission of the petition.

Question: Given that in 2006 and 2007 the United States failed to fulfill its promises in terms of numbers of Iraqi refugees admitted to the United States, do you think the Administration's latest goal of 12,000 Iraqis to be admitted in 2008 is realistic? What is the Department doing to prepare to meet this goal?

Response: DHS is committed to our joint goal with the Department of State (DOS) to meet the Administration's target of admitting 12,000 Iraqi refugees to the U.S. during FY 2008. USCIS is working aggressively with DOS to complete approximately 16,000 Iraqi interviews by the end of the third quarter of this fiscal year. USCIS and DOS coordinate daily at the staff-level to work to achieve this important goal. In addition, the departments hold biweekly meetings at a senior level—between Ambassador James Foley and Special Advisor Lori Scialabba—to assess progress towards meeting the 12,000 Iraqi refugee admissions goal for FY 2008. These meetings are used to identify ways to facilitate and streamline processing to meet the target admissions number.

The biggest step USCIS is taking to achieve this goal is maintaining a current and timely interview schedule. Since spring 2007, USCIS officers have interviewed Iraqis primarily in Jordan, Syria, Egypt, Turkey, and Lebanon. USCIS is also adapting its circuit-ride planning and staffing model to meet changing needs and conditions. USCIS has teams of adjudicators in the region today and has scheduled to field teams on a nearly continuous basis in the coming months as cases become ready for interview. USCIS has worked with DOS in preparing a schedule of up to another 8,000 interviews for Iraqi refugee applicants during the third quarter. As of May 7, 2008, USCIS has interviewed 11,678 Iraqi refugee applicants this Fiscal Year.

Question#:	21
Topic:	detainment
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: I am troubled by recent news accounts of U.S. citizens and lawful residents being wrongfully detained for immigration violations for long periods of time and without access to counsel. A recent McClatchy story recounts the ordeal of a Minnesota-born man named Thomas Warziniack, whom immigration authorities accused of being an illegal immigrant from Russia. Mr. Warziniack was erroneously detained by Immigration and Customs Enforcement ("ICE") for weeks in an Arizona detention facility. He was only released after the McClatchy news organization managed to track down his three half-sisters, who then obtained a copy of his birth certificate and were able to obtain assistance from Senator Richard Burr's office in contacting ICE to resolve the situation.

As the Administration significantly increases enforcement activities, what additional steps has the Department taken to ensure that no American citizen or legal resident is wrongly held by immigration officials?

Response: Lawful Permanent Residents are generally only candidates for removal proceedings as a result of criminal convictions; if they appear to have abandoned their permanent residence in the United States; or when they have obtained their resident status through fraud or omission. Lawful Permanent Residents placed in removal proceedings as a result of criminal convictions are often subject to the mandatory detention provisions of Immigration and Nationality Act ("INA") § 236(c). Lawful Permanent Residents placed into proceedings for other reasons are eligible for a custody determination and are generally released either on their own recognizance or on reasonable bond. Because ICE has access to the files of all Lawful Permanent Residents, any protracted period of confusion or uncertainty regarding the identity and immigration status of a permanent resident is unlikely, unless that confusion was intentionally generated by the subject in an attempt to be deported in order to avoid criminal proceedings.

In the case of a naturalized or derivative United States citizen, ICE has access to the same aforementioned records allowing prompt confirmation of the subject's identity and citizenship. In the case of native born United States citizens, there is a greater array of documentation to compile and consider, including birth certificates, school records, baptismal records, church records, Social Security records; and vital statistic records. In Mr. Warziniack's case, his alleged birth in Minnesota has not been conclusively established.Warziniak was initially identified by ICE as part of the Criminal Alien Program. At the time he was placed into removal proceedings, he claimed to be a citizen

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of Russia. Removal proceedings against Mr. Warzinack were initiated based upon his own statements that he was born outside the United States. It was not until his removal proceedings that Mr. Warziniak claimed U.S. citizenship; his family and attorney subsequently provided his U.S. birth certificate. Once those documents were validated, the proceedings were terminated and Mr. Warziniak was released from custody. It should be noted that there are documented instances of United States citizens claiming to be aliens in an attempt to avoid criminal proceedings or with the hope of being deported and/or receiving a reduced criminal sentence.

Within the United States' borders, ICE bears the burden of proving that an individual is not legally present in the United States. Pursuant INA § 287(a)(1); 8 U.S.C. § 1357(a)(1), as amended, a law enforcement officer/agent has the authority to question any alien or person without a warrant if the officer/agent reasonably believes the subject is in violation of the United States' immigration laws.

INA § 287(a)(2) provides that if, after questioning a subject regarding their legal status, the officer/agent has reason to believe the person is in the United States in violation of the immigration laws and is likely to escape before an arrest warrant can be obtained, the officer/agent has the authority to make an arrest. However, once the subject provides a credible response that he/she is a United States citizen, questioning regarding alienage stops. See, e.g., Immigration and Naturalization Service v. Delgado, 466 U.S. 210, 217, 219-220 (1984); 8 U.S.C. § 1357(b); 8 C.F.R. § 287.8(b). If the subject gives an unsatisfactory response or admits that he or she is an alien, the subject may be asked to produce evidence that he or she is lawfully present in the United States. 8 U.S.C. § 1304(e) requires aliens 18 years of age and older to carry proof of alien registration at all times. Failure to carry such proof is a misdemeanor punishable by up to 30 days imprisonment and a fine of $100.00

ICE Officers utilize many factors to determine whether an individual is legally present in the United States. ICE officers are extensively trained to question and identify persons regarding their nationality and citizenship. ICE officers have access to a multitude of intergovernmental and private sector databases to assist them in this endeavor. Because the Government has the burden of proof to establish alienage and deportability in removal proceedings, ICE officers ensure that sufficient evidence, which often includes an affidavit provided by the person in custody, substantiates the charges against the subject. ICE also trains its officers to collect physical evidence when available, including passports and other identifying documentation such as a driver's license, to supplement and support the Government's case. The time required to determine whether an individual is legally in the United States is different in each case, and depends on the evidence readily available to the officer. If the subject refuses to speak to the officer/agent and there is no reasonable suspicion that the person was unlawfully present or unauthorized to work in the United States, the subject is not detained.

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To detain an individual for further questioning, the officer must have reasonable suspicion that the individual either; (1) committed a crime; (2) is an alien who is unlawfully present in the United States; (3) is an alien with status who is inadmissible to or removable from the United States; or, (4) is a non-immigrant who is failed to provide truthful information to DHS personnel upon demand. (See 8 C.F.R. § 214.1(f)). If a subject is arrested, a determination is generally made within 48 hours of the arrest whether the alien will be continued in custody or released on bond or recognizance, and whether a Notice to Appear and Warrant of Arrest will be issued. In the event of an emergency or other extraordinary circumstance, a determination will be made within a reasonable period of time following the arrest as dictated by the facts of the case.

If the subject is classified as a "mandatory detention" case under INA § 236(c) or poses a threat to public safety or national security or, his or her claim to United States citizenship is found incredible based upon review of the file, investigative tools and interviews, the subject will remain in ICE custody. Some custody determinations made by ICE are subject to review by an immigration judge. Generally, a custody decision rendered by an immigration judge may be appealed to the Board of Immigration Appeals.

Question#:	22
Topic:	immigration
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: Each year roughly 280,000 people are held on immigration violations at 15 federal detention centers and more than 400 state and local contract facilities nationwide. In recent House testimony, 8 individuals were identified who had been held in immigration custody who should not have been due to lawful presence or citizenship. It is unfortunate that we only learn of these cases through news reports or advocacy groups because the Immigration and Customs Enforcement agency apparently does not track the number of U.S. citizens who are detained or deported. I understand from ICE officials that plans are underway to track instances where citizens or lawfully present individuals are wrongfully detained.

Would you agree that given the magnitude of the harm involved with immigration officials holding an American citizen without access to a lawyer that immigration officials should at minimum have an accounting of when that is occurring?

Is it accurate, as has been reported by ICE to congressional staff, that ICE will begin tracking instances of lawful residents or citizens who are erroneously detained?

Response: ICE currently has no plans to track instances in which citizens or legal permanent residents are subsequently found to be erroneously detained by ICE.

The full spectrum of immigration rules and procedures is designed to identify, arrest, process and remove from the United States aliens present in violation of the INA. ICE officers are extensively trained to question and identify persons as to their nationality and citizenship. ICE also trains its officers to collect physical evidence when available, including passports and other identifying documentation such as driver's licenses and I-551s. Additionally, most often charges of alienage are sustained by an immigration judge in a process which allows all persons access to an attorney, recitation of rights, an appeal process, and full due process. Attorney lists and telephones are readily accessible in all detention facilities, as is other information including telephone numbers to DHS OIG. Further, when ICE acts to enforce a removal order against any person determined by an immigration judge or the Department to be an alien and removable from the United States, ICE must first obtain a travel document. Travel documents are issued by a foreign government only after officials of that government have ascertained from information available to them, which often includes a personal interview, that the person being removed from the United States to their country is in fact a native and citizen of their country.

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There are instances, however, of aliens falsely claiming to be U.S. citizens. Pursuant to section 212(a)(6)(C)(ii) of the INA, an alien is inadmissible if he or she makes a false claim to U.S. citizenship for any immigration purpose or benefit. An exception to this ground of inadmissibility is if the alien reasonably believed at the time of making such representation that he or she was a citizen.

Further recognition that there are aliens who will intentionally falsely claim to be U.S. citizens is also found in federal criminal statutes that provide for criminal prosecution in instances of aliens claiming to be citizens of the United States in order to register to vote or vote, or to gain employment.

There have also been instances in which U.S. citizens have claimed to be aliens in order to avoid criminal prosecution, thereby running the risk of creating for themselves an "immigration record" which will surface if and when they are apprehended again.

In summary, ICE officers are well-trained to make determination of citizenship and alienage, and do their best under sometimes extraordinarily difficult circumstances. However, when new evidence comes to light calling a finding of alienage into question, ICE expeditiously resolves these issues.

Question#:	23
Topic:	Thomas Hogan
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: Sixty-six individuals have died in administrative custody since 2004. A majority of the immigrants in custody have no criminal history. Around the nation, immigrants held in detention have complained about the lack of medical care available to them, and substandard medical care has been a factor in a number of cases. The cases of Francisco Castaneda and Arturo Alvarez are two such examples. Thomas Hogan, the warden for the York County Pennsylvania Prison, one of the largest detention centers in the country said in a court affidavit that "The Department of Homeland Security has made it difficult, if not impossible to meet the constitutional requirements of providing adequate health care to inmates that have a serious need for that care."

How do you respond to Warden Hogan's criticism?

What is the DHS doing to make sure that the facilities it contracts with to detain prisoners are providing proper medical care?

Before a local or contract prison is asked to hold a detainee, what procedures are in place to make sure the facility has appropriate medical care in place?

What kind of oversight procedures does DHS have in place to investigate detainee deaths?

The DHS has resisted efforts by the American Bar Association and others to turn the legally unenforceable detention standards into regulations. In light of the problems in medical care and the deaths that have resulted, how do you defend your agency's position?

Response: ICE does not agree with the opinion of Warden Thomas Hogan. The foundation of the ICE Medical Program is the four comprehensive National Health Care Standards that were developed in collaboration with the Department of Justice, the US Public Health Service, and other organizations involved in representation of and advocacy for detainees. Although tailored to meet the unique needs of immigration detainees, the health care standards—as with the other ICE detention standards—are based on community detention practices, Federal Bureau of Prisons (BOP) program statements, and the widely accepted American Correctional Association (ACA) standards

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for adult local detention facilities. ICE's health care standards meet or exceed the relevant health related standards of the Joint Commission and the National Commission on Correctional Health Care (NCCHC). ICE is dedicated to ensuring that all facilities that hold ICE detainees are in compliance with these national standards.

Furthermore, all 1.5 million individuals who have come through detention facilities since ICE was created in 2003 have received taxpayer-funded comprehensive medical screening and, for those remaining in ICE custody at least 14 days, a comprehensive physical examination. Each received specific treatment, as medically necessary. Care management was provided by the DIHS or local Intergovernmental Service Agreement (IGSA) contractor at a cost of more than $360 million. ICE spent more than $90 million in fiscal year FY 2007 alone. In FY2007, of the 184,448 screenings, 34% (63,628 individuals) were identified as having chronic conditions, most had hypertension or diabetes. Many of these detainees first learned of their medical ailment or received medical care and treatment for the first time due to this comprehensive screening. In FY 2007, DIHS performed twenty-four biopsies totaling $21,148.08.

As a result of ICE's commitment to providing appropriate medical care to its detainees, the number of deaths at ICE detention facilities has steadily declined each year since the agency's creation. The death rate per 100,000 detainees at ICE facilities for FY04, FY05, FY06, and FY07 is 10.8, 6.8, 6.7, and 3.5, respectively.

Each facility housing ICE detainees has a written plan for delivery of 24-hour emergency health care or when immediate outside medical attention is required. All facilities have current arrangements with nearby medical facilities or health care providers for health care not provided within the facility. These arrangements require appropriate custodial officers to transport and remain with the detainee for the duration of any off-site treatment or hospital admission.

Each facility has a mechanism that allows detainees to request health care services provided by a physician or other qualified medical officer in a clinical setting. Detainees, especially those who are illiterate or do not speak English, can receive help in filling out the request slip for the so-called sick call process.

Each detainee who is identified with a chronic-care issue is treated and educated on self-care needs, and appropriate treatment and follow-up are coordinated. DIHS includes more than 684 doctors, nurses, and other health care professionals. Whoever the service provider, ICE detainees receive appropriate health services consistent with community standards and the ICE mission.

Question#:	23
Topic:	Thomas Hogan
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: What is the DHS doing to make sure that the facilities it contracts with to detain prisoners are providing proper medical care?

Response: ICE strives to maintain safe, secure and humane detention conditions and quality healthcare. ICE incorporates all of the Detention Standards related to Medical Care of Detainees in all of our contracts and Inter-governmental Service Agreements. The language of the agreements is specific as to the Auspices of Health Authority, Level of Professionalism, Access to Health Care, both onsite and offsite medical care, Arrival Screening, Unacceptable Medical Conditions and Pre-approvals for Non emergent Off-site Care, Emergency care, Medical Guard Services and Managed Care Coordinators. We have a system that places Division of Immigration Health Services (DIHS) Managed Care Coordinators at all of the major facilities. In addition, we encourage Service Providers to refer detainees to off-site medical facilities in the event that medical care is necessary which is outside the Service Providers' ability to provide onsite. We use Medicare rates to offset costs to outside medical providers. We inspect all facilities to determine compliance with Detention Standards in regards to medical care, as well as other operational care needs. The inspections are very detailed and are specifically designed to assist ICE in determining whether a facility meets our needs and that of the detained population.

In addition, ICE has awarded two contracts with companies recognized for their expertise in detention management. Detention professionals from Creative Corrections are now performing the annual detention facilities inspections formerly performed by ICE employees on a collateral duty basis. Detention experts from the Nakamoto Group are now serving as on-site, full time quality assurance inspectors at our 40 largest facilities and will be performing the same function on a regional basis for all our other facilities.

Also, ICE created the Detention Facilities Inspection Group (DFIG) within its Office of Professional Responsibility (OPR). The DFIG, implemented in February, 2007 provides objective oversight and independent validation of the detention facility inspection program. It also conducts immediate focused reviews of serious incidents involving detainees.

Question: Before a local or contract prison is asked to hold a detainee, what procedures are in place to make sure the facility has appropriate medical care in place?

Response: All contract detention service providers are required to submit policies, plans and detention operations procedures to ICE for review and approval prior to activation and commencement of service. Contractors are required to provide a management

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system that ensures all written plans, policies, and procedures are reviewed by ICE at least annually and updated as necessary. Service providers are required to develop and maintain a Quality Assurance Plan (QAP) that addresses critical, measurable operational performance standards for the treatment of detainees and services required within detention contracts.

ICE contracts contain a Quality Assurance Performance clause, which are supported by both Quality Assurance and Quality Control Surveillance Plans. The Contracting Officers Technical Representative (COTR) will periodically evaluate and inspect the facility to determine the contractor's adherence to these standards. The contractor is required to correct any noted deficiencies to the government's specifications and return the facility to maximum operating efficiency. If a facility fails to timely correct deficiencies, they may be subject to certain penalties, as outlined in the contract, based on the recommendation of the Contracting Officer. When facilities are unable and/or unwilling to come into compliance, a recommendation to discontinue its use may result.

Facilities are reviewed on an annual basis to determine overall compliance with the current NDS. These facilities include Service Processing Centers (SPCs), state and local Intergovernmental Service Agreements (IGSAs), and Contract Detention Facilities (CDFs). ICE has an aggressive Detention Standards compliance program that measures whether detention facilities are in compliance with the NDS. ICE has recently improved its annual review process and compliance monitoring by contracting with Nakamoto Group and Creative Corrections Corporation, two private companies that bring considerable subject-matter expertise in the corrections field. Nakamoto Group will place subject-matter experts in selected facilities on a daily basis to monitor both detention standards compliance and quality of life issues. Creative Corrections conducts all annual reviews of detention facilities. Each annual review consists of a comprehensive 85-page, 643-point inspection, which takes five specially trained compliance reviewers two to three days to complete. All facility inspections/reports undergo a multi-layer review process and plans of action are required from the field office directors, having jurisdiction over the detention facility, to correct all areas determined to be deficient (not in compliance with the NDS) prior to the placement of ICE detainees.

Question: What kind of oversight procedures does DHS have in place to investigate detainee deaths?

Response: All detainee deaths are reported to the DHS Office of Inspector General, ICE Office of Professional Responsibility and appropriate local authorities. OIG and OPR will open an investigation depending on the facts and circumstances surrounding each case.

Question#:	23
Topic:	Thomas Hogan
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: The DHS has resisted efforts by the American Bar Association and others to turn the legally unenforceable detention standards into regulations. In light of the problems in medical care and the deaths that have resulted, how do you defend your agency's position?

Response: DHS has not yet made a decision as to whether to promulgate regulations governing detention standards. However, DHS has taken substantial steps to increase oversight, training and compliance; steps I believe would have been more difficult to take with regulations in place. In addition, we are currently undertaking a broad initiative to update the ICE National Detention Standards (NDS) into performance-based standards. This would be much more difficult, if not impossible, if regulations were in place. In my view, the current structure of the NDS allows ICE the necessary flexibility to enforce standards that ensure appropriate conditions of confinement. The NDS employed by ICE are also consistent with industry standards, such as those established and promoted by the American Correctional Association (ACA), among other groups specializing in detainee care and treatment. In addition, the facilities are also governed by existing federal, state and local regulations and policies applicable to the particular jurisdiction's correctional/detention programs.

ICE has engaged in negotiations with local service providers, conducted regular meetings with various NGOs, and maintains its own inspection requirements in order to ensure compliance with these standards. The NGO coalition has raised a number of important matters requiring policy, operational, and legal consideration. DHS continues to consider these matters and remains mindful of the flexibility needed to provide appropriate conditions of confinement.

The codification of NDS would limit ICE's flexibility to change procedures and processes as sometimes required in response to the ever changing dynamics of immigration enforcement and recommendations from both governmental and non-governmental entities. ICE takes its responsibility for the detention of immigration violators seriously and is focused on ensuring that the thousands of aliens processed through its detention system are treated appropriately. ICE has a newly developed comprehensive annual inspection and detention oversight program that will ensure that detainees are treated fairly and humanely and that ICE Detention Facilities are in compliance with the NDS. The new annual inspection program will provide for independent and objective quality assurance reviews of all detention facilities used to house ICE detainees.

Question#:	24
Topic:	Torres-Flores
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: In a widely reported incident, a woman named Adriana Torres-Flores was left alone in a Washington County, Arkansas jail cell for four days without food, water, or bathroom facilities, due to the actions of the local law enforcement officials holding her. The local law enforcement officials responsible for Ms. Torres-Flores are party to a 287(g) (8 U.S.C. 1357(g)) agreement with the Department of Homeland Security. This incident suggests a failure of oversight by the DHS with respect to these agreements.

What procedures does DHS have in place to conduct oversight of local officials acting on DHS' behalf pursuant to 287(g) agreements?

Have you taken any steps following the incident with Ms. Torres-Flores to ensure that local officials involved in enforcing immigration law pursuant to 287(g) agreements are adhering to the guidelines set forth in these agreements?

Response: ICE has reviewed the incident you referred to and has concluded that Adriana Torres-Flores' detention was unrelated to and in no way involved the use of 287(g) authorities. Ms. Torres-Flores' detention was based completely on State law and the officer in question was not trained under the 287(g) program.

However, in the very near future, ICE will be sending inspection teams made up of representatives from ICE's Office of State and Local Coordination (OSLC) and Office of Professional Responsibility (OPR) to various 287(g) sites throughout the country to review policies, procedures, facilities and equipment used by the various 287(g) programs to ensure that the terms, responsibilities, obligations and limitations of the Memoranda of Agreement (MOA) entered into with ICE are being fulfilled. It is our goal to review all active and operational 287(g) programs in an effort to ensure that we continue to hold our partnering agencies to the highest standard.

In addition, 287(g) MOAs include a requirement that a "Steering Committee" be established to monitor the agreement. The Steering Committee is required to periodically meet, review and assess the immigration enforcement activities conducted by the participating law enforcement agency (LEA) and ensure compliance with the terms of the MOA. Committee participants are provided specific information on case reviews, individual participants, complaints filed, media coverage and, to the extent practicable, statistical information on increased enforcement activity in the geographic area The Steering Committee generally includes field leadership from ICE and the

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LEA. In addition, immigration enforcement activities by state and local law enforcement personnel are supervised and directed by ICE supervisory agents and officers, or a designated team leader, who reviews enforcement activities on an ongoing basis to ensure the agency's and individual officer's compliance with the MOA and its accompanying procedures and to assess the need for individual additional training or guidance. Participating LEA personnel are not authorized to perform immigration officer functions, except when working under the supervision of an ICE officer, or when acting pursuant to the guidance provided by an ICE agent. Participating LEA personnel are required to give timely notice to the ICE supervisory officer within 24 hours of any detainer issued under the authorities set forth in the Memorandum of Agreement.

Question: Have you taken any steps following the incident with Ms. Torres-Flores to ensure that local officials involved in enforcing immigration law pursuant to 287(g) agreements are adhering to the guidelines set forth in these agreements?

Response: ICE 287(g) Delegation of Authority Program training covers substantive immigration law, DHS policies, and the Department of Justice's "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies," issued in June 2003. Within this intensive training, we expect all 287(g) officers to protect the civil rights of each individual they encounter. As a result of this intensive training, local law enforcement agencies become better positioned to ensure humane treatment of all persons in the United States. Again, ICE has reviewed this incident and concluded that it in no way involved the use of 287(g) authorities. Accordingly, this incident is outside the scope of 287(g).

Question#:	25
Topic:	trailers
Hearing:	Oversight Hearing
Primary:	The Honorable Patrick J. Leahy
Committee:	JUDICIARY (SENATE)

Question: FEMA provided as many as 143,000 trailers to victims displaced from their homes by Hurricanes Rita and Katrina. More than 34,000 trailers are still being used by individuals who have not been placed in permanent housing. On February 14, 2008, preliminary results of testing done by the Center for Disease Control in conjunction with FEMA revealed heightened levels of formaldehyde present in FEMA-issued trailers and mobile homes.

When was FEMA first made aware that the levels of formaldehyde in the trailers exceeded the amount that was safe for long-term human exposure?

On January 28, 2008, CBS News, citing internal CDC emails, reported that Dr. Christopher De Rosa, the director of CDC's Division of Toxicology and Environmental Medicine, told his superiors that there is no safe level of exposure to formaldehyde in FEMA-issued trailers. Mr. De Rosa also wrote in an email that two members of his staff were directed by FEMA officials not to "address longer term health effects" of the toxin in a February 2007 report. Although CDC eventually amended its report to include information about long-term health effects, at any point did FEMA officials direct the CDC to withhold the long term risks associated with formaldehyde from their original 2007 report?

What plan is currently in place to correct problem? Warmer weather will intensify the formaldehyde's toxicity. Will evacuees be relocated before the summer arrives?

Response: FEMA first recognized that a systemic problem regarding elevated levels of formaldehyde in travel trailers may exist following the release of a Sierra Club report in mid 2006.

Question 2: On January 28, 2008, CBS News, citing internal CDC emails, reported that Dr. Christopher De Rosa, the director of CDC's Division of Toxicology and Environmental Medicine, told his superiors that there is no safe level of exposure to formaldehyde in FEMA-issued trailers. Mr. De Rosa also wrote in an email that two members of his staff were directed by FEMA officials not to "address longer term health effects" of the toxin in a February 2007 report. Although CDC eventually amended its report to include information about long-term health effects, at any point did FEMA officials direct the CDC to withhold the long term risks associated with formaldehyde from their original 2007 report?

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Primary:	The Honorable Patrick J. Leahy
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Response: No. The health and safety of temporary housing occupants is of paramount importance to FEMA. FEMA is not aware of any FEMA official communicating such direction to CDC.

Question 3: What plan is currently in place to correct problem? Warmer weather will intensify the formaldehyde's toxicity. Will evacuees be relocated before the summer arrives?

Response: FEMA has committed to a comprehensive relocation strategy that commits the agency to the following actions:

- Entering into direct contracts with hotels in order to obtain the needed hotel/motel capacity.
- Utilizing contract resources to support local relocation.
- Providing food vouchers and stipends for households relocated to hotels without cooking facilities.
- Entering into direct lease agreements with landlords.
- Contracting for temporary storage and/or shipping of household property.
- Contracting for the boarding and care of household pets for families relocated to hotels or apartments that don't allow pets.
- Providing furniture for rental units by working with Voluntary Agencies where possible, and will purchase the furniture when necessary.
- Contracting for moving teams and equipment to assist in the movement of households with special medical needs.
- Providing additional staff to our offices on the ground to facilitate and manage the expedited relocation of households.

Relocation priority is given to unit occupants expressing a health concern and those most susceptible to health risk such as the elderly, households with young children and those with respiratory challenges.

FEMA is also coordinating with CDC to provide occupants with additional public health information. Specifically, CDC and FEMA teams are visiting occupants of CDC tested units to provide them with the specific results for their home and advise them on a course of action.

In addition, FEMA is working closely with HUD to deliver needed case management services to all temporary housing occupants to ensure best access to information and programs that can lead to long-term sustainable housing and self sufficiency.

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Further, it should be noted that EPA and HUD will be coordinating during HUD's review of a proposal to amend its manufactured housing regulations governing formaldehyde, and that EPA is initiating a proceeding to investigate whether and what type of regulatory or other action might be appropriate to protect against risks posed by formaldehyde emitted from pressed wood products."

Gulf Coast Relocation Efforts

At peak occupancy, FEMA had 143,123 families living in temporary housing units (Travel Trailers, Park Models and Manufactured Homes) across the Gulf Coast. Currently, FEMA has 25,357 families living in temporary housing units still located throughout the Gulf Coast. This represents an 82% reduction in the peak occupancy.

Since February 2008, an average of about 1,000 families per week have been relocated out of temporary housing units. During the same timeframe, FEMA has closed over 50 group sites in Mississippi and Louisiana. Less than 20 group sites now remain, and all but 6 group sites, totaling 450 occupants, in Louisiana are forecast to be closed by June 1. FEMA will continue to work with all remaining occupants to attempt to relocate them to a more permanent housing option of their choice as quickly as possible.

Question#:	26
Topic:	ETA
Hearing:	Oversight Hearing
Primary:	The Honorable Dianne Feinstein
Committee:	JUDICIARY (SENATE)

Question: The "Implementing Recommendation of the 9/11 Commission Act of 2007" requires that DHS develop a fully operational electronic travel authorization system that would collect and verify the biographical information of all visa waiver travelers before they get on the plane.

How does DHS define "fully operational?"

You testified during the hearing that with respect to the electronic travel authorization system, DHS was "beginning with the new countries." Does DHS agree that in order to be "fully operational" the electronic travel authorization system must apply to all Visa Waiver Program travelers, not just those from the new countries?

Response: There is no definition of "fully operational" in INA § 217. At the very least, to be fully operational ESTA must meet the statutory description in INA § 217(h)(3)(A): it is "fully automated," "electronic," and capable of collecting "such biographical and other information" as the Secretary "determines necessary to determine, in advance of travel, the eligibility of, and whether there exists a law enforcement or security risk in permitting, the alien to travel to the United States." Additional showings may be required prior to certification.

Although ESTA must at some date apply to every alien traveling under the VWP, the statute delays the effective date of this requirement until "the date that is 60 days after the date on which the Secretary of Homeland Security publishes notice in the Federal Register of the requirement under such paragraph." *See* Pub. L. No. 110-53, Title VII, section 711(d)(2); 8 U.S.C. § 1187 note. This notice has not yet been published, though that likely will happen in November of this year.

As detailed in the Interim Final Rule, 73 Fed. Reg. 32,440 (June 9, 2008), DHS intends that ESTA will be initially operational in English only as of August 1, 2008, at which time travelers from VWP countries may use the system to apply for ESTA authorization. On October 15, 2008, ESTA is intended to be operational in multiple languages and VWP travelers will be strongly encouraged to use the system to apply for ESTA authorization. Roadmap countries that qualify may be admitted to the program after the certification called for in section 711(d)(2); 8 U.S.C. § 1187 note. If and when any of the roadmap countries are admitted into the Program, citizens of those countries will be immediately required to use ESTA prior to traveling to the United States under the VWP. We anticipate that on January 12, 2009, 60 days after the statutory notice referred to

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above, *all* VWP travelers will be required to apply for and obtain ESTA authorization prior to embarking on air or sea travel to the United States under the VWP.

Question#:	27
Topic:	border tunnel
Hearing:	Oversight Hearing
Primary:	The Honorable Dianne Feinstein
Committee:	JUDICIARY (SENATE)

Question: A record number of border tunnels were discovered in 2007. As recently as last week a new border tunnel was discovered near the Otay Mesa port of entry.

What efforts has DHS taken to enforce the Border Tunnel Prevention Act? Have any individuals been investigated or prosecuted under the Act? If not, why not?

What efforts has DHS taken to coordinate the detection of border tunnels with the Department of Defense? Have any new methods of border tunnel detection been developed? Has DHS established any internal mandates or deadlines for the development of new technology? If not, why not?

In February 2007, I was informed in writing by DHS that a single border tunnel coordinator was going to be appointed by the Department. Has DHS appointed a border tunnel coordinator? If not, why not? If so, has the border tunnel coordinator done any outreach to the local areas regarding the compliance with the Act?

Response: Upon discovery of a cross border tunnel by the Border Patrol, the contraband is seized, the area is secured, and notification goes out to DHS's U.S. Immigration and Customs Enforcement (ICE). Once ICE is on scene, all contraband and individuals are turned over to them for investigation. ICE is the investigating agency over cross border tunnel investigations and the subsequent arrest and prosecution of individuals involved in the construction of the tunnel.

The Border Patrol has arrested numerous individuals associated with tunnels and all were turned over to ICE for investigation.

DHS's Science and Technology Directorate (S&T) is coordinating efforts with other entities that share the common objective of developing tunnel detection technologies. These include U.S. Northern Command, Joint Task Force North, U.S. Army Corps of Engineers, Defense Advanced Research Projects Agency, National Geospatial Intelligence Agency, Defense Threat Reduction Agency, and the Tunnel Detection Technical Support Working Group.

On February 1, 2007, S&T posted the Tunnel Detection Technologies Broad Agency Announcement, a High Impact Technology Solution designed to identify, pursue, and provide proof-of-concept that could result in high-payoff technology breakthroughs.

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Also, S&T plans to leverage a promising technology previously funded as a Small Business Innovation Research project under the U.S. Navy's Counter-Narcotics Terrorism Program Office to develop a prototype airborne electromagnetic gradiometer sensor system using an unmanned aerial vehicle. A demonstration of this capability is pending.

DHS S&T currently has two tunnel detection technology development projects. One is for the development and demonstration of an airborne electromagnetic gradiometer; the other is to demonstrate the capability of advanced, frequency-agile ground penetrating radar.

Question#:	28
Topic:	passports
Hearing:	Oversight Hearing
Primary:	The Honorable Dianne Feinstein
Committee:	JUDICIARY (SENATE)

Question: A March 26, 2008 article in the Washington Times discusses the practice of the Government Printing Office to outsource the manufacture of U.S. passports to foreign countries. The article states that "officials at GPO, DHS and the State Department played down such concerns, saying that they are confident that regular audits and other protections already in place will keep terrorists and foreign spies from stealing or copying sensitive components to make false passports."

Was DHS involved in the decision to outsource the manufacture of U.S. passports?

What protections does DHS have in place to protect U.S. passports manufactured in foreign countries from being stolen or misused?

Response: These questions should be directed to both the Government Printing Office and the Department of State, as DHS does not play a role in the manufacturing of passports and related security precautions.

Question#:	29
Topic:	firearms
Hearing:	Oversight Hearing
Primary:	The Honorable Dianne Feinstein
Committee:	JUDICIARY (SENATE)

Question: CNN has recently reported that there are a flood of firearms that are being shipped from the United States to Mexico for use by Mexican drug cartels. An Alcohol, Tobacco and Firearms (ATF) agent said that "the .50 caliber rifle has become the gun of choice for drug cartels." .50 caliber rifles have recently been used by the cartels to kill Mexican police officials near the border. According to ATF, other firearms, including AK-47's and Fabrique National handguns referred to as the "cop killer," are also being smuggled from the United States to Mexico for use by the cartels.

Please describe the interdiction efforts being pursued by the United States Border Patrol aimed at stopping the flood of firearms being smuggled from the United States to Mexico.

How many .50 caliber weapons have been found and confiscated by U.S. Border Patrol agents during the last year?

Response: The Border Patrol seizes numerous weapons while conducting patrol activities along the border. The weapons seizures are normally associated with narcotics smuggling and alien smuggling. The seized weapons vary from AK-47s to small caliber handguns; however .50 caliber weapons have not been encountered or seized by the Border Patrol.

The Border Patrol does not conduct southbound inspections at the Port-of-Entries or along the border which target the illegal exportation of firearms into Mexico. However, should an agent encounter a situation involving this type of illegal activity during his/her normal duties, the agent will take appropriate law enforcement action to include arrest, seizure, and/or referral to other Federal, State, local, or tribal law enforcement.

Question#:	30
Topic:	drug stops
Hearing:	Oversight Hearing
Primary:	The Honorable Dianne Feinstein
Committee:	JUDICIARY (SENATE)

Question: I recently sent you and Attorney General Mukasey a letter detailing allegations made by Mexico Attorney General Eduardo Medina-Mora that the United States border authorities are releasing cartel-affiliated marijuana couriers after these drug runners are detained on the U.S. side of the border. According to Attorney General Medina-Mora, after the U.S. seizes the marijuana loads carried by these drug smugglers, they are being freely released back to Mexico.

Are the allegations described by the Mexico Attorney General true? Are U.S. Border Patrol Agents releasing individuals entering the United States when they are found in possession of marijuana?

Are these cases being referred to the U.S. Attorney's Office in San Diego for prosecution? If so, why aren't these cases being prosecuted?

Response: When a narcotics courier is apprehended by the Department of Homeland Security (DHS), the case will typically be considered for investigation and Federal prosecution by the Drug Enforcement Administration (DEA) or by DHS's U.S. Immigration and Customs Enforcement (ICE), depending upon the facts and circumstances of each case. DEA or ICE, as appropriate, then presents the case to the United States Attorney's Office, which has sole authority to accept or decline Federal prosecution. Should DEA or ICE not accept custody of the case, or if the U.S. Attorney declines prosecution, the case typically will be offered to State and local law enforcement, in which case the State/local prosecutor would then have sole authority to accept or decline the State/local prosecution. For the most part, these drug couriers are often arrested and prosecuted, if not by the Federal Government, then by the State and local authorities.

Additionally, the Border Patrol always lodges immigration charges on all narcotics traffickers who are eligible for removal under the Immigration Act.

Question#:	31
Topic:	section 238
Hearing:	Oversight Hearing
Primary:	The Honorable Arlen Specter
Committee:	JUDICIARY (SENATE)

Questions: Section 238 of the INA already permits a criminal alien to waive his right to a removal hearing as part of a plea bargain with the U.S. Attorney, yet the procedure is relatively unknown.

Does DHS participate in the Section 238 waiver process? If so, how?

Over the past 5 years, how many times has Section 238 been used? If possible, please provide this information by year and district.

Do you believe US Attorneys adequately utilize this provision?

Federal Rule of Criminal Procedure 35 currently allows the federal government to move for a reduction in sentence for "substantial assistance" to the government. Would you support an amendment to Rule 35 that allows the prosecutor to file for a sentencing reduction for "waiver of rights and substantial assistance in removal proceedings?"

Should Congress consider legislation that directs the Sentencing Commission to study solutions and promulgate guidelines? The U.S. Sentencing Guidelines already allow for a number of downward departures and adjustments for things like acceptance of responsibility (Section 3E1.1) and substantial assistance (Section 5K1.1).

Question: Does DHS participate in the Section 238 waiver process? If so, how?

Response: INA 238(c)(5) requires participation by ICE in order to give effect to the statute, e.g., the [Commissioner] Assistant Secretary must provide concurrence to the plea agreement / stipulation. This in turn involves ICE conducting an investigation of issues such as alienage, and determining whether the alien is eligible for any relief from removal, and protection from removal, i.e.asylum.

Question: Over the past 5 years, how many times has Section 238 been used? If possible, please provide this information by year and district.

Response:

Question#:	31
Topic:	section 238
Hearing:	Oversight Hearing
Primary:	The Honorable Arlen Specter
Committee:	JUDICIARY (SENATE)

Judicial Removals - INA Section 238-Closed Cases

Field Office	FY 02	FY03	FY04	FY05	FY06	FY07	FY08	Total FY02 to date
Atlanta	3	3	6	0	0	0	0	12
Baltimore	1	0	0	0	0	0	5	6
Boston	3	3	1	0	2	3	0	12
Buffalo	0	0	2	0	0	0	0	2
Chicago	0	1	0	0	0	0	0	1
Dallas	2	0	0	2	1	1	0	6
Denver	0	0	0	0	0	0	0	0
Detroit	0	2	0	2	0	3	0	7
El Paso	1	2	0	0	1	0	0	4
Houston	0	0	0	0	0	0	0	0
Los Angeles	0	0	0	0	1	0	0	1
Miami	2	1	1	1	5	1	0	11
Newark	9	10	1	3	4	1	0	28
New Orleans	6	3	1	0	0	0	0	10
New York	0	0	1	3	2	0	0	6
Philadelphia	4	8	3	0	1	4	5	25
Phoenix	0	0	0	0	0	0	0	0
Seattle	0	0	0	4	0	1	0	5
San Francisco	0	0	0	1	0	0	2	3
Salt Lake City	0	1	0	0	0	0	0	1
San Antonio	3	0	0	0	0	0	0	3
San Diego	1	0	1	0	0	0	1	3
St. Paul	1	0	0	1	0	1	1	4
Washington	3	3	0	0	1	3	0	10
Total	39	37	17	17	18	18	14	160

Judicial Removals - INA Section 238 Open cases

Field Office	
Atlanta	3
Baltimore	1
Boston	2

Question#:	31
Topic:	section 238
Hearing:	Oversight Hearing
Primary:	The Honorable Arlen Specter
Committee:	JUDICIARY (SENATE)

Buffalo	0
Chicago	5
Dallas	0
Denver	0
Detroit	5
El Paso	1
Houston	1
Los Angeles	1
Miami	5
Newark	2
New Orleans	2
New York	21
Philadelphia	3
Phoenix	0
Seattle	0
San Francisco	1
Salt Lake City	0
San Antonio	0
San Diego	1
St. Paul	0
Washington	3
Total	57

Question: Do you believe US Attorneys adequately utilize this provision?

Response: Although some US Attorneys do utilize this provision, other US Attorneys are hesitant to use it as a general practice. DHS will continue to work with U.S. Attorneys to utilize this provision of law.

Question: Federal Rule of Criminal Procedure 35 currently allows the federal government to move for a reduction in sentence for "substantial assistance" to the government. Would you support an amendment to Rule 35 that allows the prosecutor to file for a sentencing reduction for "waiver of rights and substantial assistance in removal proceedings?"

Question#:	31
Topic:	section 238
Hearing:	Oversight Hearing
Primary:	The Honorable Arlen Specter
Committee:	JUDICIARY (SENATE)

Response: Such a provision would have to be carefully considered in light of the fact that there are some immigration removal charges that are dependent upon a particular criminal sentence being imposed. If judges were reducing sentences because of an aliens promise to be removed, that reduction could allow the alien to avoid certain immigration consequences. There is already current law that allows for the early release of an alien convicted of a non-violent offense. See, INA 241(a)(4)(B), 8 USC 1231(a)(4)(B) (Exception for Removal of Nonviolent Offenders prior to Completion of Sentence of Imprisonment). However that provision calls for early release, not a sentence reduction. The question of whether a sentence for a criminal offense, especially in the case of a felony or other violent offense, should be tied to a civil immigration proceeding is one that DHS has not considered, and would have to be studied. We look forward to working with the Committee about your ideas about how to expeditiously remove criminal aliens from the U.S.

Question: Should Congress consider legislation that directs the Sentencing Commission to study solutions and promulgate guidelines? The U.S. Sentencing Guidelines already allow for a number of downward departures and adjustments for things like acceptance of responsibility (Section 3E1.1) and substantial assistance (Section 5K1.1).

Response: The Department has not explored the complex issue of the use of downward departures in return for stipulation to removal. Generally speaking, it would be important to consider whether the benefits such downward departures might have would outweigh the possible consequences as described above. DHS would be happy to work with the committee to explore ways to quickly and efficiently remove these types of aliens.

Question#:	32
Topic:	removal proceedings
Hearing:	Oversight Hearing
Primary:	The Honorable Arlen Specter
Committee:	JUDICIARY (SENATE)

Question: Only a small percentage of the 300,000-455,000 removable criminal aliens are in federal custody (between 17K and 50K).

How can Congress and DHS best encourage state and local prosecutors and judges to give credit for waiving challenges to removal proceedings?

Do you believe the Rapid REPAT Program is a good model for Congress to expand or broaden?

Are you aware of any problems with those who have been granted early release in exchange for a waiver of removal?

The Secure Communities Plan notes that New York saved approximately $12 million a year since 1995 in incarceration costs under Rapid REPAT. If this program has been around for so long why is not more broadly used? Are there obstacles to expanding the program?

Do you see any constitutional or practical problems with allowing for sentencing credit for waivers of removal?

Question: How can Congress and DHS best encourage state and local prosecutors and judges to give credit for waiving challenges to removal proceedings?

Response: ICE has been aggressively pursuing the implementation of Rapid REPAT in all states, as well as the Commonwealth of Puerto Rico. Local ICE field offices are coordinating with state officials within the respective Departments of Corrections, Divisions of Probation and Parole, and the Governors' Offices to discuss the many benefits of Rapid REPAT and how all parties involved can benefit from implementing this program.

Members of Congress can help promote Rapid REPAT by informing their respective states about the program and directing interested states to ICE.

Question: Do you believe the Rapid REPAT Program is a good model for Congress to expand or broaden?

Question#:	32
Topic:	removal proceedings
Hearing:	Oversight Hearing
Primary:	The Honorable Arlen Specter
Committee:	JUDICIARY (SENATE)

Response: ICE appreciates Congress' support of our efforts and those of participating state governments. Generally speaking, we believe no new federal law is necessary for the program to work in states whose governments are willing to participate. Therefore, we do not believe there is a need for additional Congressional action at this time.

Question: Are you aware of any problems with those who have been granted early release in exchange for a waiver of removal?

Response: The Rapid REPAT Program does not involve a waiver of removal. The program is designed to allow an alien to obtain a reduction in his or her criminal sentence in exchange for the alien's agreement to cooperate in his or her immediate removal and to not return to the United States. We are not aware of any problems relating to those aliens who have participated in the program so far.

Question: The Secure Communities Plan notes that New York saved approximately $12 million a year since 1995 in incarceration costs under Rapid REPAT. If this program has been around for so long why is not more broadly used? Are there obstacles to expanding the program?

Response: One state's laws on parole may vary drastically from another state's parole laws. So, what might work in New York may not necessarily work exactly the same or as well in another state. Indeed, some states may lack the necessarily laws to implement a Rapid REPAT program. However, it was in ICE's best interest to use the arrangement in New York as a model for promoting customized Rapid REPAT programs in other states. To further our mission, we are aggressively pursuing the implementation of Rapid REPAT in all states, as well as the Commonwealth of Puerto Rico. Certainly portions of the New York program can be adopted elsewhere, but it is anticipated that each state's particular Rapid REPAT program will be slightly different, depending on that state's circumstances, laws, and interests.

Question: Do you see any constitutional or practical problems with allowing for sentencing credit for waivers of removal?

Response: The Rapid REPAT Program does not involve waivers of removal. The program is designed to allow an alien to obtain a reduction in his or her criminal sentence in exchange for the alien's agreement to cooperate in his or her immediate removal and to not return to the United States. Consistent with 8 U.S.C. § 1231 (a) (4), only non-violent offenders are eligible to participate in this program. It should be noted, however, that eligibility requirements for State inmates versus Federal inmates are not identical under the statute. ICE does not see significant problems with the program as applicable to State

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inmates, as long as each participating alien inmate is fully advised of the rights he or she is waiving (and executes a written waiver), and is also advised of the criminal and immigration consequences for failure to satisfy the conditions of the early release from incarceration. If either the alien or the participating State fail to abide by the conditions of their agreement, practical concerns may arise. For example, if a participating alien agrees to cooperate in his or her removal but later refuses to cooperate, there could be difficulties in executing the removal. If the participating alien is deported and then unlawfully reenters the United States, it would be necessary to ensure he or she serves the balance of the criminal sentence and appropriate to prosecute the alien for illegal reentry.

Question#:	33
Topic:	latest statistics
Hearing:	Oversight Hearing
Primary:	The Honorable Arlen Specter
Committee:	JUDICIARY (SENATE)

Question: As Congress reviews these issues it would be helpful to have the latest statistics on the use of methods to streamline the removal process.

Please provide the number of instances in which early release of federal criminal aliens has been granted pursuant to INA 241(a)(4)(b)(i) for aliens who waive deportation proceedings and cooperate in repatriation, by federal district and by year for the last 5 years.

Please provide the number of instances in which Rapid REPAT has been used in the last 5 years. If possible, please provide the information by state and, if available, by county.

I understand ICE field offices have contacted state authorities in all 50 states about expanding Rapid REPAT. Please submit a list of states that have committed to participating or not participating and, to the extent possible for those that are uncommitted, by estimated interest level in participating. (e.g. Likely, Unlikely, Wavering).

Question: As Congress reviews these issues it would be helpful to have the latest statistics on the use of methods to streamline the removal process.

Please provide the number of instances in which early release of federal criminal aliens has been granted pursuant to INA 241(a)(4)(b)(i) for aliens who waive deportation proceedings and cooperate in repatriation, by federal district and by year for the last 5 years.

Response: Currently ICE and the Bureau of Prisons do not have an agreement to remove criminal aliens from Federal custody pursuant to section 241(a)(4)(b)(i) of the INA.

Question: Please provide the number of instances in which Rapid REPAT has been used in the last 5 years. If possible, please provide the information by state and, if available, by county.

Response: Since 2005, the ICE DRO Field Offices in Buffalo, NY and New York, NY have removed 434 criminal aliens through Rapid REPAT program.

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Topic:	latest statistics
Hearing:	Oversight Hearing
Primary:	The Honorable Arlen Specter
Committee:	JUDICIARY (SENATE)

Since 2005, the ICE DRO Field Office in Phoenix, AZ has removed a total of 1,133 criminal aliens through this program.

Question: I understand ICE field offices have contacted state authorities in all 50 states about expanding Rapid REPAT. Please submit a list of states that have committed to participating or not participating and, to the extent possible for those that are uncommitted, by estimated interest level in participating. (e.g. Likely, Unlikely, Wavering).

Response: The Rapid REPAT program was modeled on the two existing programs in New York and Arizona. ICE has been in contact with state leadership of all states and Puerto Rico. Discussions are ongoing in all cases; at this time we do not have a set of commitments or declinations. Because our discussions continue, I cannot and should not speculate about individual states' interest levels.

Question#:	34
Topic:	WHTI - 1
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Schumer
Committee:	JUDICIARY (SENATE)

Question: Is DHS working with the Canadian provinces of Quebec and Ontario to reach agreement on enhanced provincial driver's licenses that will be acceptable for land border crossings?

Response: The Department of Homeland Security (DHS) is working very closely with the States and Canada Border Services Agency (CBSA) who works with the Canadian provinces to pursue the development of Enhanced Driver's Licenses (EDLs). British Columbia is already issuing EDLs in a limited pilot and has issued over 500 EDLs to Canadian residents. Today, British Columbia EDL holders are applying for admission at our land and sea borders; it is our understanding that Ontario, Manitoba, and Quebec plan to issue EDLs by the end of this year. Additionally, DHS's U.S. Customs and Border Protection has signed a Memorandum of Agreement with Canada on the information sharing arrangement for the Enhanced Driver's License.

Question#:	35
Topic:	WHTI - 2
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Schumer
Committee:	JUDICIARY (SENATE)

Question: Last week, the Department issued a final rule for the Western Hemisphere Travel Initiative (WHTI). As you may know, Canadians made more than 40 million visits to the United States in 2006, spending more than $13.5 billion. Large numbers of interested entities and individuals, including me, commented during the formal rulemaking process for WHTI that DHS should develop a strong communications plan to let travelers and other affected parties know about new security requirements. Yet only in February of 2008 did DHS award a small contract to a public relations firm to develop a communications plan about new WHTI requirements.

Please explain precisely what DHS and its outside contractor are doing to develop a robust communications and outreach campaign for these new travel policies and to ease what will most likely be an economically costly transition.

Will you agree to share the communications plan with me and other members of Congress so that we can assure ourselves that it will meet the needs of our constituents?

Response: The Department of Homeland Security (DHS) is keenly aware of the impact these very important issues have on local communities and their economies. U.S. Customs and Border Protection (CBP) remains committed to ensuring a smooth transition and mitigating any negative impact on legitimate trade and travel. DHS has moved aggressively to ensure that key audiences are aware of the new policies, and of the rationale behind them as part of our ongoing effort to make America's borders even more secure and to assure that commerce is not unnecessarily impeded by these important changes.

That initiative will accelerate and expand in the coming weeks and months. We are mindful that WHTI represents a significant social and cultural change, and that it is in our best interest to use this change as an opportunity to encourage trade and travel, which is such a vital economic interest to the United States as well as our neighbors.

On February 4, 2008, to alert and educate audiences in both the United States and Canada, CBP awarded a Public Relations Contract to Elevation, LTD, to create a comprehensive plan to proactively communicate the new requirements and document options to the traveling public. We estimate the contract to be worth $10 - $15 million over the next several years.

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Topic:	WHTI - 2
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Primary:	The Honorable Charles E. Schumer
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We will use a variety of tools in this sustained campaign, including paid advertising, public service announcements, press conferences and grassroots outreach, and consumer-friendly materials, as well as leverage existing stakeholder partnerships. This campaign has been designed, and will be executed, to raise traveler awareness across the Nation about secure and standard documents with facilitative technologies, and to ultimately solicit compliance and ensure a smooth transition to full WHTI requirements.

DHS remains committed to ongoing outreach to key stakeholders and the traveling public, specifically frequent border crossers and those living along the northern and southern U.S. borders. The immediate goal of the communications plan is to conduct border events in summer 2008 with a "Know Before You Go" summer travel theme, including advertising WHTI-compliant documents and advising border communities of planned radio frequency identification (RFID) infrastructure construction. As we know, increased summer travel can produce increased wait times. Our intent through this program, as we have done in past years, is to remind the traveling public of potential delays and to encourage them to take steps that help minimize those delays – while also demonstrating that CBP is moving aggressively to make the process smoother, and less time-consuming, in future years while also greatly enhancing border security.

An advertising campaign will be launched later this year to reach the broader national audience that includes infrequent or would-be travelers. Joint press conferences will also be conducted with various states as enhanced driver's licenses become available, beginning with New York in August. Communication activities will be planned in coordination with the Department of State and the production of the passport card, and will be shared with Canadian counterparts to ensure that messages are aligned.

Moreover, when assessing efforts by DHS to ensure a smooth transition to this critical change on our borders, the following factors must be considered also:

- DHS published the land and sea rule more than one year in advance of the full implementation date to give the public ample notice and time to obtain the WHTI-compliant documents they will need to enter or re-enter the United States on or after June 1, 2009.

- The WHTI air implementation in January 2007, and the change in land and sea travel document procedures that went into effect January 31, 2008, has demonstrated the traveling public's willingness to obtain the proper documents. DHS has applied lessons learned, including the need to disperse demand more evenly for travel documents, as well as the production of two additional document

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options – the enhanced driver's license and the passport card specifically designed for land and sea travel.

- DHS is confident that the passport card, with more than 200,000 applications received, and the enhanced driver's licenses being offered by several states, will serve as the cost-effective, convenient alternatives that were requested throughout the rulemaking process.

DHS and CBP would be happy to meet with you and/or your staff in the coming weeks to discuss the WHTI communications plan.

Question#:	36
Topic:	WHTI - 3
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Schumer
Committee:	JUDICIARY (SENATE)

Question: The delayed communications initiative for WHTI exemplifies a broader problem. Good communication with the public can improve security. Travelers who are informed about new policies, changes or fixes are more efficient and possibly cooperative when passing through security screening at a travel facility or international port of entry. However, travelers need up-to-date information in a way that is accessible and easy to follow.

Do you agree that it would make sense to have a specific entity, such as a public-private partnership, devoted to communicating new travel policies, rather than relying on ad hoc outsourcing?

Response: The Department of Homeland Security is in the best position to effectively communicate document requirement changes, due to our extensive networks within the border communities. Our strong partnership with a variety of key border, travel, and trade stakeholders allows us to communicate changes in a timely fashion. We have demonstrated our ability to generate awareness and solicit compliance to the land border communities on new document requirements. Taking a concerted and proactive grassroots approach during a concentrated time period prepared the traveling public for the document changes of January 31, 2008. This grassroots approach translated to a high compliance rate among travelers and a smooth implementation with no attributable wait times as result of the transition.

Question#:	37
Topic:	WHTI - 4
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Schumer
Committee:	JUDICIARY (SENATE)

Question: Prior to full implementation of WHTI, DHS is required to install infrastructure at land border crossings to process the new passport cards. These passport cards contain radio frequency identification (RFID) chips that can be read from a distance, and you have argued that this technology will make border crossing more efficient. At the hearing, you stated that DHS plans to install RFID readers at the top 39 ports of entry by June 1, 2009.

Please identify which land ports of entry in New York are slated to receive RFID readers, and which ports are not slated to receive readers.

For the ports where DHS plans to install readers, please state how many lanes will have readers under the plan and how many lanes will not have readers.

What is your best estimate of when DHS will complete installation of all of the readers that are destined for New York ports of entry?

Response: In preparation for full implementation, DHS awarded a contract on January 10, 2008, to begin the process of deploying vicinity RFID facilitative technology and infrastructure to over 354 vehicle primary lanes at 39 high-volume land ports, which process 95 percent of land border traveler crossings. Site surveys will be completed by the end of May 2008. This summer, we will begin the actual construction at land border locations and the installation of the integrated solution will commence shortly thereafter. Deployment will continue with completion scheduled for May 2009.

Currently, U.S. Customs and Border Protection (CBP) has the optical reader technology in place at virtually all air, land and sea ports of entry. This technology will read any travel document with a machine-readable zone, including passports, border crossing cards, trusted traveler cards and the new passport card. All CBP officers are currently trained in the use of this technology. This means our ports of entry can accept all WHTI-compliant documents today.

The following chart specifies the land ports of entry in the State of New York. CBP anticipates that the installation of the RFID technology infrastructure will be completed by June 1, 2009.

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FY06 Land Port Volume Rank	Land Port Location (crossing location)	# of lanes with RFID readers	# of lanes without RFID readers
5	**Buffalo, NY:**	**39**	
	Lewiston	(6)	
	Peace Bridge	(11)	
	Rainbow Bridge	(18)	
	Whirlpool Bridge	(4)	
18	**Champlain-Rouses Point, NY:**	**12**	
	Champlain	(10)	
	Rouses Point	(2)	
23	**Massena, NY**	**6**	
28	**Alexandria Bay, NY**	**6**	
44	Ogdensburg, NY		3
55	Trout River, NY 5 low volume crossing locations		9
	Total Lanes	**63**	**12**

Question#:	38
Topic:	birth certificate
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Schumer
Committee:	JUDICIARY (SENATE)

Question: On January 31, 2008, DHS began requiring American travelers to present a birth certificate or other citizenship document to return to the United States. As you may know, the Government Accountability Office (GAO) testified before Congress in 2006 about a study during which undercover investigators attempted to enter the United States using fake birth certificates and drivers' licenses that they created with commercially available software. (GAO-06-976T) They were successful at all nine ports of entry they tried, including two in New York. The investigators presented fake birth certificates several times at ports of entry, yet Customs and Border Protection (CBP) officers never recognized them as fakes.

The GAO concluded that, in periodic tests conducted between 2002 and 2006, CBP officers were "unable to effectively identify counterfeit driver's licenses, birth certificates, and other documents." In fact, according to news reports, at least one person has successfully used a fraudulent birth certificate to secure employment as a Border Patrol officer. (San Diego Union-Times, August 5, 2005) These facts are disturbing but not surprising, given that thousands of authorities issue birth certificates; certificates are not standardized; and most certificates lack security or tamper-resistant protections.

I know that our CBP officers are hardworking individuals who are committed to achieving security, but I am concerned that quickly determining the authenticity of a paper birth certificate is an impossible task that distracts our officers from inspections that might be more effective.

On average, how much time does it take for an officer to evaluate a single birth certificate to see if it is authentic?

Since you instituted the new border requirement on January 31, 2008, has there been any increase in the average amount of time required per primary inspection at land ports of entry along the Canadian border? If so, what is that increase?

Since 2006, what additional training have officers received to enable them to differentiate between authentic and fraudulent birth certificates presented during an inspection?

What quality assurance measures, if any, have you instituted to verify that officers are performing this task successfully since January 31, 2008?

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Response: U.S. Customs and Border Protection (CBP) officers are trained to determine identity and citizenship through document examination and interviewing techniques. Although there are thousands of authorities that issue birth certificates, CBP officers are trained to recognize common security features and related discrepancies in all types of documents. During primary processing, CBP officers routinely make decisions within seconds about the authenticity of all types of documents, based not only on the appearance of the documents, but also on the interaction with the traveler presenting the documents. When the authenticity of a document is in question, officers may ask for additional documents or may choose to refer the traveler for further processing.

Using the same primary techniques, CBP officers are able to intercept authentic documents presented by imposters, a much more difficult task. These authentic documents may have been stolen or fraudulently obtained, and no amount of document analysis would be able to uncover the fraud without traveler interaction and officer judgment. Recognizing these challenges, birth certificates will no longer be accepted as proof of citizenship upon full implementation of WHTI on June 1, 2009.

Our recent change in document procedures on January 31, 2008, has been successful to date with no discernable increase in wait times. Compliance rates are high – U.S. and Canadian citizens are presenting the required documents when crossing the border.

Since 2006, training has been provided to the 11 Ports of Entry (POEs) with the highest rate of fraudulent document interceptions. These ports, as well as others to include the Peace Bridge in Buffalo, have also been provided with advanced equipment to assist with the examination and detection of fraudulent documents:

1. San Ysidro POE
2. Calexico POE
3. John F. Kennedy International Airport
4. Newark International Airport
5. Laredo POE
6. El Paso POE
7. Miami International Airport
8. Los Angeles International Airport
9. Dulles International Airport
10. Nogales POE
11. Atlanta International Airport

Also in 2006, CBP inserted 12 hours of fraudulent document detection into the Advanced Admissibility Secondary Processing Training program. During 2007, CBP provided

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updated training modules to the CBP Academy to be included in the basic officer training program on fraudulent documents, and implemented mandatory refresher fraudulent document training.

While CBP has provided training to officers on document fraud, it is not feasible to expect CBP officers to be able to authenticate all birth certificates presented based on the appearance of the document alone. CBP officers are instructed to consider all facets of primary processing in making the primary decision to admit or refer a traveler. While CBP continues to intercept travelers presenting fraudulently obtained authentic documents, it would be counterintuitive to establish quality assurance measures requiring a detailed inspection of every birth certificate presented. Such measures would surely distract CBP officers from traveler interaction, an effective and key component of primary processing.

Question#:	39
Topic:	SFI
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Schumer
Committee:	JUDICIARY (SENATE)

Question: Customs and Border Protection, within DHS, is a partner in the Secure Freight Initiative (SFI). SFI is an initial step toward meeting the mandate, set forth in the Implementing the Recommendations of the 9/11 Commission Act of 2007, to scan all U.S.-bound cargo containers for radioactive material and nuclear weapons by 2012.

Based on the Department's experience thus far with the Secure Freight Initiative, do you predict that DHS will be able to meet the 2012 deadline for implementing 100% scanning of all U.S.-bound containers?

If you predict that DHS will not be able to meet the 2012 deadline, what resources or authority could Congress provide in order to enable DHS to meet the deadline?

Response: In the pilot ports of the Secure Freight Initiative (SFI)/International Container Security (ICS) program located in Honduras, the United Kingdom, and Pakistan, U.S. Customs and Border Protection (CBP) focused its efforts on exploring methods to ensure efficient implementation of SFI with the goals being to maximize the security benefit, minimize disruptions to port operations, and control costs. The results of the pilot program indicate that scanning U.S.-bound maritime containers is possible, but only on a limited scale.

Each of the pilot ports experienced a unique set of challenges that required SFI managers to respond with a wide array of operational, technical, logistical, and diplomatic solutions. The means by which these challenges were addressed in one location were not necessarily available or appropriate in other locations. Each of the more than 700 ports that ship to the U.S. will present its own unique set of challenges in implementing SFI.

In these first three ports, CBP benefited from considerable host nation cooperation, low transshipment rates, and technology and infrastructure costs covered primarily by the United States Government. These supportive conditions will not necessarily exist in all ports shipping to the United States.

Considering that 11.5 million containers enter the U.S. annually, our economic health requires that we balance the efficient flow of legitimate goods with effective cargo and port security programs that ensure our homeland security objectives are met. DHS has made steady progress in implementing and improving cargo and port security programs

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that have resulted in a robust, risk-oriented and layered approach to security that maximizes the use of available resources.

The issue of container security has precipitated much discussion and effort over the last several years, but DHS has also identified other more significant threats to U.S. ports and vulnerabilities within other components of the supply chain that put us at risk. With a robust, risk-based, layered strategy in place, the homeland security objectives of the SFI can be met without expanding the program to every international port that ships to the U.S.

Question#:	40
Topic:	transition
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Schumer
Committee:	JUDICIARY (SENATE)

Question: History shows us that political transitions can be times of heightened vulnerability and therefore, of increased threat. Our enemies are aware of political events in the United States, and surely will not hesitate to exploit any weakness. The transition period is particularly worrisome in the case of DHS, because your Department faces its first transition to a new president and has a disproportionately large number of political appointees in the highest ranks of the Department. As a matter of our national security, this is an issue of great importance to me and the State of New York. I commend you for creating the Administration Transition Task Force in preparation for this challenge.

The task force recently released a document outlining several recommendations. Have you identified individuals to take the lead in developing a comprehensive plan for implementing these recommendations and ensuring a secure political transition in the Department?

If so, when will such a plan be completed?

Will you make the transition plan available to me and other members of Congress for comment?

I understand the Department has begun replacing political appointments with career jobs as well as formalizing its institutional "best practices." What other preparations, if any, are already in progress?

Response: Before addressing your specific questions about transition planning, I think it is important to address your comment that the Department has a disproportionately large number of political appointees in the highest ranks of the Department. Please allow me to underscore the fact that over 200,000 of our Department's employees are located in the seven major operating components and that the change in administration will have minor impact on the day to day operations.

There are approximately 200 political appointees in the Department. That is one tenth of a percent of the entire Department. Of these 200, only 82 are in positions that are considered senior executives. These include Presidential Appointment with Senate Confirmation, Presidential Appointment, Non-career Senior Executive Service, Senior Level and Scientific and Professional positions. Of these 82 political positions, 45 are at headquarters. These 45 positions are primarily Under Secretaries, Assistant Secretaries,

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Deputies to these positions, Chiefs of Staff, and others, such as Chief Financial Officer, Chief Human Capital Officer and Chief Information Officer positions. Approximately 50% of these 45 positions at headquarters are in the immediate Office of the Secretary and the Office of Policy. This distribution of appointees in these offices is to be expected given their primary policy-making roles. While the other 50% of these political appointee executive positions are interspersed throughout DHS headquarters, the majority of the headquarters offices have senior career individuals as the number two official.

In addition, one of the key political appointee executive positions, the Under Secretary for Management (USM), by law is authorized to stay in office to help ensure a smooth transition until there is a senate confirmed political appointee for this position.

It is important to note that approximately 204,000 of our Department's 208,000 employees are located in our seven major operating components. The change in administration will have a minimal impact on their day-to-day operations or their ability to respond in the event of a national incident. as they are led by career civil servants. The following is a brief summary of the transition posture for our seven major operating components.

1. Two of the seven, the Coast Guard and the Secret Service have no political appointees.
2. The number two position in TSA, ICE and CBP and most of the leadership positions are filled by long term career civil servants.
3. The number three positions in CIS and FEMA and most of the leadership positions are filled by long term career civil servants.
4. The operating components already underwent a transition in DHS headquarters leadership when the Secretary assumed his position approximately 3 years ago and are very familiar with what they have to do to assure continuity of operations during a change in leadership.

Question: The task force recently released a document outlining several recommendations. Have you identified individuals to take the lead in developing a comprehensive plan for implementing these recommendations and ensuring a secure political transition in the Department?

Response: Section 341(a)(9)(B) of Title 6, United Stated Code vests the Under Secretary for Management (USM) with the responsibility for managing the Department's transition. The transition effort is centrally coordinated through the Office of the USM, led by Under Secretary for Management Ms. Elaine Duke, formerly a career civil servant, and her core transition team. The core transition team consists of four individuals supported

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by approximately 45 senior level employees located within the components who are serving as either a Senior or Deputy Transition Officer. In addition, RADM John Acton will be detailed to the USM's office from the United States Coast Guard to serve as the career DHS Transition Director to Elaine Duke. Below is a breakdown of the USM Transition Team. In Attachment 1, we are proving the names and titles of both the Senior and Deputy Transition Officers within each component.

Transition Executive: Paul A. Schneider	*Sets Vision for 2009 Transition*
Career Transition Senior Official: Elaine Duke	*Leads overall Administration Transition effort* ✓ Oversees planning and execution of Transition Planning Efforts ✓ Ensures operational continuity through change of Presidential Administration
USM Core Transition Team **Transition Director**: RADM John Acton **Senior Transition Officer:** Elaine Rigas **Deputy Transition Officers (Detailees):** Damian Kokinda, USSS Tiffany Lightbourn, S&T	*Manages day-to-day Administration Transition effort* ✓ Plans and coordinates development and facilitation of informational materials, briefings, training and other orientation activities to ensure smooth transition for the new leadership

We are learning about other approaches to administration transition from Federal, state and local governments as well as the private sector by leveraging the expertise of the Homeland Security Advisory Council (HSAC). In January 2008, the HSAC Administration Transition Task Force (HSAC-ATTF) delivered a report that identifies transition best practices. This report is part of the Department's overall multi-pronged transition planning efforts. The recommendations in this report will help the Department develop transition guidance to address the operational challenges during leadership change. Such operational challenges include ensuring proper succession of career personnel to serve in an acting capacity for departing appointees, organizing table top exercises for incoming appointees, creating a cadre of individuals to focus on transition and ensuring proper out-processing of departing employees.

We have already implemented many of the HSAC-ATTF report recommendations. For example, we created the Deputy Under Secretary for Management career position to ensure operational continuity during transition for a key element of the DHS management

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structure. We have also identified senior-level career personnel within each component to serve in an acting capacity once the appointees depart. We also implemented the recommendation to identify a cadre of individuals to serve as Senior Transition Officers within their components to help lead transition efforts. We have taken it a step further and in keeping with our desire to train future leaders of DHS, we have identified career employees at the General Schedule 14- and 15- levels, many of whom have graduated from our DHS Fellows and other DHS sponsored graduate-level educational programs, to serve as Deputies to the Senior Transition Officers.

We are also holding training conferences as well as briefings and exercises to prepare these senior level career personnel to be the decision makers should they be called upon to manage an incident in the absence of senior leadership. In February 2008, DHS hosted a two and a half day conference that brought together the Department's top leadership from all components including field-based employees. The attendees consisted of career and non-career employees who participated in a FEMA exercise and received briefings on the Department's major initiatives. These briefings focused on execution of policies in the field. From May 13-15th, the Department hosted another three day event for senior career employees from all of the components at the Federal Law Enforcement Training Center in Glynco, Georgia. This training engaged senior career employees in a series of briefing scenarios and FEMA exercises to reinforce integrated operational preparedness and execution throughout the Department. Additionally, beginning this summer and continuing through inauguration, we will be holding more incident response table top exercises that will ensure senior career and incoming appointees have the ability to put into practice the guidance of the National Response Framework, the National Infrastructure Protection Plan and National Incident Management System.

Some of the HSAC-ATTF recommendations that are under the "Congressional Oversight and Action" section and throughout the report are not within the Department's legal authority or role to implement such recommendations to consider and expeditiously approve the new Administration's Secretary of Homeland Security, and to implement the 9/11 Commission recommendation to reduce the number of Congressional oversight committees and subcommittees from its current eighty-six. The Department is encouraged by these recommendations and looks forward to Congress taking them into consideration to implement.

Question: If so, when will such a plan be completed? Will you make the transition plan available to me and other members of Congress for comment?

Response: Section 341(a)(9)(B) of Title 6, United States Code of the Homeland Security Act requires the overall transition and succession plan to be made available to the

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incoming Secretary and Under Secretary for Management by December 1, 2008. Below is an excerpt of the law:

> SEC. 2405. UNDER SECRETARY FOR MANAGEMENT OF DEPARTMENT OF HOMELAND SECURITY.
>
> (a) Responsibilities- Section 701(a) of the Homeland Security Act of 2002 (6 U.S.C. 341) is amended--
>
> (1) by inserting `The Under Secretary for Management shall serve as the Chief Management Officer and principal advisor to the Secretary on matters related to the management of the Department, including management integration and transformation in support of homeland security operations and programs.' before `The Secretary';
> (2) by striking paragraph (7) and inserting the following:
> `(7) Strategic management planning and annual performance planning and identification and tracking of performance measures relating to the responsibilities of the Department.'; and
> (3) by striking paragraph (9), and inserting the following:
> `(9) The management integration and transformation process, as well as the transition process, to ensure an efficient and orderly consolidation of functions and personnel in the Department and transition, including--
>
> `(A) the development of a management integration strategy for the Department, and
> `(B) before December 1 of any year in which a Presidential election is held, the development of a transition and succession plan, to be made available to the incoming Secretary and Under Secretary for Management, to guide the transition of management functions to a new Administration.'.

DHS has every intention of complying with the statutory framework created by Congress and providing the materials to the incoming Administration in the timeframe specified. DHS is also fully committed to working with the Congress regarding transition planning. However, it is important to distinguish between transition planning documents and policy documents. Transition planning documents relate to the planning necessary to ensure a fully functioning department during the transition between the current and future Administrations. In contrast, policy documents relate to plans to assist the incoming Administration with selecting and prioritizing its policy initiatives. We are fully committed to sharing the transition planning documents with the Congress and are providing the DHS Transition and Succession Planning Outline in Attachment 3; however, it would be inappropriate to send policy documents to the Congress before they

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are shared with the incoming Administration as required by law. Such documents are pre-decisional in that they comprise no more than internal drafts for consideration by the decision-makers within the new Administration. In the meantime, what we believe is appropriate to provide is Attachment 2 which is the outline on what policy documents we expect will be included in the DHS Transition Briefing Book Outline.

Question: I understand the Department has begun replacing political appointments with career jobs as well as formalizing its institutional "best practices." What other preparations, if any, are already in progress?

Response: We are taking a multi-pronged approach to our transition planning to ensure operational continuity of homeland security responsibilities during the Presidential Administration Transition. These areas of focus and related activities are as follows:

1. ORDER OF SUCCESSION - On August 13, 2007, the President signed an Executive Order that specifies the order of succession for the position of Secretary of the Department of Homeland Security. The previous Order of Succession for DHS had not been revised since the Department was established in 2003. The Executive Order now reflects our current organization. In October 2007, DHS completed a component-level succession order and delegation of authority for each component head position within the Department. I have submitted the Department's order of succession as part of my testimony.

2. DHS SUCCESSION PLANNING - We are identifying and planning succession for critical homeland security positions within components to provide continuity at the time of transition. For departing senior level political appointees we have identified interim acting career executives. In addition, Public Law 110-28 required and appropriated funds for the Office of the Under Secretary for Management to commission an independent study with the National Academy of Public Administration (NAPA) to compare the Department of Homeland Security senior career and political staffing levels and senior career training programs with those of similarly structured cabinet-level agencies. NAPA will deliver this report in May, 2008. This report should give us great insights into how we compare with other agencies and identify areas of strength or needed improvement.

3. CROSS-GOVERNMENT COLLABORATION – The Department engaged the Council for Excellence in Government (CEG) to help ensure our senior career employees, incoming appointees and leaders of other agencies critical

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to homeland security are prepared to respond should a national incident occur. CEG is facilitating our efforts on inter-agency collaboration. This inter-agency collaboration effort centers on structured, deliberate processes where DHS will engage key groups and individuals. In concert with FEMA and other parts of DHS, CEG will utilize the National Response Framework and deliver multiple table top exercises during the time of the presidential election campaign, inauguration, and subsequent appointments of Senate-confirmed positions. With these exercises, participants will not only practice their roles but also build relationships and camaraderie with other key decision makers in a variety of emergency scenarios. This effort will strengthen DHS employees' knowledge of national security protocols and interfaces with other departments as well as state, local, and tribal governments to ensure we are prepared should a crisis arise. We are also working closely with the Homeland Security Council at the White House to ensure other departments with homeland security roles are integrated with our transition efforts.

4. BEST PRACTICES – As mentioned above, we are learning about other approaches to administration transition from Federal, state and local governments as well as the private sector by leveraging the expertise of the Homeland Security Advisory Council (HSAC).

5. ADMINISTRATIVE TRANSITION GUIDANCE- The Senior and Deputy Transition Officers that have been identified are working closely with the USM's core transition team to evaluate internal processes and develop briefing materials. It is particularly important to evaluate our internal processes to ensure effectiveness during the anticipated surge of incoming and exiting staff. The internal processes initiative will involve reviewing Directives, strengthening records management and ensuring for incoming staff, that both new appointees and career employees are equipped with the tools they need and the information and relationships required to be effective in their jobs. We will also be developing briefing materials to convey to career executives and incoming appointees the requisite information and knowledge to maintain operations. For exiting staff we will ensure proper briefings.

6. PROCESSES- In addition to focusing on internal administrative processes of what we call the "nuts and bolts", we are also focusing on management processes that include the budget, our major investments and the role of the Operations, Planning and Coordination Component. In planning the Fiscal Year 2009 budget we instituted a recommendation by the Homeland Security

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Advisory Council-Cultural Task Force (HSAC-CTF) and commenced a Department wide process of engaging the Components in their strategies, investments and financial objectives. For Fiscal Year 2010 we took it a step further and involved a heavy concentration of career civil servants in the budget process to ensure it continues seamlessly during transition. To continue with the HSAC-CTF recommendation of providing a cohesive, integrated and operationally efficient means of protecting the homeland, we are enhancing our operational planning and coordination efforts across the Department.

5. PROGRAMS. The past two years we have spent considerable effort to make sure our major programs are properly structured and resourced to be successful. In August 2007, we formalized our oversight efforts and support for acquisition programs by establishing the Acquisition Program Management Division (APMD) within the Office of the Chief Procurement Officer. To date, APMD has performed Quick Look assessments of 37 Level 1 programs and has overseen Deep Dive reviews of the SBInet and Advance Spectroscopic Portal programs. APMD has provided advice and guidance to a number of programs, particularly in the area of cost benefit analysis. We are ensuring that the requirements are clear, cost estimates are valid, technology risks are properly assessed, schedules are realistic, contract vehicles are proper, and the efforts are well managed.

Our goal is ensure the programs we are implementing are on track for the next administration.

In summary, we have a comprehensive transition plan in place to ensure that we are prepared for not only the 2009 administration change but also an incident. In addition, the response we have received from our briefings on our transition efforts to this committee, the U.S. Government Accountability Office, and the Office of Management and Budget, has been extremely positive where our plan has been touted as a best practice for other departments to follow.

Question#:	41
Topic:	staffing
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Schumer
Committee:	JUDICIARY (SENATE)

Question: A recent GAO report on border security cited continuing concerns with staffing levels for Customs and Border Protection (CBP). It found that while CBP has expanded their personnel considerably in the past two years, staffing remains inadequate. Indeed, the report went on to say that current staffing shortages are both affecting the agency's ability to effectively execute anti-terrorism programs and also lowering officer morale. Additionally, the agency's high attrition rates and large number of eligible retirees magnify the need for action.

It is my understanding that the agency's staffing model was not finalized in time to prepare its fiscal year (FY) 2008 budget request. Has the new staffing model been utilized for the department's FY 2009 request?

It is also my understanding that the new staffing model would determine relative need among different CBP locations. Have the model's results demonstrated a greater need for increased staffing on our northern border?

As mentioned above, high attrition rates are a contributor to inadequate staffing levels. What action is the department taking to address this issue?

Response: The Department of Homeland Security (DHS) and Customs and Border Protection (CBP) must balance CBP's staffing needs against the agency's ability to hire, train, and deploy officers in a timely manner. Staffing needs at the ports of entry are determined based on workload volume, training capacity at the Federal Law Enforcement Training Center (FLETC), the constraints of current facilities and infrastructure, the current number of terminals or lanes at the ports of entry, and threat assessment.

The Workload Staffing Model (WSM) for CBP officers (CBPOs) was finalized and is used as a tool to support the development of position deployments including those received in FY 2008 as well as for the FY 2009 request. The final deployment of CBP officers is developed by analyzing a variety of criteria such as: volume, processing times, number of terminals as well as an assessment of various threat and risk factors through the use of the WSM. CBP continues to assess its staffing needs throughout the year, based in part upon information that we are given from our Field Offices. These submissions, combined with the WSM and the subject matter expertise of operations and program managers play a role in how we allocate our personnel throughout the country within CBP's financial resources.

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CBP continues to do everything in its capacity to hire, train and deploy CBPOs funded for FY 2008. Throughout the country, CBP has rolled out aggressive recruitment and hiring campaign to attract qualified candidates to apply for the CBPO position. CBP has also worked to streamline the hiring process by initiating the medical examination and background investigation for tentatively selected individuals, while they wait for openings. For those selected for the positions, FLETC has had, at times, a 6-day training schedule, to accommodate staffing increases.

Question#:	44
Topic:	manpads
Hearing:	Oversight Hearing
Primary:	The Honorable Charles E. Schumer
Committee:	JUDICIARY (SENATE)

Question: Secretary Chertoff, as you know, over the past 26 years, 35 civilian aircraft have come under attack by shoulder-fired missiles, known as MANPADS. These missiles are portable and relatively easy to obtain, but can be used to devastating effect. Out of the 35 aircraft that have been attacked, 24 were shot down resulting in more than 500 deaths. Several of these incidents involved large turbojet airliners including two shootings that resulted in catastrophic losses of the airplanes, killing every person on board.

We are all familiar with the 2002 attempt to shoot down an Israeli charter jet in Mombasa, Kenya, which was a politically motivated effort believed to be carried out by terrorists linked to Al Qaeda. In response, Israel has taken huge strides to protect their civilian aircraft from shoulder-fired missile attacks and is now beginning to equip its passenger aircraft with anti-missile technology. But the United States seems to be lagging far behind.

In 2003, Congress passed legislation requiring DHS to prepare a plan for developing missile protection systems for commercial aircraft.

Five years later, how far along is DHS's three phase program to develop, design, test and evaluate anti-missile technology for civilian aircraft?

Response: Over the last five years, the Department's Science and Technology (S&T) Directorate has successfully completed the first and second phases to develop technology to protect commercial aircraft from shoulder-fired, surface-to-air missile attack. The S&T Directorate is currently conducting work from the initial plan for Phase III as well as expanded flight tests.

In 2004, the S&T Directorate initiated Phase I of the Counter-MANPADS program to assess the feasibility of adapting military technologies for civilian aircraft. At the completion of Phase I, the S&T Directorate went on to try to demonstrate the viability of these systems, their effectiveness, and assess the economic costs of deployment through two phases. During Phase II, the S&T Directorate developed Counter-MANPADS systems and the Federal Aviation Administration certified them for airworthiness. The program is currently in Phase III and there are two primary objectives:

1) **Complete performance assessment through live fire testing and system improvements**: DHS tests show that both systems can protect commercial transports

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with some limitations that required additional analyses and testing to resolve. During live fire tests both systems defeated MANPADS missiles fired at a target representing a wide-body transport.

2) **Evaluate the systems in commercial airline operations to better estimate the operational and maintenance costs:** Results of the cargo transport in-service evaluation are still being analyzed and the S&T Directorate will be providing Congress with a report outlining preliminary assessments early this summer. Funding was added in 2007 to evaluate the systems on passenger aircraft. In response, we are working with American Airlines and will be obtaining data from systems installed on three passenger aircraft later this year. We should complete Phase III data analysis, including an updated life cycle cost estimate in mid-2009. The S&T Directorate plans to submit to Congress a complete Phase III report in late FY 2009.

The S&T Directorate is also evaluating other Emerging Counter-MANPADS technology (ECMT) as identified in the fiscal year 2006 Appropriation Act. We are assessing two ground-based concepts and one airborne concept using decoys for potential application in the civilian environment. These assessments are similar to the Phase I feasibility studies of the Counter-MANPADS Directed Infrared Countermeasures (DIRCM) systems and not the system development programs.

The S&T Directorate is also investigating a third Counter-MANPADS innovative concept potentially using unmanned aerial vehicles (UAV) orbiting over airports at high altitude, called CHLOE. Tests of a missile warning system were conducted late in 2007. Contractor system concept of operation studies and additional experimental tests will be conducted and reported in 2008. Follow-on tests of other potential missions for a persistent high-altitude UAV are being considered for FY 2009.

Question: To date, are any American passenger aircraft equipped with anti-missile technology?

Response: No, however during Phase III several passenger aircraft will be equipped with anti-missile technology as we conduct a reliability and maintainability assessment.

Question: After 5 years and $270 million dollars, are most of the commercial aircraft that fly in this country every day still vulnerable to terrorists using shoulder fired missiles?

Response: The S&T Directorate's Counter-MANPADS efforts are not complete and a decision to deploy systems has not been made.

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Question: How much money did the President request for the DHS Counter-MANPADS program in the FY09 budget?

Response: There is no funding requested in the President's FY 2009 budget for the S&T Directorate's DIRCM or ECMT programs. However, two million has been requested for Project CHLOE in FY 2009.

Question: Without a budget for this program, how does DHS intend to integrate 5 years of research, development and testing of counter-MANPAD technology into the civilian aircraft fleet?

Response: The S&T Directorate's Counter-MANPADS efforts are not complete and a decision to deploy systems has not been made. The amount and purpose of future funding will depend on the results of these efforts. The technologies may be ready for incorporation into an alternative solution or, if not, additional research and development may be necessary.

Question#:	45
Topic:	aging reports
Hearing:	Oversight Hearing
Primary:	The Honorable Edward M. Kennedy
Committee:	JUDICIARY (SENATE)

Question: On March 19th, Sens. Leahy, Schumer and I requested detailed aging reports on the current backlog. CIS officials told us they were working on collecting the information but could not provide us with a date when they would be able to produce it.

Will you commit to us that USCIS will produce this data for our offices within the next two weeks?

Response: The N-400 Aging Report was transmitted to Senate Judiciary staff on May 8, 2008, and USCIS will be incorporating the information into future monthly updates. See attachment "N-400 Aging Report".

Question#:	46
Topic:	background checks
Hearing:	Oversight Hearing
Primary:	The Honorable Edward M. Kennedy
Committee:	JUDICIARY (SENATE)

Question: We all agree that any citizenship applicant must pass several security and background checks. They already undergo a T-tech screening, an IBIS check name check, and a FBI fingerprint check to name a few.

Please list and detail all the types of security, name and background checks a naturalization applicant must go through. Please also include any security, name and background checks that are also required for someone applying for lawful permanent residence.

Response: USCIS conducts the following background checks on naturalization applicants and applicants applying for lawful permanent residence:

1. **The Interagency Border Inspection System (IBIS) Name Check**— This is a name check that is conducted against Custom and Border Protection's Treasury Enforcement Communication System (TECS) via Interagency Border Inspection System (IBIS). TECS is a common database of law enforcement data. Information from 26 different government agencies is included in TECS. This check is conducted to see if any relevant information relating to national security or other law enforcement issues exists in TECS. Results of a TECS/IBIS check are usually available immediately. In some cases, information found during a TECS/IBIS check will require further investigation. The IBIS check is not deemed completed until all eligibility issues arising from the initial system response are resolved. If there is a match, the USCIS adjudicator must review the information and determine if the information impacts that applicant's eligibility for the benefit that is being sought.

2. **FBI Fingerprint Check**— The FBI fingerprint check provides information relating to criminal background within the United States. USCIS electronically submits an applicant's fingerprints to FBI's Integrated Automated Fingerprint Identification System (IAFIS) in Clarksburg, WV. Generally, the FBI forwards responses to USCIS within 24-48 hours. If there is a record match, the FBI forwards an electronic copy of the criminal history (RAP sheet) to USCIS. At that point, a USCIS adjudicator reviews the information to determine what effect it may have on eligibility for the benefit. In cases involving arrests or charges without disposition, USCIS requires the applicant to provide court certified evidence of the disposition. Applicants with prior arrests should provide complete

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information and certified disposition records at the time of filing to avoid adjudication delays.

3. **FBI Name Checks**—The FBI name check is separate from the FBI fingerprint check. The records maintained in the FBI name check process consist of administrative, applicant, criminal, personnel and other files compiled by law enforcement. If there is a match, the FBI forwards the report to USCIS where the reports are reviewed and disseminated to the appropriate USCIS office. If there is a match, an adjudicator must review the report and determine how the information in the report affects the applicant's eligibility for the benefit being sought. Even after the FBI has provided an initial response to USCIS concerning a match, the name check is not complete until full information is obtained and eligibility issues arising from it are resolved.

Question#:	47
Topic:	FBI
Hearing:	Oversight Hearing
Primary:	The Honorable Edward M. Kennedy
Committee:	JUDICIARY (SENATE)

Question: The FBI takes an average of 60 days to conduct name checks on applicants.

Can adjudicators process naturalization applications while they are being reviewed by the FBI?

Response: Certain aspects of the adjudication process are initiated while FBI name checks are pending. However, USCIS does not schedule naturalization interviews until the agency has received a definitive response from the FBI that a full background check has been completed. USCIS has adopted this policy because of the need for an adjudicator to be aware of all potentially derogatory information at the time of the interview.

Question#:	48
Topic:	security clearance
Hearing:	Oversight Hearing
Primary:	The Honorable Edward M. Kennedy
Committee:	JUDICIARY (SENATE)

Question: Your Department has told us that even if you have new hires to assist with naturalization applications, you can't get them through the security clearance process fast enough.

Have you approached OPM to see if they can prioritize and speed up that processing?

Response: USCIS has hired additional personnel security specialists and has streamlined its security screening process. USCIS is not experiencing hiring delays as a result of the security screening process. Through April 26, USCIS hired an additional 821 new Adjudication Officers. As a result of attrition and retirements, there is a net gain of 686 Adjudication Officers. In the near future, another 265 Adjudication Officers will enter-on-duty and there are more than 300 applicants completing the pre-employment screening process. In the next few weeks, supervisors in the field are expected to make nearly 500 more selections and we anticipate all new Adjudication Officers to be on board by the end of October 2008.

Question#:	49
Topic:	delays
Hearing:	Oversight Hearing
Primary:	The Honorable Edward M. Kennedy
Committee:	JUDICIARY (SENATE)

Question: We've received data from DHS showing that in some cities, significant delays are occurring between the time your agency approves a naturalization application and the time that an individual is sworn-in as a U.S. Citizen. In some cases, the delay is as much as 3 months.

Why does it take so long to have an individual sworn-in after approval of the application? Is there a way to speed up that process?

Response: USCIS makes every attempt possible to ensure that applicants for naturalization are sworn-in as soon as possible after approval of their naturalization applications. The statutory framework for the swearing-in process, however, takes two forms. By statute, Federal Courts can exercise exclusive jurisdiction to administer the oath of allegiance. In USCIS offices where the federal courts have exercised exclusive authority to administer the oath of allegiance, USCIS works closely with the Courts to ensure that applicants are sworn in as expeditiously as possible given the Court's resources. In USCIS offices where the courts have not exercised their right to exclusive jurisdiction to administer the oath, USCIS administers the oath of allegiance in administrative ceremonies. USCIS strives to schedule administrative ceremonies as soon as possible after the naturalization application has been approved. In fact, at times, USCIS schedules the oath on the same day the naturalization application is approved. If an applicant requests a later date for personal reasons, or if a name change is requested that requires the oath to be taken in Court, USCIS will accommodate this or other special requests that may result in a later date.

Question#:	50
Topic:	iraqi refugees - 2
Hearing:	Oversight Hearing
Primary:	The Honorable Edward M. Kennedy
Committee:	JUDICIARY (SENATE)

Question: The Administration announced last year that it would accept 12,000 Iraqi refugees in Fiscal Year 2008. On page 17, your testimony says that the U.S. government has in place the resources to admit up to 12,000 Iraqis this year. This is not a numbers game. There are human lives – and often desperate human lives – behind each and every one of these refugee applications.

Can you commit to us that the President's goal of 12,000 Iraqi refugees will be achieved in this fiscal year?

Response: DHS is committed to our joint goal with the Department of State (DOS) to meet the Administration's target of admitting 12,000 Iraqi refugees to the U.S. during FY 2008. USCIS is working aggressively with DOS to complete interviews of approximately 16,000 Iraqis by the end of the third quarter of this fiscal year, in addition to the 4,550 Iraqi applicants interviewed in FY07. USCIS and DOS coordinate daily at the staff-level to work to achieve this important goal. In addition, the departments hold biweekly meetings at a senior level—between Ambassador James Foley and Special Advisor Lori Scialabba—to assess progress towards meeting the 12,000 Iraqi refugee admissions goal for FY 2008. These meetings are used to identify ways to facilitate and streamline processing to meet the target admissions number.

Question: I understand that by the end of March, halfway through the fiscal year, you have admitted fewer than 3,000 Iraqis. In other words, you are less than 25% of the way toward meeting your annual target of 12,000. I understand that DHS has committed to interviewing 8,000 refugees in the next three months, which would mean interviewing more Iraqis in one quarter than were interviewed in the entire year in 2007. Please describe in detail your plans to interview 8,000 Iraqi refugees in the next three months.

Response: The biggest step USCIS is taking to achieve this goal is maintaining a current and timely interview schedule. Since spring 2007, USCIS officers have interviewed Iraqis primarily in Jordan, Syria, Egypt, Turkey, and Lebanon. USCIS is also adapting its circuit-ride planning and staffing model to meet changing needs and conditions. USCIS has teams of adjudicators in the region today and has scheduled to field teams on a nearly continuous basis in the coming months as cases become ready for interview. USCIS has worked with DOS in preparing a schedule of up to another 8,000 interviews for Iraqi refugee applicants during the third quarter. As of May 7, 2008, USCIS has interviewed 11,678 Iraqi refugee applicants this Fiscal Year.

Question#:	51
Topic:	secure communities plan
Hearing:	Oversight Hearing
Primary:	The Honorable Edward M. Kennedy
Committee:	JUDICIARY (SENATE)

Question: U.S. Immigration Enforcement (ICE) recently unveiled its "Secure Communities plan," a multi-year initiative to identify, detain, and return removable criminal aliens incarcerated in federal, state and local prisons and jails.

Can you provide details of this plan, including any budget estimates? I understand Congress appropriated about $200 million this year to start the program, but have received reports that it will cost at least $2 billion a year.

I understand that under this program, any foreign-born person arrested would be reported to ICE as a potential illegal immigrant. What happens when a foreign-born person is not in your ICE database or who has been arrested for a non-removable crime?

Response: The focus of this program is to identify, detain, and remove all incarcerated aliens who are determined to be inadmissible to the United States or removable from the United States, under applicable provisions of the INA. The first phase of Secure Communities will focus on removing only those aliens who have been convicted of violent offenses or major drug offenses.

ICE currently screens 100 percent of all federal and state prisons, but has full coverage of only about 10 percent of the approximately 3,100 local jails throughout the United States. Leveraging emerging technology that shares law enforcement data between federal, state, and local law enforcement agencies, ICE is now able to expand coverage nationwide in a cost effective manner. "Interoperability" between the Federal Bureau of Investigation's (FBI's) Integrated Automated Fingerprint Identification System (IAFIS) and DHS' Automated Biometric Identification System (IDENT) will help ICE and local law enforcement officers positively identify criminal aliens in prisons and jails.

Beginning in October 2008, ICE will work with state and local law enforcement officials to begin rolling out Secure Communities to local jails. ICE estimates that it will take 3.5-4 years to reach all 3,100 local jails. During this timeframe, ICE will work with participating jails to identify all criminal aliens with matching records through Interoperability. ICE will make a status determination of all persons with matched records, and then detain and remove all persons convicted of violent or major drug offenses.

Congress provided $200 million to begin to implement phase one. These funds will be spent on IT infrastructure, Criminal Alien Program (CAP) teams, and detention beds. .

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Once Interoperability and Secure Communities are rolled out to all nationwide jails, ICE will begin to detain and remove nonviolent criminals if adequate resources are provided.

If an alien convicted of a violent or major drug offense declares a foreign place of birth but does not match the DHS database through Interoperability, ICE will interview that person to make a determination if he/she is in the United States illegally. If he/she is found to be in the United States illegally, ICE will detain and remove that person.

If an alien is arrested or convicted of a non-removable offense, has no prior criminal or immigration history which would otherwise render him or her removable, and is otherwise lawfully present in the United States, no charging document can or will be issued. If however, an alien is arrested for a non-removable offense but is in the United States in violation of the INA, ICE has the authority and may take action to remove that individual.

Question#:	52
Topic:	investigative mission
Hearing:	Oversight Hearing
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

Question: Mr. Secretary, as you are aware, the Fiscal Year 2009 Budget Request does not provide additional funding for the Secret Service's investigative mission. Specifically, the additional $26,000,000 allocated in the Fiscal Year 2009 Budget Request for Investigations Division reflects the movement of staff from the Protection Division to the Investigations Division. This has led to following statement being issued by the Secret Service:

"To maximize the use of the agency's resources, particularly during the presidential campaign and post-election activities, the Secret Service will continue to prioritize investigative cases by focusing its resources on those investigations that have a significant impact on our communities and on those that pose the greatest risk to our nation's critical financial infrastructure."

I have no doubt that the Secret Service will continue to diligently and conscientiously carry out its investigative responsibilities. However, it is obvious from this statement that the Secret Service does not believe it will have sufficient resources to conduct investigations into many crimes that threaten to undermine our nation's financial institutions. Ironically, for the same period, the Federal Bureau of Investigation's proposed budget will be increased by approximately, 6.76 percent and Director Muller has just asked Congress for an additional $450 million.

Why then has the Secret Service's Investigations Budget not been raised?

Response: The temporary re-allocation of special agents assigned to investigative duties in the Secret Service field offices to protective duties is a continual and ongoing feature of the Agency's management of personnel. The Secret Service meets its dual mission responsibilities by having its special agents that are assigned to field offices spend approximately 50% of their work time conducting investigative duties, depending on the demands of the protective mission. During presidential campaigns, the percentage of investigative work for these agents will trend to a slightly lower percentage.

Question#:	53
Topic:	cyber crimes
Hearing:	Oversight Hearing
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

Question: Mr. Secretary, as you are well aware, the Secret Service's investigative mission continues to expand. Currently, the Service is statutory mandated to protect our nation's financial infrastructure from cyber crimes and attacks. Increasingly, international criminal enterprises and web sites originating from Russia, have sought to compromise pecuniary information contained in our nation's financial computer infrastructure. In fact, cyber criminals routinely use computers and the Internet to launch attacks and network intrusions on financial institutions. These same groups are so well organized that they have web sites where cyber criminals and terrorists can buy, sell, and trade malicious software; spamming services; hacking services; and financial information. The Secret Service has taken a leading role in the investigation of cyber crime and computer network intrusions. However, I was dismayed to learn that despite the Secret Service's expertise in this area, the Department's budget only allocates $47,021,000 to the Service's efforts in this area.

Why such a spartan number when our nation's financial infrastructure is under daily cyber attack?

Response: The Secret Service continues to take a leading role in the investigation of cybercrime and computer network intrusions. As both domestic and international criminal enterprises continue to target our nation's critical financial infrastructure, the Secret Service is developing the tools and relationships necessary to proactively address this issue within the confines of its resources.

The Secret Service constantly evaluates domestic and international regions where an Electronic Crimes Task Force (ECTF) could be replicated to address cyber-electronic criminal activity. Any expansion beyond the 24 operating ECTF's would have to be considered within the Administration's budget priorities identified through the annual budget process.

Also, within the scope of budget priorities, the Secret Service sufficiently addresses the Cyber Investigative Section (CIS). This section serves as a central repository for the collection of data generated through: Secret Service field investigations; open source Internet content; and partnerships with financial and private industry as it relates to identity theft, credit card fraud, bank fraud, and telecommunications fraud. CIS has developed an investigative unit which serves to provide information to our field offices

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regarding international criminals involved in cyber intrusions, identity theft, credit card fraud, bank fraud, and telecommunications fraud.

The Comprehensive National Cybersecurity Initiative (CNCI) recognizes the Secret Service's expertise in these investigations by requiring their representation on the National Cyber Investigative Joint Task Force, as well as calling for adequate support for agents, analysts, and the technical infrastructure to effectively combat cybercrime and computer network intrusions.

Question#:	54
Topic:	287(g)
Hearing:	Oversight Hearing
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

Question: Mr. Secretary, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 added Section 287(g) to the Immigration and Nationality Act. As you know, the program created by Section 287(g) authorizes the Secretary of Homeland Security to enter into agreements with state and local law enforcement agencies permitting designated and properly trained local law enforcement officers to enforce our nation's immigration laws. I support this program. Not surprisingly, a number of Utah law enforcement agencies have applied, or are in the process of applying, to participate in the 287(g) program.

As Utah joins other states that have applied for the 287(g) program, I am interested to know your thoughts on how effective the program has been in enforcing our immigration laws.

Response: Since its inception, the ICE 287(g) program has entered into 47 memoranda of agreement (MOA) with state and local law enforcement agencies; there are currently 17 MOAs in process. Through these partnerships, the 287(g) program has identified and arrested more than 50,000 illegal aliens for possible deportation and trained nearly 700 state and local officers. Currently, ICE 287(g) memoranda of agreement (MOA) are generally focused on jail enforcement officer (JEO) and task force officer (TFO) models. Agencies participating under the JEO model are working in an institutional or jail setting and are able to identify and process criminal aliens of interest to ICE. Agencies participating under the TFO model are working in an ICE-led task force and are able to identify process and prosecute criminal aliens of interest to ICE. Both of the 287(g) enforcement models help ensure public safety, as the program precludes criminal aliens from being released into the local community and identifies possible criminal aliens in the local communities.

Following are just some success stories from state and local law enforcement agencies from across the country:

Florida's Collier County deputy sheriff's arrested 20 individuals attempting to purchase fraudulently obtained state driver's licenses. All individuals were convicted on state driver license fraud charges. The illegal aliens were removed from the U.S. after serving their sentence.

In Alabama, 27 individuals were convicted of federal charges after attempting to obtain Alabama drivers licenses using fraudulent documents. Thirteen individuals were

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convicted of state charges that include narcotics violations and possession of forged instruments.

In Orange County, California, 287(g) cross-trained detention officers have conducted a large number of interviews that have resulted in immigration detainers and misdemeanor, and felony charges. Of these, it was determined that some were affiliated with street gangs.

287(g) cross-designated sheriff's deputies from the Mecklenburg County Sheriff's Office in North Carolina have identified numerous aliens who were in their custody for committing crimes, including aggravated felonies.

Question#:	55
Topic:	state enactments
Hearing:	Oversight Hearing
Primary:	The Honorable Orrin G. Hatch
Committee:	JUDICIARY (SENATE)

Question: As you know, many, particularly in western states, are frustrated by the level of illegal immigration. Citing Congress' inability to reach a consensus on immigration reform, many states, including my home state of Utah, have enacted their own laws aimed at combating illegal immigration. However, I believe it is crucial for both the federal and state governments to work together in resolving our immigration problem.

Mr. Secretary, I am interested to know what, if any, concerns the Department might have about these recent state enactments. Also, what advice would you give to state legislators drafting such laws in order to ensure compatibility between state and federal enforcement measures?

Response: The Department of Homeland Security generally does not take a position on bills pending in state legislatures. The Department welcomes states' cooperation and assistance on these important issues.

One option for local governments concerned about immigration enforcement is the 287(g) program, which cross-designates local officers to enforce immigration laws as authorized through section 287(g) of the Immigration and Nationality Act.

Additionally, we note that several states have proactively encouraged employers in their states to use E-Verify, an electronic employment eligibility verification program operated by DHS in partnership with the Social Security Administration (SSA). E-Verify is currently the best publicly available means for employers to determine the employment eligibility of their workforce. We have made considerable improvements to the system in recent years, including working with states to strengthen E-Verify's defenses against state ID fraud and identity theft. We are proud of E-Verify, and gratified by the confidence that states have already shown in the program.

Question#:	56
Topic:	gender based violence
Hearing:	Oversight Hearing
Primary:	The Honorable Joseph R. Biden Jr.
Committee:	JUDICIARY (SENATE)

Question: On September 27, 2007, the Board of Immigration Appeals issued a precedent decision, Matter of A-T-, 24 I. & N. Dec. 296 (BIA 2007). In this decision, the BIA denied protection to Alima Traore, a young woman from Mali who had been subjected to female genital mutilation (FGM) in the past, and who faces forced marriage upon return to her home country. Contrary to its own prior unpublished decisions, and to overwhelming medical documentation on the issue, the BIA ruled that FGM is a one-time act, which does not cause ongoing or permanent harm. It also ruled that forced marriage – which has been characterized by the U.S. Department of State as a violation of basic human rights does not constitute persecution. This decision represents a serious retreat from the progress made in U.S. asylum law to recognize gendered forms of persecution as the basis for asylum. This progress began in 1995 with the issuance of Gender Considerations by the former Immigration and Naturalization Service, and was followed by several developments that specifically address FGM; most notably these include a landmark BIA decision in 1996 recognizing that FGM is a severe human rights violation that constitutes persecution, and "permanently disfigures" its victim, (Matter of Kasinga, 21 I. & N. Dec. 357 (BIA 1996)), and Congress's legislation criminalizing the practice of FGM in the U.S. and requiring the former INS to provide information about the "severe harm to physical and psychological health caused by female genital mutilation" to all aliens issued visas. See 18 U.S.C. § 116; 8 U.S.C. § 1374(a).

The implications of Matter of A-T- are far-reaching, and represent a significant shift in U.S. policy regarding its commitment to the protection of women fleeing violations of their most fundamental human rights.

Would you be willing to request that the Attorney General certify Matter of A-T- to himself, so that such a significant decision, which has departed from existing BIA and federal court precedent, be given the benefit of fuller consideration?

Would you be willing to request that the appeal to the Fourth Circuit Court of Appeals be held in abeyance in order to provide sufficient time for you to make a determination whether to request that Attorney General Mukasey certify the decision to himself?

If your answer to either of these questions is in the negative, can you explain how this decision is consistent with the U.S. commitment to protect women's human rights?

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Response: First, it is important to note that the Department of Homeland Security follows and applies Matter of Kasinga, the seminal precedent decision by the Board of Immigration Appeals on the issue of female genital mutilation. Further, it is the Department's position that Matter of A-T- does not stand for the proposition that someone who has undergone female genital mutilation cannot qualify for asylum. The Board noted, however, that Ms. A-T- was statutorily ineligible for asylum pursuant to section 208(a)(2)(B) of the Immigration and Nationality Act, because she had failed to apply for asylum within one year of her arrival in the United States. Rather, she was only eligible for withholding of removal, a different form of protection, that, unlike asylum, cannot be granted based on past persecution alone but requires an additional analysis of the likelihood of future persecution.

Moreover, the Board has acknowledged that a humanitarian grant of asylum is potentially available to an individual based on past persecution in the form of female genital mutilation even in the absence of a well-founded fear of future persecution. (Under the governing regulations, such a humanitarian grant of asylum can be premised upon either compelling reasons arising out of the severity of the past persecution, or a reasonable possibility of "other serious harm.") In a precedent decision issued on March 5th of this year, Matter of S-A-K- and H-A-H-, 24 I & N Dec. 464 (BIA 2008), the Board held that a mother and daughter from Somalia who provided sufficient evidence of past persecution in the form of female genital mutilation were eligible for asylum based on humanitarian grounds, regardless of whether they could establish a well-founded fear of future persecution. Matter of A-T- does not suggest that past female genital mutilation does not cause ongoing suffering. Rather, such ongoing suffering is ordinarily a consequence of the past act of persecution, not an additional act of future persecution. On an individualized case-by-case basis, the ongoing suffering that female genital mutilation has caused is considered in determining whether the severity of the past persecution justifies a grant of asylum in the absence of a well-founded fear of additional acts of future persecution. See generally, Matter of S-A-K- and H-A-H-, 24 I & N Dec. 464 (BIA 2008) and Matter of Chen, 20 I & N Dec. 16 (BIA 1989). The Department recognizes that these are significant legal issues and closely considers the development of the applicable law.

Finally, Matter of A-T- is the subject of ongoing federal court litigation. As it is the Department of Justice that is representing the Government before the Fourth Circuit Court of Appeals, the Department of Homeland Security is not in a position to comment as to matters, or take actions before that court, that may impact on that litigation. We further note that the Attorney General may certify the case to himself without the Department so requesting. 8 C.F.R. § 1003.1(h)(1)(i).

Question#:	57
Topic:	rail security
Hearing:	Oversight Hearing
Primary:	The Honorable Joseph R. Biden Jr.
Committee:	JUDICIARY (SENATE)

Question: Please give us your assessment of the state of rail security in the country today, your evaluation of efforts by passenger rail companies like Amtrak to beef up security, and the efforts your Department is making to help with these challenges and coordinate policy with these companies.

Response: The existing Mass Transit Modal Implementation Annex to the Transportation Systems Sector Security Plan (TSSSP), produced in coordination with the Transit, Commuter and Long Distance Rail Government Coordinating Council (GCC), the Mass Transit Sector Coordinating Council (SCC), and the Transit Policing and Security Peer Advisory Group (PAG) and published in June 2007, presents the coordinated security enhancement strategy for public transportation and passenger rail systems. The Annex may be accessed at: http://www.tsa.gov/assets/pdf/modal_annex_mass_transit.pdf. We commend this product to your attention. The information that follows provides an update on the Transportation Security Administration's (TSA) efforts, in coordination with security partners in the Federal Government and mass transit and passenger rail mode, to implement the security strategy and enhance its effectiveness.

TSA's efforts to assist public transit agencies and passenger rail carriers to deter terrorism and minimize the effects of terrorist attacks continue to be guided by five principles: (1) expanding partnerships for security enhancement through regional coordination and liaison, notably engagement with Federal and mass transit and passenger rail security partners through the GCC/SCC framework, the Transit Policing and Security Peer Advisory Group, and multi-agency coordination forums in regional areas throughout the country; (2) elevating the security baseline through the Baseline Assessment for Security Enhancement (BASE) program and the analysis and application of results to drive development of security programs and resource allocations that most effectively produce security enhancement; (3) building security force multipliers through security training of employees and law enforcement, terrorism prevention and response exercises and drills, and public awareness campaigns; (4) leading information assurance by building information sharing networks integrating Federal security partners with mass transit and passenger rail agencies and State and local entities to facilitate timely exchange of intelligence products and security implications at both classified and unclassified levels; and (5) protecting high risk assets and systems through development, testing, and deployment of new technologies and targeted application of security grants to achieve the most substantial mitigation of risk.

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Expanding Partnerships for Security Enhancement:

- TSA is actively involved in regional security forums and supports these collaborative efforts through direct involvement of surface security inspectors and other liaison, timely sharing of intelligence products and related security information, and focused security initiatives. A key initiative is the joint classified threat and analysis briefings provided by intelligence professionals in the Department of Homeland Security (DHS), TSA, and the Federal Bureau of Investigation (FBI) to mass transit and passenger rail security officials and their Federal partners. These sessions occur on at least a quarterly basis, with additional sessions as threat developments may warrant. They engage regional mass transit and passenger rail security professionals and their TSA and FBI colleagues in 15 metropolitan areas simultaneously through the FBI's secure video teleconference system maintained in the Joint Terrorism Task Force network.
- Connecting Communities Emergency Response and Preparedness Forums continue as a successful TSA/Federal Transit Administration (FTA) partnership project. These 2-day workshops enhance security and safety by sharing transit policies, procedures, resources, and best practices with local first responders to transit emergencies. The program uses realistic scenarios, including terrorism, to focus discussion on emergency preparedness, management, and response. A key objective is expanding the understanding and effective integration of the roles of Federal, State, and local emergency management offices and response entities to facilitate efficient planning, preparedness, and response coordination. In 2007, eight connecting communities forums were held around the country.
- TSA maintains extensive engagement with foreign counterparts on transit security matters with the aim of sharing and gleaning effective practices for potential integration in the domestic strategic approach. TSA conducts and maintains these efforts in collaboration and coordination with DHS component agencies, the Department of State, and other Federal agencies on projects involving transportation security within international and regional organizations.
- Engagement within the Group of 8 (G8) and with the European Union, the Asia-Pacific Economic Cooperation, and the Mexican and Canadian governments fosters sharing of effective practices and technologies in mass transit and passenger rail security.
- The expanding cooperation in this area has culminated in the International Working Group on Land Transport Security (IWGLTS), a dedicated collaboration outside of any preexisting forum with primary focus on passenger rail and mass transit security. The IWGLTS was formed to provide a global forum for experts to share best practices and lessons learned. The composition of the IWGLTS includes representatives from Australia, Canada, European Commission, France, Germany, India, Indonesia, Japan, Italy, Russia, Spain, United Kingdom, Republic of Korea,

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Malaysia, Israel, China, and the United States. TSA will chair this working group from mid-2008 through mid-2009, hosting a meeting in November 2008 in San Francisco and another yet to be scheduled in 2009. The group's efforts in 2007 led to several beneficial studies in mass transit and rail security, including in the areas of public awareness and recovery from an attack or incident involving chemical, biological, and radiological weapons and hazards.

- TSA also participates in the Rail and Urban Transport Working Group, consisting of the United States, United Kingdom, Canada, France, and Israel, in support of technology information sharing.

Elevating the Security Baseline:

- Under the BASE Program, TSA works with mass transit and passenger rail agencies to elevate their security posture. The BASE program assesses security posture in 17 Security and Emergency Management Action Items. Developed in a joint effort of TSA, DHS, Department of Transportation (DOT), and mass transit and passenger rail operating and security officials engaged through the Mass Transit SCC and Transit Policing and Security Peer Advisory Group, the Action Items encompass activities and measures that are foundational to an effective security program. Particular attention is paid to the transit agencies posture in six fundamental areas: protection of high-risk underwater/underground assets and systems; protection of other high-risk assets that have been identified through system-wide risk assessments; use of visible, unpredictable deterrence; targeted counter-terrorism training for key front-line staff; emergency preparedness drills and exercises; and public awareness and preparedness campaigns.
- TSA's Transportation Security Inspectors (TSI) Surface conduct the assessments in partnership with the mass transit and passenger rail agencies' security chiefs and directors. The results of the security assessments inform development of risk mitigation and security enhancement programs, resource allocations, and priorities for transit security grants.
- Security assessments commenced during FY 2007 with an initial focus on the 50 largest mass transit and passenger rail agencies. In 2007, BASE assessments were conducted in 46 of the largest 50 transit agencies in the nation. To date, 63 BASE assessments have been completed in total, covering 47 of the largest 50 agencies, 9 ranked in the 51-100 range in size, and 7 smaller agencies.
- Three areas where assessment results produced timely action to address identified weaknesses were security training, where TSA produced focused training guidance and revised and streamlined processes under the Transit Security Grant Program to expand training opportunities; approval of TSGP funding of anti-terrorism teams (Op-Packs) in high risk locations; and development of the national exercise program

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mandated in the 9/11 Commission Act, which is being piloted in the National Capital Region.

- The assessment results identified smart security practices developed and implemented by the assessed transit agencies. TSA has compiled these practices and contact information for the implementing agencies into a resource for dissemination to transit security professionals to use to adapt these effective practices to operating circumstances in other systems.
- TSA surface inspectors are assigned to cover the key rail and mass transit facilities in 20 metropolitan areas around the country. Beyond conducting security assessments, inspectors serve as TSA's regional liaison to mass transit agencies and their local, State, and Federal security partners. During 2007, TSA surface inspectors conducted over 13,000 hours of stakeholder outreach, completed more than 1,350 Station Profiles of passenger and transit rail stations, trained 139 Federal Security Directors (FSD)/FSD staff and Federal Air Marshal Service (FAMS) personnel in Railroad Operations Training in Pueblo, Colorado, and supported numerous Visible Intermodal Prevention and Response (VIPR) deployments nationwide.
- TSA and its Federal partners continued their engagement with the American Public Transportation Association (APTA) Security Standards Policy and Planning Committee to develop security best practices to enhance security in transit systems. The security standards development effort brings together security professionals from the public transportation industry, business partner representatives, and the Federal Government in a collaborative effort to develop consensus-based standards to enhance security in transit systems. TSA has provided subject matter expertise to the joint working groups, which cover three areas: infrastructure protection, emergency management, and risk assessment.
- The proposed standards are being developed in a format that is consistent with American National Standards Institute (ANSI) requirements and are posted for comment and then approved by consensus. Federal participation in the consensus-based efforts is effected through the GCC/SCC framework and CIPAC process. The approved standards will be put forth as "recommended practices" and supported by APTA for voluntary adoption by the transit industry. TSA plans to provide the smart security practices derived from the BASE program security assessment results to the appropriate working groups to spur progress and expedite completion of this lengthy effort. This initiative, coupled with separate working group efforts, should produce multiple consensus standards in 2008.

Building Security Force Multipliers:

- Through the Transit Security Grant Program (TSGP), DHS funds security enhancements in mass transit and passenger rail agencies in a risk-based approach. During FY 2008, the total allocation is $343 million to eligible mass transit and

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passenger rail systems plus $25 million to Amtrak. Total funding under the program in FY 2007 reached $255 million through the annual DHS appropriation and the supplemental appropriation.

- Key priorities of the TSGP include protection of high risk assets and systems, involving:
  - Underwater tunnels and major terminals and stations;
  - Targeted anti-terrorism training for employees;
  - Terrorism prevention and response exercises and drills;
  - Expanded public awareness campaigns; and
  - Building in-house anti-terrorism capabilities through funding of a substantial potion of personnel, equipment, and training costs of dedicated operational teams.
- Well-trained employees are a force multiplier for security efforts implemented by transit agencies. To assist transit agencies in improving training, in 2007, TSA developed and published the Mass Transit Security Training Program. This program consists of guidelines for basic and follow-on training areas and specified subject areas in which particular categories of employees should receive training, and is aligned with the components of a security training program Congress has mandated under the 9/11 Commission Act. TSA coordinated with DHS/Federal Emergency Management Agency (FEMA), FTA, Mass Transit SCC, and the Transit Policing and Security Peer Advisory Group in developing these guidelines.
- A focused initiative under the TSGP simplified the application process and facilitated more timely funding of training project requests. Course options include programs funded by FTA/TSA (transit specific terrorism prevention and response) and FEMA (general terrorism prevention and response). As such, these are integrated into National Training Program.
- Agencies taking advantage of this program in 2007 had their applications expedited for approval to ensure funds were delivered on a more timely basis than had been the case in the past. This initiative expanded significantly the volume and quality of training for transit employees. As an example, the proportion of grant awards for security training among eligible mass transit and passenger rail agencies in Tier 2 under the TSGP rose from 3 percent of the total funding allocation in FY 2006 to 68 percent in FY 2007.
- In 2007, 149 VIPR deployments were conducted at various mass transit and passenger rail systems throughout the country. The TSA teams augment security in the systems and expand their capabilities to implement random, unpredictable security activities for deterrent effect. The varying force packages may consist of Federal Air Marshals, Transportation Security Inspectors, Transportation Security Officers, explosives detection canine teams, and necessary supporting equipment. VIPR teams work with local security and law enforcement officials to supplement existing security resources, provide deterrent presence and detection capabilities, and

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introduce elements of randomness and unpredictability to disrupt potential terrorist planning activities.

- To enhance coordination and deterrent effect, TSA and the representatives of the Transit Policing and Security Peer Advisory Group worked cooperatively and closely to improve coordination, preparation, planning, execution, and after action review of VIPR deployments in mass transit and passenger rail systems. This cooperation culminated with the completion of mutually agreed upon operating guidelines for "Effective Employment of Visible Intermodal Prevention and Response Teams in Mass Transit and Passenger Rail." The guidelines have been distributed to FSDs, AFSDs-Surface, and FAMSACs around the country by the JCC to improve the effectiveness of the VIPR program.
- A follow-on product, developed and distributed in February 2008, details the roles and capabilities of the multiple TSA resources available to participate in VIPR deployments and provides recommendations on effective deployment in anti-terrorism activities.
- To enhance terrorism prevention and immediate response capabilities, TSA is developing a national exercise program in partnership with mass transit and passenger rail agencies in the National Capital Region. The objective is to produce a package for nationwide distribute to facilitate planning, preparation, and execution of a multi-phased, multi-jurisdictional, and cross-functional anti-terrorism exercise program. The ongoing pilot in the Washington, DC, area includes Amtrak, WMATA, Maryland Transit, and Virginia Railway Express, and other security partners. Specific emphasis is placed on enhancing and testing prevention capabilities.

Leading Information Assurance:

- TSA is advancing accomplishment of this strategic security priority through multiple means:
  - TSA's Mass Transit Security Information Network ensures timely development and distribution to mass transit and passenger rail security officials and Federal government decision makers of security information products and recommendations and guidelines during periods of heightened threat or security incidents.
  - The Homeland Security Information Network (HSIN) Public Transit Portal has been integrated into this network to provide a one-stop security information sources and outlets for security advisories, alerts, and notices.
  - 65 percent enrollment in HSIN-Public Transit portal among 100 largest agencies achieved; 107 agencies enrolled in total. Target has expanded to encompass smaller agencies during FY 2008.
  - Joint DHS/TSA/FBI threat and analysis briefings at Secret level held on a quarterly basis, bringing together mass transit and passenger rail security directors and law enforcement chiefs with their Federal security partners in 16 metropolitan areas

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through the secure video teleconferencing system maintained in the Joint Terrorism Task force (JTTF) network. This capability enables timely assembly of these key officials through this means for unscheduled sessions as threats or security incidents warrant.

- Deployment of secure telephone equipment based on risk to Amtrak and mass transit and passenger rail agencies ranked among the 20 largest to enable immediate contact to enable immediate exchange of intelligence on specific threats and other time-sensitive security concerns.
- Periodic dissemination of TSA Security Awareness Messages to mass transit and passenger rail security and management officials that convey DHS, FBI, and TSA unclassified intelligence products with security context and recommendations on their use in security enhancement and awareness activities. Distribution by direct e-mail using rosters for mass transit and passenger rail officials in 20 metropolitan areas and posting on HSIN-Public Transit portal.

Protecting High Risk Assets and Systems:

- Protecting high-risk underwater and underground assets and systems in mass transit is a top priority. The tunnel security working group formed by DHS and DOT continued to bring together subject matter experts from a range of relevant fields to identify, assess, and prioritize the risk to mass transit systems with underwater tunnels. The effort assists transit agencies in planning and implementing protective measures to deter and prevent attacks, and blast mitigation and emergency response strategies. Through regular meetings, this effort has developed mitigation strategies, engaged stakeholders, analyzed and applied the results of risk assessments, prepared statements of work for testing and modeling programs, and integrated the overall risk mitigation effort for a cohesive, coordinated, and effective approach. Efforts to date have accomplished the following:
  - Identified and assessed risk to underwater tunnels (completed);
  - Prioritized tunnel risk mitigation based on risk to drive DHS Transportation Security Grant Program funding to most pressing areas (completed); and
  - Produced and disseminated recommended protective measures transit agencies may implement to enhance security with available resources or through targeted grant funding (completed).
  - The working group has developed strategies for funding for future technology research and development aimed at producing novel approaches to this challenging problem. For example, TSA is partnering with the DHS Science and Technology Directorate on a new program called "Resilient Tunnel." This program aims to address post-9/11 concerns that terrorists will target vulnerable tunnels causing catastrophic damages. Resilient Tunnel is a High Impact Technology Solutions project that is specifically pursuing novel solutions to protect critical transportation

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tunnels. The working group has also developed priorities for tunnel related transit security grant projects, such as enhanced surveillance and detection capabilities, anti-terrorism operational teams integrating dedicated law enforcement teams with explosives detection canine patrols for enhanced deterrence, and bolstering detection capabilities through anti-terrorism training and drill and exercises and multi-media public awareness activities.

- The National Explosives Detection Canine Team Program (NEDCTP) has continued to augment the explosives detection capability of critical transit agencies by providing partial funding, training, certification and management assistance. By the end of 2007, 62 TSA-certified explosives detection canine teams were deployed in a risk-based approach to 14 transit systems across the country. These teams provide a visible and effective detection and deterrence capability in the public transportation system and can be surged to other venues as threats dictate. Their mobility enables deployment randomly and unpredictably in patrols throughout passenger rail and mass transit systems and postings at key junctions or points within systems, stations, terminals, and facilities.
  - The NEDCTP also established protocols for other agencies and departments to request the temporary use of TSA-certified canine teams during National Special Security Events (NSSEs) and level 1 and 2 stolen explosive and recovery (SEAR) events.
  - Additionally, the Transit Security Grant Program guidance for 2007 was revised to allow eligible agencies to procure the canines and training of the team through other sources that meet the TSA standard. Highly trained and certified canine teams continue to be one of the more effective and highly mobile explosives detection methods in the transit environment.
- In coordination with the Department of Homeland Security Directorate of Science and Technology (DHS/S&T) and TSA's Office of Security Technologies, TSNM Mass Transit pursues development of multiple technologies to advance capabilities to detect and deter terrorist activity and prevent attacks. Project priorities are informed by input from security partners in the mass transit and passenger rail community. Particular priority is given to development of capabilities to mitigate the risk to underwater infrastructure. Ongoing development projects include:
  - Anomalous Explosives Detector for Surface Transportation
  - Intelligent Video Monitoring at Mass Transit Sites
  - Bus Command and Control
  - Chemical/Biological Program for Mass Transit
  - Explosives Testing and Assessment of Rail Car Vulnerability
  - Mass Transit Tunnels Entry Denial Systems
  - Rapid Response to Extreme Events in Tunnels

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Amtrak Security Enhancement:

- The question specifically references evaluation of and assistance to Amtrak in security enhancement. According to a press release issued by Amtrak on February 19, 2008:
  - The rail carrier is deploying squads from the Amtrak Mobile Security Team to patrol station and trains and initiating random inspection of passengers' carry-on bags.
  - The squads of the Amtrak Mobile Security Team may consist of armed, specially trained Amtrak police, explosives detection canine teams, and armed counterterrorism special agents in tactical uniform. The squads will conduct passenger screening and patrol stations and trains.
  - Recognizing patterns in security are vulnerable to exploitation, the deployment of the special squads and conduct of passenger screening will occur randomly, at varying times and locations. Unpredictability specifically aims to heighten deterrent effect.
  - Passengers selected randomly for screening will have the right to refuse inspection. If they do so, however, Amtrak will not permit them to board the train and will offer a full ticket refund.
  - The program has been developed to minimize disruption and delay. Amtrak maintains the Mobile Security Team's activities should not delay travel. The inspection process should typically take less than a minute.
- Prior to initiating these security enhancements, Amtrak conducted outreach sessions with passengers.
  - The sessions demonstrated passengers' interest in improved security and a willingness to accept some minor delay for this purpose.
  - Amtrak's random inspection program joins similar programs in effect in the New York Metropolitan Transportation Authority, Massachusetts Bay Transportation Authority, and Port Authority Trans-Hudson systems.
- The new activities build upon existing security measures already in place, including:
  - Deployment of uniformed and plain clothes police officers on trains and at stations;
  - Visual surveillance systems;
  - Random identification checks of passengers;
  - Investment in procurement and deployment of security technologies;
  - Security awareness training of Amtrak's frontline employees and police officers; and
  - Passenger education programs to promote security awareness and vigilance, such as the "See Something, Say Something" campaign.
- TSA has supported the development of Amtrak's security enhancement activities.

Question#:	57
Topic:	rail security
Hearing:	Oversight Hearing
Primary:	The Honorable Joseph R. Biden Jr.
Committee:	JUDICIARY (SENATE)

- For the random security inspection program, Amtrak consulted with TSA on development of notification signage and general matters pertaining to security inspections in public transportation.
- Through the Transit Security Grant Program and the collaborative agreement process that advances the most effective risk mitigation projects, TSA has emphasized the importance of expanded operational security activities, implemented randomly and unpredictably, for deterrence.
- Awards under the TSGP have enabled Amtrak to enhance security through procurement and installation or deployment of various technologies, training of employees in security awareness, behavior recognition, and immediate response to threats or incidents, public awareness programs, and operational activities.
- Amtrak will receive $25 million in security enhancement grants in FY 2008. Additionally, Amtrak has received security grant awards as follows during the previous three fiscal years:
  - $13.4 million allocated in FY 2007
  - $7.2 million allocated in FY 2006
  - $6.4 million allocated in FY 2005.
- Amtrak has been an active participant in the TSA VIPR program since its inception in December 2005. The TSA teams have deployed frequently throughout the Amtrak system in random, unpredictable security augmentation for deterrent effect. The Amtrak/TSA VIPR Operational Plan procedures have been used as a model for how other transit agencies could partner with TSA in operational activities.

– Summary of other TSA security assistance for and engagement with Amtrak:

- Amtrak's Chief of Police John O'Connor is a member of the Transit Policing and Security Peer Advisory Group. The Group consists of 15 law enforcement and security chiefs from mass transit and passenger rail agencies around the country, and serves as a consultative body to facilitate TSA's identification of security priorities and development and implementation of effective security enhancement programs and initiatives.
- Amtrak law enforcement officials participate in the classified threat and analysis briefings of mass transit and passenger rail security officials and their Federal partners. These sessions, held on a quarterly basis or as threat developments warrant, take place simultaneously in 15 metropolitan areas through the FBI's secure video teleconference system in the JTTF network.
- TSA leads the interagency Tunnel Risk Mitigation Working Group to develop and advance effective strategies and initiatives for hardening and security enhancement of underwater transit tunnels. Amtrak operates in several underwater tunnels in the New York area covered by this effort.

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- TSA has deployed secure telephone equipment to Amtrak facilities in three locations. Work continues to install this equipment for Amtrak in three additional locations.
- TSA ensured Amtrak's membership in the Mass Transit SCC, the principal forum for security coordination between the Federal Government, through the Transit, Commuter, and Long Distance rail GCC, under the National Infrastructure Protection Plan framework.

Question#:	58
Topic:	grant funding
Hearing:	Oversight Hearing
Primary:	The Honorable Joseph R. Biden Jr.
Committee:	JUDICIARY (SENATE)

Question: I understand that Amtrak is currently not permitted to use any of its grant funding from DHS for operational deployments, such as the deployment of its new counter-terrorism mobile team, while state and regional transit agencies, such as the NYPD Transit Bureau, have been granted that discretion. What is the reason that DHS has restrained Amtrak more than similar agencies in funding its rail security activities?

Response: The primary purpose of the Transit Security Grant Program (TSGP) is to provide funding for capital improvements to security to enhance the Nation's critical transit infrastructure. Operational activities, such as canine teams, mobile screening teams, and Visible Intermodal Protection and Response teams, were introduced in the fiscal year (FY) 2007 TSGP Supplemental based on threats identified by the National Intelligence Estimate. In FY 2007, $4 million was provided to Amtrak for operational activities such as police and canine team patrols, intelligence analysis, and specialized training to meet those operational needs through FY 2010. Further, in FY 2008, the Department is proposing to fund Amtrak at a $7 million level for operational activities such as equipment for mobile screening teams, mobile team exercises, and mobile team security training, to be complemented with $18 million of capital security improvements such as access control, intrusion detection systems, live-monitored closed circuit television (CCTV), and crowd behavioral assessment.

Question#:	59
Topic:	broader grant funding
Hearing:	Oversight Hearing
Primary:	The Honorable Joseph R. Biden Jr.
Committee:	JUDICIARY (SENATE)

Question: Mr. Secretary, H.R. 1, the Implementing Recommendations of the 9/11 Commission Act of 2007, which we enacted last summer, set aside $25 million specifically for Amtrak rail security, but also included much broader grant funding aimed at transit and surface transportation generally. My intention in voting for the bill was that this $25 million would serve as a floor for the funding of security on Amtrak, not a ceiling. Is that your understanding of the law as well?

Response: The Implementing Recommendations of the 9/11 Commission Act of 2007 authorized up to $150 million to be made available as security grants to Amtrak from the money appropriated for railroad security under section 1503. As per the Consolidated Appropriations Act, fiscal year (FY) 2008, Amtrak was to receive no less than $25 million from the $400 million appropriated for the FY 2008 Transit Security Grant Program (TSGP). The Department used the transit risk model to determine the target allocations for the Tier I regions in the FY 2008 process. As per the model, Amtrak would have received significantly less than $25 million. To comply with the Consolidated Appropriations Act, FY 2008, Amtrak's FY 2008 allocation was set at a minimum of $25 million.

In accordance with the FY 2008 TSGP process, the Department engaged with Amtrak in a cooperative agreement process to discuss the funding opportunities available to them based on risk and program priorities. The Transportation Security Administration and the Federal Emergency Management Agency met with Amtrak staff several times to discuss the FY 2008 security grants, including explaining that they could receive funds in excess of $25 million depending on the efficacy of their projects in reducing risk as compared to the projects submitted by the other transit applicants in the FY 2008 TSGP process. However, Amtrak has put forth only $25 million worth of requests that meet the requirements of the grant guidance, and will be fully funded for those requests.

Question#:	60
Topic:	haz mat shipping
Hearing:	Oversight Hearing
Primary:	The Honorable Joseph R. Biden Jr.
Committee:	JUDICIARY (SENATE)

Question: The Implementing Recommendations of the 9/11 Commission Act of 2007 included provisions related to regulating shipments of highly hazardous materials through high vulnerability zones, including the possible re-routing of such shipments. The law required regulation to be adopted within 18 months of passage of the Act. Could you give me the status of those regulation and when you expect that they will be issued and implemented?

Response: The Transportation Security Administration (TSA) is working closely with the Department of Transportation's (DOT) Federal Motor Carrier Safety Administration (FMCSA) in meeting the requirement outlined in section 1553 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act) entitled *Hazardous Materials (HM) Highway Routing.* The 9/11 Act requires the Secretary of Transportation in consultation with the Secretary of Homeland Security to document existing and proposed radioactive and non-radioactive HM routes; assess and characterize existing and proposed routes; analyze current route-related HM regulations; prepare guidance materials for State routing officials; develop a tool to assess security risks associated with each route; and transmit findings to Congress. The completion of these activities has been spearheaded by the FMCSA with TSA playing a supportive role. We have worked with FMCSA and its contractor to document the specific updated for 2007 HM routes in the HM routing registry and incorporate both safety and security concerns of the public. The tool will analyze potential HM routes using safety and security algorithms that will geographically display the best route of travel in and around major populated areas or significant iconic structures. The final report is scheduled to be completed by FMCSA in the time frame required in section 1553.

Question#:	61
Topic:	human rights
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: At a hearing of the Senate Judiciary Subcommittee on Human Rights and the Law held in November 2007, I asked Marcy Forman, Director of the Office of Investigations at Immigration and Customs Enforcement, how many of the 100 human rights-related arrests ICE testified it has made since FY 2004 were for human rights violations rather than immigration offenses. ICE responded in writing that only one of these 100 individuals was arrested on criminal human rights violation charges and two were arrested based on administrative immigration human rights violations. In all other cases, ICE said it sought to use all available tools, including immigration fraud charges, to remove these individuals from the United States.

This suggests that the overwhelming majority of suspected human rights violators found in the United States are either being removed to countries where there is little likelihood they will be prosecuted for the crimes they have committed and where they may still constitute a destabilizing threat, or they are being prosecuted for immigration violations that are much less serious than the human rights abuses they have committed. Suspected human rights violators found in the United States, such as Marko Boskic, who reportedly admitted to participating in the execution of men and boys in the Srebrenica massacre, have committed some of the most egregious crimes against humanity. Sending them back to their countries to live freely or sentencing them for immigration violations perpetuates impunity for war crimes.

Why have so few of the suspected human rights violators found in the United States been held accountable for the underlying human rights violations they committed?

What is DHS doing to ensure that a larger number and percentage of suspected human rights violators in the Untied States will be prosecuted for the underlying human rights violations they have committed rather than comparatively minor immigration violations?

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Why have so few of the suspected human rights violators found in the United States been held accountable for the underlying human rights violations they committed?

Response: ICE approaches each case involving suspected human rights violators with the goal of holding the individual accountable for the underlying human rights violations committed. This goal may be difficult to achieve due to a variety of factors to include statutory limitations, difficulties in obtaining evidence, scant foreign records, reluctant overseas or domestic victims or witnesses, hostile overseas investigative environments, and the lack of cooperation of foreign governments.

Both the Torture and Genocide statute require the government to prove the alleged offender had the specific intent to commit the prohibited act. Obtaining the requisite evidence is extremely problematic in foreign jurisdictions where members of the current government or regime who may themselves have been complicit in the commission of such acts, are unwilling to cooperate with ICE's investigation.

Additionally, the torture statute became effective in November 1994, the war crimes act became effective in October 1996 and was revised several times thereafter, and the genocide statute was substantially amended in December 2007 to provide broader jurisdiction. "Ex post facto" concerns may limit our ability to use these statutes for conduct that occurred before these dates. Much of the conduct of the individuals being investigated by ICE occurred before these respective dates, and thus the substantive statutes may not be applicable.

Question: What is DHS doing to ensure that a larger number and percentage of suspected human rights violators in the Untied States will be prosecuted for the

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underlying human rights violations they have committed rather than comparatively minor immigration violations?

Response: While each situation differs based on the legal and factual circumstances, ICE generally undertakes the following approach when dealing with such cases. First, ICE seeks to raise criminal charges for the substantive human rights abuses which the suspect allegedly committed in his or her home jurisdiction. In this effort, ICE works very closely with our partners at the U.S. Department of Justice—Domestic Security Section and the various U.S. Attorney's Offices.

Where the offender has fraudulently obtained U.S. citizenship, we work with our partners in the U.S. Department of Justice—Office of Special Investigations to raise either a criminal denaturalization case (18 USC 1425) or undertake civil denaturalization proceedings. In large part, the criminal charges that ICE pursues and recommends to the respective U.S. Attorney's Offices for prosecution depend on our understanding of the judicial environment in the country where the human rights abuses originally took place. In cases where the affected jurisdiction is willing and able to undertake investigating and trying the substantive offenses, ICE may recommend that a limited number of criminal counts be raised so that the offender can be removed or deported back to their home jurisdiction as rapidly as possible in order to face trial before the victims of their crimes. This approach has successfully been employed with offenders from Argentina, Bosnia and Herzegovina, and Peru, all which have demonstrated both the judicial capacity and the political willingness to undertake these trials.

Alternatively, in some instances, we understand that the affected jurisdiction is either unwilling or unable to undertake these trials, such as in some Central American countries where suspects enjoy broad amnesties. In such cases, ICE recommends the maximum number of criminal counts and seeks enhanced sentencing factors so that victims of these abuses might find some measure of justice.

By adopting such an approach, ICE works to ensure that offenders who commit human rights abuses abroad will not perceive that that they will gain impunity or some other form of 'safe-haven' by seeking admission into the United States. Additionally, ICE is using funds specifically designated by Congress to hire additional personnel and to fund overseas investigations to obtain evidence to ensure more human rights violators are prosecuted.

Question#:	62
Topic:	human rights violators center
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: In response to a written question I submitted following a hearing of the Senate Judiciary Subcommittee on Human Rights and the Law held in November 2007, ICE wrote that they were planning to establish a pilot Human Rights Violators Center to proactively identify and bar from entry individuals who have assisted in, ordered, or committed offenses such as genocide, war crimes, torture, or extrajudicial killings.

ICE also wrote that they knew of only seven out of the reported 238 removals of human rights violators from the United States since FY 2004 where they had obtained assurances that the human rights violators would be prosecuted in their home country. They noted that they do not formally track whether human rights violators returned to their countries are prosecuted.

Is the Human Rights Violators Center operational? Please provide a status report on the Center.

What steps will the Human Rights Violators Center take to ensure that suspected human rights violators are prosecuted for the underlying human rights offenses they are suspected of committing either in the United States or in another country?

Response: This pilot program is designed to allow for the ICE Human Rights Violator efforts to be more proactively focused on two key areas:

1) To deter or prevent suspected war criminals or human rights abusers from entering the United States as permanent residents, refugees, asylum seekers or visitors.

2) To more effectively identify, locate, prosecute and remove foreign human rights abusers who have already gained admission into the United States.

In order to properly implement this center pilot program, it was determined that the human rights violator enforcement mission was best served by increasing the allocated positions to the mission and to also separate the human rights violator mission from the existing public safety (gang enforcement) mission. On April 27, 2008, the former Human Rights Violators/Public Safety Unit was disbanded and two separate units were established—the Human Rights Violators and War Crimes Unit, and the Gang Unit. Under this reorganization, the Human Rights Violators and War Crimes (HRVWC) unit

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gained six additional Headquarters Senior Special Agent/Program Manager positions and Criminal Research Officer positions — for a total of twelve dedicated positions within the unit. On April 29, 2008, a one-year transition plan was drafted in order to identify milestones and to prioritize the recruitment and hiring process so that vacant unit positions can be filled.

Question: What steps will the Human Rights Violators Center take to ensure that suspected human rights violators are prosecuted for the underlying human rights offenses they are suspected of committing either in the United States or in another country?

Response: ICE, in conjunction with the Department of Justice, Office of International Affairs and the Department of State, maintains a strong working relationship with numerous international and national law enforcement agencies and prosecutors dedicated to the investigation and prosecution of human rights abuses and war crimes issues. If the foreign jurisdiction indicates it is both willing and able to undertake the necessary measures to investigate and try such offenders who have been identified in the United States, ICE seeks to return these suspects to the foreign jurisdiction as quickly as possible via deportation or when requested, through extradition. When ICE understands that a foreign jurisdiction lacks the necessary judicial capacity to effectively investigate and prosecute suspected offenders or is unwilling to do so, ICE seeks to work with the relevant U.S. Attorney's Offices to undertake criminal prosecution of such suspects to the maximum extent possible under the law. In addition, when possible, ICE lodges administrative removal charges based on the underlying human rights offense. ICE is fully committed to combating international impunity for war crimes and human rights abuses and ensuring that the United States is not perceived as a 'safe-haven' for such offenders.

Question#:	63
Topic:	worksite enforcement
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: Your testimony noted that in fiscal year 2007, ICE made a total of 863 worksite enforcement arrests. Of these, only 92, or about 10%, were actions against employers, supervisors, or corporate officials. In a letter to Senator McCaskill, DHS reported that only 17 companies were subject to fines.

Please explain why enforcement against employers who hire illegal immigrants has not been a bigger part of DHS's immigration enforcement activities.

What efforts are you making to sanction more employers who hire illegal immigrants?

Response: It is important to recognize that worksite enforcement investigations - from the initial investigation of a company's hiring practices, to the enforcement operation at the worksite, and finally to the larger investigation of the employers and their crimes – can at times be lengthy and complex. Federal criminal charges against employers of illegal aliens may not be filed immediately after a worksite enforcement operation. And depending on many factors outside of ICE's control, the resulting convictions and sentences with respect to those employers may occur many months after the charges have been filed with the courts.

The sanctioning of an employer can take several forms. First, through criminal prosecutions, ICE believes that the greatest penalty and deterrence can be achieved from those employers and persons who are acting on behalf of employers to knowingly hire undocumented aliens.

Second, by reinvigorating the administrative fine process, ICE will be able to hold those employers who do not abide by their legal obligation to verify the identity and work authorization of their workforce accountable. In the Spring of 2008, ICE issued revised guidance to all field offices which completely revised the development of an administrative fine case and further emphasized its importance as a tool against egregious employers of unauthorized workers.

Finally, while a prosecution and/or a fine against an employer may not always be achievable, ICE is able to significantly disrupt the operations of egregious employers by administratively arresting their undocumented workforce.

ICE has shown a marked increase in the number of work hours dedicated to worksite enforcement investigations. In FY 2006 and FY 2007, ICE agents dedicated 216,315

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hours (127 investigative full time employees) and 568,955 hours (335 investigative full time employees) respectively to worksite enforcement investigations. FY2007 alone reflected a dramatic 263% increase in total number of hours worked by investigators on employer sanction cases. This increase reflects the agency's aggressive efforts and continued dedication to increasing its worksite enforcement investigations as part of its broader mandate of protecting the nation's safety and security and targeting egregious employers who violate the law by employing an illegal labor force.

Question: What efforts are you making to sanction more employers who hire illegal immigrants?

Response: Again, it is important to recognize that worksite enforcement investigations - from the initial investigation of a company's hiring practices, to the enforcement operation at the worksite, and finally to the larger investigation of the employers and their crimes – can at times be lengthy and complex.

In addition to understanding how our criminal investigations develop and progress, it is important to recall that, until recently, criminal prosecution was not the main focus of worksite enforcement operations. The former INS devoted its worksite enforcement resources to bringing administrative sanctions, not criminal charges, against employers of illegal aliens. Because the administrative fine process often proved to hold little deterrence value for violators and given that many employers came to view these fines as simply the "cost of doing business," ICE developed a new comprehensive strategy aimed at dramatically enhancing efforts to combat the unlawful employment of illegal aliens in the United States. Under this new strategy, ICE now aggressively targets unscrupulous employers of illegal aliens by pursuing criminal prosecutions and asset forfeitures. Furthermore, ICE completely revised the administrative fine process to standardize and simplify the fines further reducing the amount of investigative time spent preparing each case.

To illustrate this difference in strategy, the former INS, in its last full year, made only twenty-five criminal arrests in worksite investigations cases. In contrast, our worksite investigations in FY 2006 resulted in 716 criminal arrests, the seizure of property and assets valued at approximately $1.7 million, and approximately $233,044 in judicially ordered criminal fines, forfeitures, and payments in lieu of forfeiture. Of the 716 arrests, 110 of these individuals were employers or individuals who had a position of authority within a company such as a supervisor or manager. As each company has many more workers than managers, ICE feels that the pursuit of all criminal charges available lends itself to having a larger number of employees arrested for criminal violations than employers.
While the deterrent effect of this new ICE worksite enforcement strategy cannot be measured though empirical data at this time, ICE believes it is already having an impact.

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Indeed, Business Week recently noted: "...there are signs that ICE's tactics have made businesses reassess their hiring practices."

Additionally, ICE continues to obtain employer compliance by conducting administrative audits of the employment eligibility verification process (Form I-9). If substantive violations of the employment eligibility verification requirements are found, ICE can issue a Notice of Intent to Fine (NIF) against an employer as an attempt to ensure future compliance with those requirements. The amount of an administrative fine is determined by guidance from statutory and regulatory law. The fine can vary, depending on mitigating and aggravating factors particular to each employer.

In an effort to promote corporate compliance with the employer verification provisions of current immigration laws, ICE has recently hired and trained worksite enforcement forensic auditors to assist investigators in conducting administrative Form I-9 audits. These auditors work with investigators to pursue the administrative fines on investigations that do not meet a criminal threshold and on criminal investigations. ICE anticipates an increase in the number of "Final Orders" issued to employers in FY 2008, as more auditors are hired and trained.

Pursuant to the number of "Final Orders" received by the Burlington Finance Center, the following are the amounts in dollars assessed for each of the following fiscal years (As of March 19, 2008):

Amounts Assessed Pursuant to Final Orders

	Assessed
FY2003	$289,814
FY2004	$90, 249
FY2005	$455,870
FY2006*	$0
FY2007	$26,560
FY2008	$576,686 as of June 30, 2008

.* Between fiscal years 2004 and 2007, the ICE worksite enforcement program was primarily focused on establishing criminal cases and initiating forfeiture over administrative fines, which have historically proved ineffective. Subsequently, in FY2006, there were no administrative fines. In FY2008, ICE completely revised the administrative fine process to standardize and strengthen their usefulness and anticipates seeing a dramatic increase in these numbers.

Question#:	64
Topic:	material support
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: On March 26, 2008, U.S. Citizenship and Immigration Services Deputy Director Jonathan Scharfen issued a memorandum that calls for the withholding of adjudication of cases in which the only grounds for referral or denial are certain terrorist-related inadmissibility provisions. In addition, the memo called for a review and reopening of all cases that have been denied or referred on those same grounds since December 26, 2007. These holds are in place to allow time for you to issue new exemptions.

A recent Washington Post article about an Iraqi refugee, Saman Kareem Ahmad, who served with American troops in Iraq and still works for the U.S. military, highlighted the broad and sometimes inappropriate reach of the terrorist-related bars to admissibility to the United States. When Congress passed language that amended the discretionary authority of the Secretary of Homeland Security to grant exemptions to these provisions in our immigration laws, our goal was to prevent cases like Mr. Ahmad's from being denied. I believe it is important to the integrity of our immigration laws that the terrorism bars are applied in an informed, measured, and accurate manner.

Mr. Scharfen's memo calls for the case review to be completed by April 30, 2008. What is the timeline for evaluating and granting exemptions from the terrorism-related bars to admissibility so that these cases can be fully adjudicated?

Response: Pursuant to the March 26, 2008, directive, USCIS has completed an initial review of all adjustment of status cases denied on or after December 26, 2007, on the basis of a terrorist-related ground of inadmissibility. In addition, USCIS has expanded its review to include all adjustment of status cases denied after May 24, 2007 on this basis. Cases meeting the hold criteria have been reopened and placed on hold to ensure appropriate consideration of all groups of cases for which the Secretary may choose to exercise his discretionary authority under the Act, as amended by the Consolidated Appropriations Act of 2008. Those cases not meeting the hold criteria remain denied. Notice of the action taken by USCIS has been sent to each affected applicant. For cases in which jurisdiction has not vested with the Executive Office for Immigration Review, USCIS will also consider requests to reopen or reconsider decisions issued before the CAA's enactment where the change in law regarding the identified groups no longer being considered terrorist organizations may now benefit the applicant.

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Additionally, the USCIS Refugee Affairs Division is working with its DOS partners to identify refugee cases denied overseas that would be appropriate for re-presentation to USCIS given the changes made by the CAA and USCIS' new hold policy.

The use of the discretionary exemption authority requires action by the Secretary of Homeland Security or the Secretary of State in consultation with the other and the Attorney General. USCIS is coordinating closely with DHS to ensure that the Secretary of Homeland Security has the information necessary to decide on the appropriate use of his authority.

Question: What criteria will DHS use to determine if support for a particular group should be a bar to admission or legal permanent residence in the United States?

Response: USCIS recognizes that the Act's broad definition of "engage in terrorist activity," which includes the provision of material support to individuals or organizations that have engaged in terrorist activity, can encompass individuals who do not pose a risk to United States national security, including genuine refugees who may face persecution – sometimes at the hands of terrorists themselves. The INA defines an undesignated terrorist organization as a "group of two or more individuals, whether organized or not, which engages in, or has a sub-group which engages in," any of the expansive list of activities listed in INA section 212(a)(3)(B)(iv). Under this definition, two or more individuals found to have unlawfully committed an act using any explosive, firearm, or other weapon or dangerous device under circumstances indicating an intention to cause death or serious bodily injury, and for other than mere personal monetary gain, constitute a "terrorist organization." As noted by the Board of Immigration Appeals, "Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as 'freedom fighters.'" *See Matter of S-K-*, 23 I&N Dec. 936, 941 (BIA 2006), *remanded by Matter of S-K-*, 24 I&N Dec. 289 (A.G. 2007) (noting that the remand "does not affect the precedential nature of the Board's conclusions"), and *granting relief in,* 24 I & N Dec. 475 (BIA 2008).

Whether a group is a "terrorist organization" is determined on a case-by-case basis by examining the activities of the organization in question. USCIS adjudicators rely on a number of resources to determine whether an individual is inadmissible based on the provision of material support to a terrorist organization, or any other terrorism-related ground of inadmissibility. In addition to the statute, case law, and agency guidance, USCIS adjudicators use various resources to research the activities of relevant organizations. These resources may include U.S. Government sources, as well as open source materials available from other credible entities.

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The use of the discretionary exemption authority requires action by the Secretary of Homeland Security or the Secretary of State in consultation with the other and the Attorney General. USCIS is coordinating closely with DHS to ensure that the Secretary of Homeland Security has the information necessary to decide on the appropriate use of his authority.

Question: How do you envision that the exemption process will work in the future? In particular, will there be a way for an individual to apply for an exemption?

Response: In February and October of 2007, the Secretary of Homeland Security and the Secretary of State exercised their respective authority not to apply the material support inadmissibility provision with respect to certain aliens applying for immigration benefits or protection who had provided material support to ten undesignated terrorist organizations. Also in February 2007, the Secretary exercised his authority not to apply the material support inadmissibility provision with respect to certain aliens applying for immigration benefits if the material support was provided under duress to an undesignated, or "Tier III," terrorist organization under INA § 212(a)(3)(B)(vi)(III), where the totality of the circumstances justifies the favorable exercise of discretion. In April 2007, the Secretary exercised his discretionary authority not to apply the material support provision to individuals who provided the support under duress to certain designated, or "Tier I and II," terrorist organizations under INA § 212(a)(3)(B)(vi)(I) and (II), if warranted by a totality of the circumstances. As of the end of March 2008, and under the above exercises of the Secretaries' discretionary authority not to apply the terrorist-related provisions of the INA, over 5,000 applicants for refugee status, asylum, or adjustment of status have been granted exemptions.

The use of the discretionary exemption authority requires action by the Secretary of Homeland Security or the Secretary of State in consultation with the other and the Attorney General. USCIS is coordinating closely with DHS to ensure that the Secretary of Homeland Security has the information necessary to decide on the appropriate use of his authority in the future.

A working group of USCIS, ICE, and Executive Office for Immigration Review (EOIR) representatives has examined the most effective process for the identification and presentation to USCIS of cases appropriate for consideration of the Secretary's exemption authority. The possibility of creating an application process was considered, but it was determined that an application process would not be the most effective way to proceed. Many applicants are unrepresented, and there is a possibility that many such applicants would be disadvantaged by an application process. Unrepresented applicants may not realize that issues such as material support are presented by their cases, and

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therefore may be unable to navigate an application process. Instead, it was determined that a process requiring consideration of the availability of and eligibility for an exemption in **every** case is a more effective means to implement this authority. This process is coupled with staff training and a quality assurance process. As always when making a determination on a case, USCIS will consider all evidence submitted by or on behalf of the applicant.

Question#:	65
Topic:	iraqi refugees
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: According to the Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration, between 4 and 5 million Iraqis have been displaced by the war. Approximately half have fled to neighboring counties, such as Jordan, Syria, Lebanon, and Egypt, while the rest have been displaced within Iraq. The situation for many of these refugees, both inside and outside Iraq, is dire.

Some refugees face discrimination and persecution in their host countries. They are often denied access to health care and education, and some live with the fear that they will be arrested and forcibly returned to Iraq. While UNHCR has been working to register these refugees, many are afraid to come forward. Registration is a necessary first step to resettlement, and can also provide increased access to benefits.

Is DHS working with UNHCR and the governments of these countries to encourage refugees to register? If so, how?

Response: DOS has taken the lead for the U.S. government in working with UNHCR and host governments concerning refugee protection and registration, as well as access to public benefits. While DHS is not actively engaged with UNHCR or host-country governments to encourage Iraqi refugees to register for resettlement, there are programs in place that create greater access to the United States Refugee Admissions Program. The Refugee Crisis in Iraq Act expanded the categories of Iraqis eligible for access to the U.S. Refugee Admissions Program through Priority 2 group processing. The following Iraqis may apply directly to the U.S. refugee resettlement program in Jordan or Egypt:

- Iraqis who work/worked on a full-time basis as interpreters/translators for the U.S. Government or Multi-National Forces (MNF-I) in Iraq;
- Iraqis who were engaged as Locally Employed Staff (LES) by the U.S. Government in Iraq;
- Iraqis who are/were direct-hire employees of an organization or entity closely associated with the U.S. mission in Iraq that has received U.S. Government funding through an official and documented contract, award, grant or cooperative agreement;
- Iraqis who are/were employed in Iraq by a U.S.-based media organization or non-governmental organization;

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- Spouses, sons, daughters, parents and siblings of individuals described in the four categories above, or of an individual eligible for a Special Immigrant Visa as a result of his/her employment by or on behalf of the U.S. government in Iraq, including if the individual is no longer alive, provided that the relationship is verified.

In addition to the expanded P-2 program created by the Refugee Crisis in Iraq Act, DHS and DOS have agreed to the designation of a P-2 group for beneficiaries of approved Forms I-130 relative petitions. This P-2 program provides access to the refugee resettlement program as a parallel track to immigrant visa processing. In December 2007, DOS sent out letters to U.S.-based petitioners for 6,710 approved Forms I-130 with Iraqi beneficiaries inviting them to respond to DOS with an expression of interest on behalf of their Iraqi relatives. This program is currently operating in Jordan and Egypt, with the cooperation of the host governments.

Question: Is DHS taking any steps to ensure the safety of these refugee populations?

Response: UNHCR is a key partner in the complex multi-agency network that is engaged in United States Refugee Admissions. UNHCR works on the ground to bring services and a voice to vulnerable refugees. Moreover, UNHCR has the international mandate to provide protection and assistance to refugees and can provide a protection document and possibly other assistance if needed. DOS is also actively engaged with host governments on protection and assistance issues for Iraqi refugees.

DHS maintains a deep interest in the safety and security of refugee applicants in their host countries. Toward this end we provide specialized training for officers who conduct interviews of Iraqi refugee applicants, including information about conditions Iraqi refugee applicants may confront in host countries. By adjusting our staffing and conducting circuit rides to remain current with Iraqi cases prepared by OPEs, we complete the duties that fall within our mandate, namely determining the eligibility of applicants put forward for refugee status in the United States, thereby alleviating the concerns described for those who are found to qualify for refugee status in the United States.

Question#:	66
Topic:	ethnic minorities
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: Ethnic and religious Iraqi minorities have had a particularly difficult time throughout the conflict and as refugees. Refugee groups and representatives of some of these minority groups have commented that DHS has done almost nothing to address the particular threats and problems faced by ethnic and religious minorities in Iraq.

Is DHS taking any steps to specifically address ethnic minorities and religious minorities? If so, please describe them.

Response: In identifying cases for referral to the U.S. Refugee Admissions Program (USRAP), UNHCR and the Department of State (DOS) have been prioritizing several categories of especially vulnerable refugees, including individuals who are affiliated with the U.S. government and religious minorities, among others.

There are several avenues by which religious minorities may gain access to U.S. refugee processing. One of UNHCR's eleven categories for resettlement referrals is membership in a minority religious group. The Refugee Crisis in Iraq Act called for expanded Priority 2 group processing for Iraqis who are members of a religious or minority community, and who have close family members in the United States. Together with DOS, USCIS has already begun to implement this program by building on a pre-existing Priority 2 group for Iraqi beneficiaries of I-130 relative petitions. In addition, Iraqis are eligible for normal immigrant and non-immigrant visa processing and may apply for asylum if they are located in the United States.

The Priority 2 group for Iraqi beneficiaries of approved I-130 relative petitions provides access to the refugee resettlement program as a parallel track to immigrant visa processing. In December 2007, the State Department sent out letters to U.S.-based petitioners for 6,710 approved I-130s with Iraqi beneficiaries, inviting them to respond with an expression of interest in refugee resettlement on behalf of their Iraqi relatives. This program is currently operating in Jordan and Egypt, with the cooperation of the host governments.

We also continue to interview and adjudicate claims of religious minorities as they are presented to us from UNHCR.

Question#:	67
Topic:	resettlement
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: Resettlement in a safe country is the goal of many Iraqi refugees. In FY 2007, only 1,600 such refugees were resettled in the United States, and the pace is not much better for FY 2008.

What is DHS doing to speed up this process and ensure that more Iraqi refugees are allowed to resettle in the United States?

Response: The refugee program has increased capacity significantly in the Middle East since the expanded Iraqi admissions goal was announced in February 2007. Iraqis had not been designated as a priority group in the FY 2007 Annual Report to Congress on Refugee Admissions. On February 14, 2007, the U.S. government committed to processing a larger number of Iraqi refugee applicants, and UNHCR committed to make 7,000 referrals to the USRAP during FY 2007. In the relatively short time span of the past year, all refugee program partners have substantially increased their capacities to process cases in the Middle East, building the infrastructure to support a large-scale operation where it previously did not exist. This increase in capacity is evidenced by the fact that UNHCR is now able to refer more cases to the USRAP and OPEs are able to prescreen more cases for DHS interview. The increase in DHS interviews in the third quarter of FY 2008 is a result of more Iraqi refugee cases being referred and prescreened. The greater number of cases also reflects the expanded access categories for individuals to come forward for a U.S. refugee interview as a result of the passage of the Refugee Crisis in Iraq Act.

In terms of staffing these interviews, USCIS is being flexible in our circuit ride planning and staffing model. We are supplementing Refugee Corps staff with staff from the Asylum Corps and other USCIS offices. Moreover, we are scheduled to field teams on a nearly continuous basis in the coming months as cases become ready for interview.

On average, the total processing time for Iraqi cases is significantly less than for any other refugee group worldwide. This fiscal year, as of May 7, 2008, DHS had interviewed 11,678 Iraqi individuals and 3,686 Iraqi refugees had been admitted to the United States. Working with DOS, we have scheduled circuit rides that we expect to yield another 8,000 interviews in the third quarter alone.

Question: What is the process for deciding which refugees will be resettled?

Response: Under INA Section 207(c), the Secretary may admit within his discretion

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refugees who meet the refugee definition found at INA Section 101(a)(42), who are not firmly resettled, who are admissible into the United States, and who are determined to be of special humanitarian concern to the United States.

The President, in consultation with appropriate sources, as described in INA Section 207 (e) determines the refugee ceiling each year, and determines the allocation of refugee admissions per region. The total number in the ceiling includes an unallocated reserve of additional refugee slots that provide built-in flexibility to respond to crises. The Report to Congress each fiscal year identifies regional trends and groups that have been identified by the President (in consultation) to be of special humanitarian concern to the United States. The Department of State, Bureau of Population, Refugees and Migration (PRM) has overall management responsibility for the USRAP and has the lead in proposing admissions ceilings and processing priorities.

A Worldwide Priority System provides those of special humanitarian concern to the United States access to refugee resettlement in the United States. Priority 1 cases are those referred by US Embassies, UNHCR, or specially trained non-governmental organizations. Priority 2 groups are designated by the Department of State and are comprised of groups within a population with discernable characteristics. Priority 3 cases are those involving family reunification, with the eligible nationalities designated in the consultation process each year.

Iraqi refugee applicants may gain access to the USRAP through direct referrals by UNHCR, a U.S. Embassy, or a non-governmental organization; through a self-identification mechanism if they worked for the U.S. government (USG); through family reunification if an eligible family member applies on their behalf in the United States; through the expanded P-2 program created by the Refugee Crisis in Iraq Act; or through the P-2 group for beneficiaries of approved Forms I-130 relative petitions. The vast majority of cases processed thus far have been referrals from UNHCR.

After referral to the USRAP, Overseas Processing Entities (OPE) under contract to the Department of State prepare refugee applications and materials. Once cases have been prepared by OPEs, and in some instances even as the cases are being completed by OPEs, USCIS officers conduct personal interviews with the applicants designed to elicit information about the applicant's claim for refugee status. During the interview the officer: confirms the basic biographic data of the applicant; verifies that the applicant was properly given access o the USRAP; determines whether the applicant has suffered past persecution (or has a well-founded future fear of persecution) on the basis of race, religion, nationality, membership in a particular social group, or political opinion in his or her home country; determines whether the applicant is admissible to the United States

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Committee:	JUDICIARY (SENATE)

and whether he or she has been firmly resettled in another country; and assesses the credibility of the applicant.

On May 29, 2007, DHS announced and implemented an Administration-coordinated, enhanced background and security check process for Iraqi refugees applying for resettlement in the United States. No case is finally approved until results from all security checks have been received and analyzed. The security checks do not impede the flow of genuine refugees to the United States since the process takes generally only 2 to 4 weeks and runs concurrently with other out-processing steps conducted under DOS auspices (medical exams, cultural orientation, locating sponsors, travel arrangements).

Question: What are the DHS staff levels in Syria, Jordan, Lebanon, and Egypt? Does DHS have staff in other countries in the region? Does DHS have staff working on refugee issues in Iraq?

Response: There are at present nine DHS officers in Amman and six DHS officers in Damascus. We have had a near-continuous presence of interview teams in the region since the beginning of fiscal year 2008. We will continue to have a strong presence in Damascus and Amman for as long as there is a continual flow of cases that need interviews. In addition, we remain current with submissions in Cairo and Istanbul. These posts refer cases but in smaller numbers and we are able to keep abreast of submissions with less than a continual presence. We also began interviewing applicants in Beirut in mid June and will finish their interviews in mid July. We hope to send another USCIS team to Beirut later in the summer. USCIS sent a team of officers to interview refugees in Baghdad in March, and we expect to return for a second circuit ride in the fourth quarter of the fiscal year when additional cases have completed prescreening. There is also a DHS attaché in Baghdad who assists USCIS on refugee-related matters in Iraq. Finally, USCIS has recently received DOS approval for a permanent staff position in Amman. This officer will also assist with the refugee resettlement program.

USCIS is keeping pace with the level of UNHCR referrals and cases that have completed prescreening. Moreover, we are scheduling our interviews *in anticipation of* cases that have not yet been prescreened, but that are anticipated to become "ripe" for interview in the coming weeks and months.

Question: When DHS's ability to conduct interviews and evaluate refugees for resettlement is hindered or interrupted, as it has been recently in Syria, what steps does DHS take to address the problem?

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Topic:	resettlement
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
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Response: USCIS sought assistance from DOS when visas for its officers were delayed between June and November 2007. When it subsequently appeared that Syrian visas might be forthcoming, USCIS stationed additional officers in Amman who could be available to travel to Syria on short notice, while conducting refugee interviews in Amman during the interim. In addition, Lori Scialabba, Special Advisor to Secretary Chertoff, joined Ambassador James Foley on a trip to Damascus in October 2007 to engage in discussions with Syria officials to seek resumption of visa issuance to USCIS officers in support of the USRAP.

Question: When processing is slow in one country, does DHS boost its efforts in other countries to ensure that the overall number of refugees that can be interviewed does not drop?

Response: DOS is responsible for the overall management of the USRAP, and USCIS and DOS keep in close communication with respect to the number of refugee cases that are ready for interviews in various locations around the world. DOS and USCIS frequently agree that resources should be shifted from one country to another to accommodate refugee needs and changed circumstances. However, given the lead time necessary to prepare cases for USCIS interview, a shortfall in one country cannot always be offset by an immediate increase in another location.

Question#:	68
Topic:	H1B - 1
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: Last month, United States Customs and Immigration Services released the H-1B usage numbers for FY 2007. Eight of the top ten H-1B users are foreign outsourcing companies. Rather than bringing in foreign nationals to work in the United States, these companies are working to outsource American jobs to foreign countries, primarily India.

Do you agree this is an inappropriate use of the H-1B Visa program?

Is DHS taking any steps to address this problem?

Would you consider revising the regulations that control the H-1B lottery to allow for a more controlled selection process?

Response: Any intentional use of the H-1B program to harm U.S. workers is clearly contrary to the spirit and intent of the program. DHS notes that it may revoke H-1B petitions in which a beneficiary is no longer employed by the petitioner, the statement of facts in the petition was not true or correct, or if the petitioner violated the terms and conditions of the approved petition. See 8 CFR 214.2(h)(11).

As part of the 26 immigration initiatives announced by the Administration on August 10, 2007, DHS is actively considering various administrative and regulatory reforms that would benefit U.S. employers and aliens participating, or seeking to participate, in employment-based, nonimmigrant visa programs for skilled workers. These reforms would seek to increase the efficiency of such programs, clarify existing regulations and policies, and implement other significant improvements.

One of the most recent accomplishments in this reform effort occurred on March 24, 2008, when U.S. Citizenship and Immigration Services (USCIS) published an interim final rule that prohibits employers from filing multiple H-1B petitions for the same employee. To ensure a fair and orderly distribution of available H-1B visas, USCIS will deny or revoke multiple petitions filed by an employer for the same H-1B worker and will not refund the filing fees submitted with multiple or duplicative petitions. This change will ensure that companies filing H-1B petitions subject to congressionally mandated numerical limits have an equal chance to employ an H-1B worker.

USCIS is currently developing several additional reforms that may be adopted by rulemaking or policy. Reforms currently being considered include additional

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Topic:	H1B - 1
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

improvements to the H-1B lottery process and provisions designed to reduce fraud or abuse of the H-1B program.

Question#:	69
Topic:	H1B - 2
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: I have introduced legislation, S. 1035, that would correct many of the current problems with the H-1B visa program. For example, under current law, many employers are able to import H-1B workers without attesting that they will not displace American workers. My bill would require an attestation from all employers wishing to use the H-1B program.

Do you agree that all employers who want to import foreign labor should be required, at the very least, to promise they will not displace American workers?

Response: As part of the H-1B filing requirements, a company must file a labor condition application with the Department of Labor. The labor condition application requires a company to attest that they have complied with several requirements upholding protections for U.S. workers. Among those requirements is that the company will pay a foreign national the higher of the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or 100 percent of the prevailing wage. This provision helps protect against foreign labor undermining wages for U.S. workers. The employer is also required to attest that the employment of the foreign worker will not adversely affect the working conditions of workers similarly employed in the area of intended employment. USCIS will not adjudicate the H-1B petition unless it is accompanied by the certified labor condition application from the Department of Labor. At the present time USCIS does not have the statutory authority to require companies to attest that they will not displace U.S. workers.

Question#:	70
Topic:	H1B - 3
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: Under current law, only employers that employ H-1B holders as a large percentage of their workforce are required to attest that they first attempted to recruit American workers. My bill requires that all employers make a good faith effort to first recruit Americans before applying for H-1B visas.

Do you agree that all employers who seek to hire an H-1B worker from outside the U.S. should first be required to attempt to find an American worker for the job?

Response: At the present time, neither the Department of Labor nor USCIS has the statutory authority to require all H-1B employers to test the U.S. labor market before hiring an H-1B employee.

Question#:	71
Topic:	H1B - 4
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: According to your Inspector General, DHS has issued thousands of H-1B visas in excess of the statutory cap. According to the GAO, over 99.5% of such visa applications are approved, including those that clearly violate the law. The Department of Labor's Inspector General has also examined the H-1B program and concluded it is "highly susceptible to fraud."

For example, 25 H-1B visas were approved for pizza tossers at a restaurant in Phoenix, paid $10/hour. These visas were approved in the category of "software engineer."

What efforts is DHS taking to combat fraud in the H-1B process?

Response: USCIS has undertaken a number of actions aimed at combating fraud and enhancing the quality of adjudications. First and foremost, USCIS has made combating H-1B and L-1 petition fraud a national priority. In furtherance of that priority, USCIS has aligned adjudication caseload responsibilities with two Service Centers, Vermont and California, which are now specialized in the adjudication of H-1B and L-1 nonimmigrant petitions. Adjudication Officers at these centers are teamed with Center Fraud Detection Operations Officers. The combined efforts of such personnel result in increased detection and referral of suspect cases for further administrative inquiry and, in certain cases, even criminal investigation by ICE. The Service Center Operations Division (SCOPS) and the Fraud Detection and National Security Division (FDNS) have developed and employed potential fraud indicators to assist Adjudication Officers. Specialized training is provided to officers adjudicating and reviewing H-1B petitions, amongst others. USCIS has formed an anti-fraud working group to work with the Department of Labor and the Department of State counter-fraud efforts. USCIS is also in the process of developing a contract-supported Administrative Support and Verification Program that will conduct post-adjudication compliance reviews to assist USCIS in its quality assurance and integrity efforts. These reviews will be aimed primarily at verifying that beneficiaries of H-1B and L-1 petitions are employed in accordance with the terms and conditions stated on the petition. USCIS is also in the process of deploying additional FDNS Officers to interior offices and at high risk/high source locations overseas to engage in petition verification activities. Finally, and of note, USCIS recently conducted an H-1B Benefit Fraud and Compliance Assessment (BFCA) to determine areas of abuse and vulnerability. That report is in the final stages of external governmental review. This BFCA makes program improvement and anti-fraud recommendations and will result in an even more effective H-1B anti-fraud effort.

Question#:	72
Topic:	L-1 visa
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: I am also concerned about the use of the L-1 visa, which has virtually no limits or protections for American workers. A recent article in the Boston Globe reported that some companies have started using the L-1 visa instead of the H-1B visa to get around the H-1B cap and the selection lottery.

As an example of how the L-1 visa is being used, data show that in 1997, only 4.4% of L-1 visa holders were from India. In 2006, 43.8% of L-1 visa holders were from India. This suggests that the same Indian outsourcing companies that are the main users of H-1B visas are also using the L-1 visa to outsource even more American jobs.

My legislation, S. 1035, would add protections for American workers to the L-1 visa program, such as a requirement to recruit Americans first and a requirement to pay L-1 visa holders the same wage as Americans in similar jobs.

Do you agree that the L-1 visa should have stronger protections for the American workforce? If not, why not?

Response: The Department of Homeland Security (DHS) recognizes that existing skilled-worker visa programs such as the H-1B and L-1 visa programs, may be abused by unscrupulous employers indifferent to the harm their conduct may cause U.S. workers. Accordingly, as part of the 26 immigration initiatives announced by the Administration on August 10, 2007, DHS is actively considering various administrative and regulatory reforms that would benefit law-abiding U.S. employers and aliens participating, or seeking to participate, in employment-based, nonimmigrant visa programs for skilled workers. These reforms would seek to increase the efficiency of such programs, clarify existing regulations and policies, and implement other significant improvements. Reforms currently being considered include additional improvements to the H-1B lottery process and provisions designed to reduce fraud or abuse of the H-1B and L-1 programs.

Question#:	73
Topic:	ICE ACCESS
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: Your written testimony highlights ICE ACCESS, a program that provides training to state and local police on immigration enforcement and enables local law enforcement to act as immigration officers.

Many police associations, including the Major Cities Chiefs Association and the International Association of Chiefs of Police, have warned about the problems with authorizing state and local officers to act as immigration officials. Local police rely on the cooperation of the immigrant community to fight crime, maintain order, and protect public safety. Without this relationship of trust, local police are hampered in their efforts to fight crime.

As you promote programs like ICE ACCESS, how are you addressing these concerns?

Are you taking steps to ensure that state and local police who do work with ICE will not be impeded in their efforts to fight crime?

Are you taking steps to make sure that cooperation programs do not lead to civil rights infringements like racial profiling?

Response: The very reason this optional program was created was to provide state and/or local law enforcement additional avenues to address public safety issues of concern in their communities. ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) provides local law enforcement agencies an opportunity to team with ICE to combat specific challenges in their communities. ICE developed the ACCESS program based on experience gained in responding to widespread interest from state and local law enforcement agencies in the Delegation of Immigration Authority—287(g) program. ICE ACCESS coordinates an umbrella of services and programs offering a variety of opportunities to state and local law enforcement agencies to partner with ICE. For example, under ACCESS, ICE can provide Title 19 Customs cross designation training authorizing state and local officers to be cross-designated as customs officers with authority to enforce U.S. Customs laws; Document and Benefit Fraud Task Forces (DBTFs) that target and dismantle criminal organizations that exploit the immigration process through fraud; and Fugitive Operation Teams (FOTs), which identify, locate, apprehend, process and remove fugitive aliens from the United States. Again, state and local agencies may choose to participate in these programs to address concerns specific to their communities.

Question#:	73
Topic:	ICE ACCESS
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: Are you taking steps to ensure that state and local police who do work with ICE will not be impeded in their efforts to fight crime?

Response: Currently, ICE 287(g) memoranda of agreement (MOA) are focusing more on a jail enforcement officer (JEO) model and a task force officer (TFO) model. Agencies participating under the JEO model are working in an institutional or jail setting and are able to identify and process criminal aliens of interest to ICE. Agencies participating under the TFO model are working in an ICE-led task force and are able to identify, process and prosecute criminal aliens of interest to ICE. These functions should not impede the efforts of state and local law enforcement officers in the performance of their duties to fight crime as the JEO is working in a jail setting and simply incorporating the 287(g) process into the existing booking process, while the TFO is detailed to an ICE-led task force and is working jointly to accomplish the mission of the law enforcement agency he/she represents while supporting the ICE mission.

Question: Are you taking steps to make sure that cooperation programs do not lead to civil rights infringements like racial profiling?

Response: As part of the 287(g) training, local and state law enforcement officials are trained to follow the Department of Justice's "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies," issued in June 2003. Enforcement of the Nation's immigration laws can never be used as a pretext for racial discrimination. In the context of enforcing the immigration laws, alienage is often the central issue, and depending on the particular circumstances at hand, law enforcement officers may consider race or ethnicity as one of any number of relevant factors in making this determination.

Question#:	74
Topic:	immigration outsourced
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: An April 9, 2008 New York Times editorial entitled "Immigration, Outsourced" highlighted the potential problems with using local police as immigration officers. In Maricopa County, Arizona – a county with 160 local officers trained under the ICE ACCESS 287(g) program – tens of thousands of criminal warrants are being ignored in favor of immigration sweeps. The mayor of Phoenix has said that these actions are also interfering with the work of undercover city police officers and federal agents. ICE officials have said they do not see any problems with the way the ICE ACCESS program is being implemented in Maricopa County.

What kind of oversight mechanisms are in place for the 287(g) program?

Does DHS take any steps to ensure that participation in these ICE ACCESS programs is not interfering with critical law enforcement activities, such as the execution of criminal warrants?

Does DHS take any steps to ensure that the activities of state and local law enforcement trained under the ICE ACCESS program do not interfere with the activities of federal agents?

Question: What kind of oversight mechanisms are in place for the 287(g) program?

Response: ICE has statutory authority to enter into a Memorandum of Agreement (MOA) with states or their political subdivisions under Section 287(g) of the Immigration and Nationality Act (287(g)). All MOAs include a requirement that a "Steering Committee" be established to monitor the agreement. The Steering Committee is required to periodically meet, review and assess the immigration enforcement activities conducted by the participating law enforcement agency (LEA) and ensure compliance with the terms of the MOA. Committee participants are provided specific information on case reviews, individual participants, complaints filed, media coverage and, to the extent practicable, statistical information on increased enforcement activity in the geographic area. In most cases the committee initially convenes no later than nine months after the initial class of 287(g) LEA officers graduate. The Steering Committee generally includes field leadership from ICE and the LEA.

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On a day-to-day basis, immigration enforcement activities by state and local law enforcement personnel are supervised and directed by ICE supervisory agents and officers, or a designated team leader, who reviews enforcement activities on an ongoing basis to ensure the agency's and individual officer's compliance with the MOA and its accompanying procedures and to assess the need for individual additional training or guidance. Participating LEA personnel are not authorized to perform immigration officer functions, except when working under the supervision of an ICE officer, or when acting pursuant to the guidance provided by an ICE agent. Participating LEA personnel are required to give timely notice to the ICE supervisory officer within 24 hours of any detainer issued under the authorities set forth in the Memorandum of Agreement.

Longer term, ICE's Office of State and Local Coordination (OSLC), which was established on December 3, 2007, is currently in the process of establishing protocols and scheduling audits of agencies participating in the 287(g) program. Additionally, ICE Assistant Secretary Julie Myers has directed ICE's Office of Professional Responsibility (OPR) to establish an inspection program specifically tailored to the 287(g) program. A test inspection is tentatively scheduled for the week of May 18, 2008 whereby agents and management program analysts will assess the internal controls within the program as well as compliance with the MOA between ICE and participating state and local partners. It is anticipated that future inspections will be conducted to fully implement this oversight program.

Question: Does DHS take any steps to ensure that participation in these ICE ACCESS programs is not interfering with critical law enforcement activities, such as the execution of criminal warrants? Does DHS take any steps to ensure that the activities of state and local law enforcement trained under the ICE ACCESS program do not interfere with the activities of federal agents?

Response: By their very nature, ACCESS agreements are designed to further cooperation between local agencies and the federal government and thereby enhance each participating agency's law enforcement mission. Indeed, these partnerships often afford local law enforcement agencies the ability to address specific public safety problems – such as gang-related activity - that they might not be able to address save for the partnership with ICE. Depending on the specific type of agreement in place – be it 287(g), a gang task force agreement, a Title 19 agreement or another cooperative program - standard law enforcement practices with regard to notification, coordination and deconfliction are in place.

Question#:	75
Topic:	interoperability
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: In times of crisis, first responders need to be able to talk to each other and at every level of government; our inability to do this puts their lives at risk and us in danger. Communication difficulties should never be the reason why lives were lost when they could have been saved.

We have made some progress. In last year's omnibus appropriations bill, Congress established a new $50 million Interoperable Emergency Communications Grant Program to help localities develop interoperable radio communications. But I am concerned that we are not doing enough. First responders in my state still have trouble talking to each other effectively. During the recent tragic shootings at Northern Illinois University, police officers resorted to using runners because their cell phones went down and there was no link between campus police and the local police. Nationally, the Federal Communications Commission (FCC) has yet to secure a block of the radio spectrum for public safety and emergency teams to use to coordinate rescue efforts when a crisis strikes. Although DHS has awarded $968 million under the Public Safety Interoperable Communications Grant Program to help state and local governments achieve interoperability, overall federal funding has been limited, unreliable, and unevenly distributed.

Please provide an update on the Department's progress in developing interoperability standards, improving planning and coordination among different agencies and levels of government, and helping state and local authorities update or replace aging equipment.

In light of the FCC's difficulties auctioning off a part of the radio spectrum to create a public safety network, how is DHS working with state and local authorities to create functional interoperability on existing public safety spectrums?

Response:

Standards Development

With respect to the development of interoperability standards, the Science and Technology Directorate's Office for Interoperability and Compatibility (OIC) is working with the National Institute of Standards and Technology (NIST) and the Institute for Telecommunication Sciences to support efforts of the emergency response community and industry as they accelerate the development of the Project

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25 (P25) suite of standards. The current status of the major P25 standards is provided below:

- Common Air Interface (CAI) – Standards complete; products being fielded.
- Inter-RF Subsystem Interface (ISSI) – The major ISSI standards documents have been drafted, and standards for testing ISSI equipment are being developed. Products using ISSI should be available for purchase in early 2009.

OIC, with its partners, also created a P25 Compliance Assessment Program (CAP) to provide demonstrable evidence of P25 product compliance. OIC expects manufacturer laboratory assessments to begin later this year.

To connect radio systems, emergency responders rely on bridging devices. OIC is working with emergency responders and NIST to define a common connection for bridging devices that use VoIP.

OIC is also partnering with emergency responders, Federal agencies, and standards-development organizations, including the Organization for the Advancement of Structured Information Standards (OASIS), to accelerate the creation of data messaging standards. The Emergency Data Exchange Language (EDXL) Messaging Standards Initiative is a practitioner-driven, public-private partnership creating information-sharing capabilities among disparate emergency response software applications, systems, and devices. The resulting Extensible Markup Language (XML) standards assist the emergency response community in sharing data seamlessly and securely while responding to an incident. The current status of EDXL standards is as follows:

- Common Alerting Protocol Version 1.1;
- Distribution Element;
- Hospital AVailability Exchange;
- Resource Messaging; and
- Situation Reporting Standard.

Aging Equipment

The primary means by which the Department of Homeland Security (DHS) has helped State and local authorities update or replace aging equipment is interoperability grants. In FY 2008 alone this includes, but is not limited to, the following:

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- Homeland Security Grant Program ($1,751,000,000 - FY 2008);
- Transit Security Grant Program ($388,600,000 – FY 2008);
- Port Security Grant Program ($388,600,000 – FY 2008);
- Emergency Management Performance Grants ($291,450,000 - FY 2008);
- Interoperable Emergency Communications Grant Program ($50,000,000 - FY 2008);
- Buffer Zone Protection Program ($48,575,000 – FY 2008); and
- Emergency Operations Center Grant Program ($15,000,000 – FY 2008).

Each of these programs enables responder communities to acquire or update interoperable communications equipment. Additionally, funds may be used to allow communities to plan and train according to various scenarios that may affect interoperable communications, and also to exercise according to these planning and training activities to validate strengths, weaknesses, and priorities.

The Federal Emergency Management Agency (FEMA) and the Office of Emergency Communications (OEC) also are collaborating to implement the new Interoperable Emergency Communications Grant Program, which was established by Congress to make grants to States to improve local, tribal, Statewide, regional, national, and international (where appropriate) interoperable emergency communications using an all-hazards approach (natural disasters, terrorism, and other manmade disasters).

Working with State and local authorities

FEMA is taking proactive action to design, staff, and maintain an improved, rapidly deployable, responsive, interoperable, and highly reliable emergency communications capability using the latest commercial off-the-shelf voice, video, and data technology. This includes using enhanced Mobile Emergency Response Support (MERS) capabilities and leveraging commercial technology that provides real-time connectivity between communications platforms.

Recognizing the importance of FEMA's responsibility to ensure that emergency responders have interoperable capabilities, FEMA has expanded, to the extent possible, the scope of duties of the current regional staff to help carry out this responsibility. To provide even greater focus, FEMA is adding 10 new full-time equivalents targeted specifically to augmenting existing emergency communications interoperability-related activities and capabilities in the regions. The new staff will

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enhance FEMA's overall ability to support first responders in achieving interoperability capabilities.

FEMA launched a Disaster Emergency Communications (DEC) State Planning Initiative in March 2007 to integrate Federal communications response and recovery support to State and local governments more fully. As FEMA develops these communications annexes, it is focusing on four planning areas:

- communications risk assessment and mitigation planning;
- communications operability and interoperability;
- communications availability, integration and coordination of Federal resources; and
- pre-positioning of communications resources.

Policy and Planning: Significant OEC policy and planning initiatives include the Statewide Communication Interoperability Plans (SCIPs), the National Communications Capabilities Report, and the National Emergency Communications Plan (NECP).

As of April 2008, all 56 States and territories had approved SCIPs.

The NECP is being prepared with significant inter-departmental input and in coordination with the Department's State, local, and tribal government partners and the national practitioner community. The Department anticipates completing the NECP by July 2008.

Coordination and Collaboration. As mandated by Congress, DHS is establishing the ECPC (noted above) to act as the Federal focal point for interoperable emergency communications coordination. OEC currently administers the ECPC.

Technical Assistance. The Department's Interoperable Communications Technical Assistance Program is now administered by OEC and has been providing technical assistance support to States and territories on SCIP development and implementation, communications systems engineering, and the use of the Department's Communication Asset Survey and Mapping tool – a web-based tool that collects and displays interoperable communications information to improve communications planning for the emergency response community.

Question#:	76
Topic:	fire grants
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: Firefighter assistance grants, such as FIRE and SAFER grants, help firefighters and other first responders train additional front-line firefighters and obtain critically needed equipment, protective gear, emergency vehicles, training, and other resources to protect the public from fire and related hazards.

Your department's FY 2009 budget requests $300 million for FIRE grants and zeroes out the SAFER grant program – a 60% cut from FY 2008 congressionally funded levels. A 60% funding cut will have a severe negative impact on the ability of local fire departments to purchase needed equipment and recruit additional firefighters.

Please explain why the Department is making such a diminished request.

Response: The Department believes the request is sufficient. With respect to SAFER grants, the Administration has consistently held the view that the Federal government should not be involved in the local hiring of firefighters. Higher levels of funding have been added by Congress under its budget deliberations. An appropriation of $300 million for AFG will result in nearly 3,000 awards for fire departments.

Question#:	77
Topic:	fingerprint database
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: Recently, DHS began testing a pilot program at certain airports – including Chicago O'Hare International Airport – to better identify which foreigners may be criminals, illegal immigrants, or terrorists. Under the pilot, all ten fingerprints of foreigners are scanned upon entering the country. The 10-fingerprint scan allows DHS to check the identities of foreign visitors against the FBI's fingerprint database.

When will the results of this pilot program be made available to Congress?

Over a decade has passed since Congress initially urged the integration of the DHS and FBI databases, and over fifteen years since the databases were originally conceptualized.

What is the current status of the integration effort? When will the two databases be fully interoperable?

What are some of the challenges facing integration and what steps is DHS taking to expedite integration?

Question: When will the results of this pilot program be made available to Congress?

Response: The results of the 10-Print Initial Deployment will be made available in the late summer of 2008.

Question: What is the current status of the integration effort?

Response: The interim Data Sharing Model (iDSM) became operational in September 2006. The iDSM provides the Department of Homeland Security (DHS) with daily updates of Federal Bureau of Investigation (FBI) wants and warrants and known or suspected terrorists and permits DHS to perform an immediate search and response of those files. The iDSM also provides the FBI with daily updates of DHS expedited removals and Department of State Category 1 visa refusals, and it permits certain State and local government pilot sites to perform a search of those files and to receive responses from DHS. With the 10-Print Initial Deployment, DHS submits 10-print sets from the initial deployment sites to the FBI for a search of the FBI Criminal Master File (CMF).

Additional capabilities will be enabled in late 2008:

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- Selected State and local law enforcement agencies, as well as certain non-criminal justice agencies will be able to submit fingerprints to DHS's Automated Biometric Identification System (IDENT) via the FBI for a full search of the IDENT database.
- The FBI and DHS will pilot the IDENT data response to those selected State and local law enforcement agencies, as well as certain non-criminal justice agencies, searching IDENT.
- As DHS fully deploys 10-Print to all ports of entry, DHS will increase the number of 10-print sets searched against the FBI CMF.

Question: When will the two databases be fully interoperable?

Response: Initial Operating Capability for IDENT/IAFIS interoperability will be achieved by the end of 2008. Interoperability between the Department of Homeland Security's (DHS's) Automated Biometric Identification System (IDENT) and the Federal Bureau of Investigation's (FBI's) Integrated Automated Fingerprint Identification System (IAFIS) databases will be incrementally deployed in alignment with the FBI's Next Generation Identification (NGI), which currently is expected to be fully implemented, at the earliest, by 2011. The use of the interim Data Sharing Model (iDSM), which was deployed in September 2006, will continue to provide increased data-sharing capabilities.

Question: What are some of the challenges facing integration and what steps is DHS taking to expedite integration?

Response: DHS is currently undertaking several steps in expediting integration. They are:

- Continuing to work closely with DOJ/FBI and DOS through the Interoperability Integrated Project Team (IPT), which was created in 2005.
- Moving forward with Custom and Border Protection (CBP) deployment of 10-print identification readers.
- Updating IDENT to ensure that it meets the future demands of interoperability and the projected increase of submissions by DHS components as they transition over to IDENT from IAFIS (US Citizenship and Immigrations Services, Transportation Security Administration, etc.).
- Supporting the deployment of DHS/ICE Secure Communities Initiative.

Although full interoperability will no be achieved in a timeframe as originally desired, increasing functionality does exist between DHS and FBI.

Question#:	78
Topic:	real ID
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: Last month, DHS granted extensions to Montana, New Hampshire, South Carolina, and Maine to comply with REAL ID – without these states having submitted a formal request. Instead, these states sent letters to your Department outlining current security features in their driver's licenses and reiterating their refusal to implement REAL ID. All fifty states (as well as Washington D.C., American Samoa, Guam, Puerto Rico, and the Virgin Islands) have now received extensions to push back the original deadline for compliance.

Many of these states have real concerns over the implementation of a law that was inserted at the eleventh hour, in a supplemental appropriations bill, without any hearings, debates, or votes. The final rule, while an improvement over the proposed rule, still relies on database technology that hasn't been created, does not ensure adequate privacy protections, and imposes significant new costs and requirements on states without a sufficient level of support from the federal government.

Why did DHS grant Montana, New Hampshire, South Carolina, and Maine extensions they did not request?

How does DHS expect to implement a law whose initial deadline for compliance could not be met by a single state?

What forms of support, funding or otherwise, does DHS plan to offer states to lessen the burdensome cost of implementation?

Response: In our letter exchanges with officials of those States, the Department of Homeland Security (DHS) provided specific rationale for granting their extensions. All four jurisdictions requested that their current, valid driver's licenses and identification documents continue to be accepted for official purposes pursuant to the REAL ID Act. While the States noted that State laws precluded them from complying with REAL ID and therefore from specifically and directly requesting extensions, they also detailed the security measures they had implemented and intended to implement consistent with REAL ID requirements.

In our responses, DHS noted that the Secretary of Homeland Security has no legal authority to waive compliance with the REAL ID Act. Under statute, the Department can only grant a State an extension of the compliance deadline in order to give the jurisdiction more time "to meet the requirements of" REAL ID. Thus, the request to

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continue to accept documents from these four States for official purposes could only be granted if their letters could be considered requests for extensions. DHS further reiterated its preeminent interest in enhancing the security of State-issued driver's licenses and identification documents, commending the States for the security measures they have instituted and recognizing assurances from the States that additional measures will be implemented. As such, DHS believes the requirements for granting extension requests were met.

Question: How does DHS expect to implement a law whose initial deadline for compliance could not be met by a single state?

Response: All jurisdictions have taken steps in recent years to enhance the security of their driver's licenses and identification documents consistent with REAL ID and, in many cases, in order to comply with REAL ID. However, DHS recognized in the final rule that each jurisdiction is facing different challenges and is in a different position with respect to compliance with REAL ID. For that reason, DHS phased the requirements of REAL ID in the final rule. All 56 jurisdictions have been granted extensions until December 31, 2009, and for those States that may still need additional time to become fully compliant, the final rule provides a second extension to those States that have met the 18 benchmarks required for material compliance through May 2011.

DHS continues to work with the States to provide guidance regarding implementation and to listen to their concerns. The Department recognizes the difficulty that some States have in meeting the statutory requirements of the Act. However, DHS has a critical responsibility to ensure that identification documents used to board commercial aircraft or access Federal buildings are secure credentials, and to prevent persons from circumventing Federal security and screening requirements by use of false or fraudulently-obtained identification. The States also have an interest in ensuring the security of their documents.

Question: What forms of support, funding or otherwise, does DHS plan to offer states to lessen the burdensome cost of implementation?

Response: The Department of Homeland Security (DHS) has instituted a grant program, funded by Congress, for REAL ID. $79.575 million will be awarded in June, and the President's budget request for FY 2009 included up to $150 million in FEMA National Security and Terrorism Prevention and State Homeland Security Grants. In addition, the President requested $50 million in appropriated funds for development of the verification hub, a critical capability for verifying information provided by applicants for driver's licenses and identification cards. In addition, DHS established the REAL ID Program

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Office that has been supporting States in their implementation efforts and providing guidance.

Most importantly, DHS reduced the estimated implementation costs to States by 73% in the final rule and gave States additional time and flexibility to comply. Many States have already made significant progress toward meeting the Material Compliance benchmarks that would qualify them to receive a second extension until May 2011.

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Topic:	FMMI
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: FEMA is updating flood maps across the nation by county, starting with high risk, highly populated areas first. Availability of flood risk data and local capacity to work with FEMA regional offices also affect the remapping sequence. As a result, remapping schedules vary widely across the country, even for communities that are adjacent to each other.

Why did FEMA elect to remap by county instead of by floodplain?

The Department's budget requests $150 million for the FMMI in FY 2009, nearly a third less than the congressionally approved funding level of $220 million for FY 2008. The proposed cut will likely delay the updating of flood maps in Illinois and in other states that border the Mississippi River, hindering local efforts to develop appropriate flood mitigation plans.

Why is DHS requesting a funding cut, which will likely exacerbate current difficulties in ensuring that the remapping sequence stays on schedule?

Response: When FEMA performs a flood study, it does assess flood hazards and perform analysis by watershed. However; the flood mapping has historically been and will continue to be produced at the community or county level because of the main linkages within the National Flood Insurance Program (NFIP). Participation in the NFIP is based on an agreement between local communities and FEMA. The mapping of flood hazards provides the data necessary for a community to enforce floodplain management regulations that help mitigate the effects of flooding on new and improved structures. The community's participation in the NFIP also enables property owners to purchase insurance as a protection against flood losses in exchange for State and community floodplain management regulations that reduce future flood damages.

Although new flood maps are released on a community or county level and may not be released at the same time for communities within the same watershed, FEMA assures the data presented is consistent.

DHS is requesting appropriated funding of $150M in FY 2009 to ensure the FEMA's Map Mod investment is preserved. The FY 2009 funding request will be combined with increased funding from National Flood Insurance Fund's (NFIF) program fees, growing from $50 million to $98.5M effective in FY 2009. The increase in NFIF fees includes

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$12.5M generated through increasing flood insurance policy fees by $5/policy and $36M through internal reallocation of funding within the NFIF. The added fee generated income will bring the total estimated available resources requested in FY 2009 to a level on par with those provided for the past five years. Additionally, over the last 5 years FEMA has increased the number of Cooperating Technical Partners (CTPs) by more than 50%. CTPs are State and local partners that have formalized their contribution and commitment to help ensure better overall floodplain management and flood risk identification through reliable, up-to-date flood maps. CTPs bring cost-share and also leveraged contributions of resources and data that add to the quality of flood maps.

With the combination of: requested appropriated funding; increase in the NFIF program fee and cost-share and leverage contributions from CTPs, FEMA believes there is adequate funding available to ensure the remapping sequence stays on schedule.

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Topic:	aviation security - 1
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: In October 2007, Senator Obama and I wrote a letter to the Transportation Security Administration (TSA) in response to a USA Today article which revealed that screeners at Chicago O'Hare International Airport failed to detect 60 percent of hidden bomb materials packed in the everyday carry-ons of undercover TSA agents. A November 2007 GAO report suggested the importance of developing and deploying new technology at passenger screening checkpoints to address this issue. TSA also mentioned this as part of its response to us in January.

What steps are being taken specifically at Chicago O'Hare International Airport to improve TSA's explosives detection capabilities?

Response: The Transportation Security Administration (TSA) has completed or is in the process of taking a number of steps to improve explosives detection capability at Chicago O'Hare International Airport (ORD), including new technology, changes to training, new security program layers, and recognition and awards programs.

New Screening Technologies: TSA rigorously tests all new screening technology in both the laboratory and field environments and does not broadly deploy new equipment until after the benefits to the overall security are demonstrated. ORD is anticipating the delivery of the following new screening technologies. The availability of these new technologies will provide significant enhancements to the screening process and the ability of our Transportation Security Officers (TSOs) to detect explosives and improvised explosive device (IED) components.

- Liquid Explosives Screening: During 2007, ORD was one of several pilot airports that field tested bottled liquid explosive screening technology. This technology is capable of analyzing substances within a bottle by aiming sensors at the bottle opening and analyzing the intake of certain vapors. Based on the successful results of this field testing, ORD received additional liquid scanners to provide liquid explosive screening capability in all terminals.

- Portable Explosive Trace Detection: In 2007, ORD deployed portable Explosive Trace Detection equipment for use during employee screening operations at employee entrance points into the secured and sterile areas at the airport. The equipment is also being used to support security operations in other modes of transportation in the Chicago area.

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- Advanced Technology X-Ray: Beginning in September 2008, ORD is scheduled to replace all existing checkpoint x-ray equipment with the new Advanced Technology X-Ray. This new technology will provide TSOs with simultaneous views (two separate angles) of the same item to improve IED component identification, with improved high-definition display and image zoom capability that will further enhance the TSOs' effectiveness. By comparison, currently deployed x-ray equipment depends on a single, top-down x-ray view.

- Whole Body Imaging Equipment: ORD is scheduled to receive Whole Body Imaging equipment for each passenger terminal during 2008. This equipment will provide the capability to more thoroughly detect weapons, explosives, and other threat items hidden beneath an individual's clothing.

Training Program Changes: At the national level, TSA institutionalized a number of changes to the quality and quantity of explosives recognition training for all Transportation Security Officers. At ORD, TSA has implemented the following initiatives:

- Deployed more advanced Modular Bomb Set (MBS) training kits to provide more sophisticated IED component exposure and changed TSA policy to allow the MBS kits to be located at checkpoints where they are more readily available for training and testing. ORD has at least one advanced MBS training kit to support each passenger screening checkpoint.

- IED Recognition Training Boards that show actual and x-ray images of various IED components were installed in break rooms.

- Implemented a requirement for daily IED checkpoint drills and added the completion of these drills to Management Objective Report metrics that assess airport effectiveness and efficiency. ORD conducts approximately 1,500 checkpoint IED drills every two weeks.

- Replaced the previous local covert testing program with the Aviation Security Assessment Program (ASAP) and assigned program oversight to the Assistant Federal Security Director for Inspections to ensure independence in local covert testing practices. ORD has partnered with Naval Training Center (NTC) Great Lakes and uses active duty Navy personnel transiting through ORD as test object carriers. Active duty Navy personnel transiting through

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ORD on either personal or official business pose as the covert tester with simulated IED components artfully concealed in their bag or on their person when going through screening. The assistance of NTC Great Lakes ensures the testers remain anonymous and increases the number of ASAP tests ORD is able to complete.

- Changed policy to permit artful concealment of IED components as part of the ASAP program to make local covert testing program more difficult and realistic.

- Expanded the Bomb Appraisal Officer program to increase availability of these highly trained and skilled individuals to provide more advance IED recognition training and suspect IED resolution. ORD now has five of the authorized six BAO personnel on board providing daily advanced IED recognition and remedial IED training to the TSA workforce. The final BAO will be on board this summer.

- Implemented a mentoring program that pairs an employee with exceptional x-ray image interpretation skills with employees who need improvement in IED recognition.

- Increased the number of Security Training Instructors at ORD from 9 to 17. These additional training specialists are embedded in the security screening operation and readily available to assist supervisors with remedial and recurrent training on IED recognition.

- Implemented a mentoring program for x-ray image interpretation. Under this program, officers with sustained superior explosives detection capability work one-on-one with less skilled officers to improve their performance.

New Security Program Layers:

- Implemented the Travel Document Checker program to add a new layer of security focused on identifying fraudulent or fake boarding passes and identifying documents that could be indicators of terrorist or criminal activity. Individuals with these documents are directed to additional screening and/or interviews with law enforcement personnel. ORD fully implemented this program at all passenger screening checkpoints in September 2007.

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- Deployed FIDO equipment and liquid explosive detection strips to improve detection of liquid explosives. ORD has FIDO equipment available in the two busiest passenger terminals and uses the liquid explosive detection strips at all checkpoints.

- Expanded the Behavioral Detection Officer (BDO) program to increase the numbers of TSO resources dedicated to identifying passengers exhibiting suspicious behaviors that are associated with terrorist or criminal activity and allowing these individuals to be sent for more thorough screening. ORD doubled the number of assigned BDO staff during 2007 and will be increasing this workforce by more than 30 percent by the middle of summer 2008.

Performance Culture: Under the Federal Security Director's direction, ORD has implemented a number of changes to improve the work climate and culture for the TSA workforce. These measures include:

- Increased accountability of managers and supervisors for the performance of their respective screening areas and teams across all security effectiveness and operational efficiency metrics in the Management Objective Report scorecard goals established by TSA headquarters.

- Revamped the local awards and recognition program to clearly recognize and reward the performance and behaviors necessary to improve individual and team performance. Specific changes were made to recognize and reward superior performance in explosives detection during drills and testing.

ORD has seen a significant increase in the explosive detection capabilities of the Transportation Security Officer workforce as a result of the combined impact of these changes. IED recognition as measured through the Threat Image Projection System (TIPS) and Aviation Security Assessment Program (ASAP) has increased sharply over the past 12 months. TIPS performance at ORD is the highest it has been since implementing the current program in 2004. Not only is ORD on track to meet or exceed TIPS performance goals for this year, the percentage of officers performing below national standards has been reduced by 54 percent and the number of officers performing above the national goal more than doubled. Similarly, ASAP performance during the first test cycle of fiscal year 2008 compared with last half of fiscal year 2007 has more than doubled.

Question#:	81
Topic:	aviation security - 2
Hearing:	Oversight Hearing
Primary:	The Honorable Richard J. Durbin
Committee:	JUDICIARY (SENATE)

Question: In a February 8, 2008 article published in the Washington Post, TSA officials said "it will take years for much of the new technology – some of which isn't really so new – to reach checkpoints across the nation."

What are the difficulties in deploying existing technologies to passenger screening checkpoints? What is TSA doing to expedite this process? Has TSA produced a strategic plan to address this issue?

What steps are being taken by TSA to engage with airports and their communities and ensure that new technologies can be efficiently and cost-effectively deployed within existing airport configurations?

Response: Transportation Security Administration (TSA) has been very successful in fielding a number of new passenger screening technologies over the past year. In fiscal year (FY) 2007, TSA initiated operational field tests and evaluations of five emerging airport checkpoint technologies including: whole body imagers, advanced technology for carry-on baggage, bottled liquids scanners, cast and prosthesis scanners, and automated carry-on baggage explosives detection system (AutoEDS) equipment.

TSA follows program management best practices in acquiring checkpoint screening equipment. This entails a structured process of defining requirements, laboratory and operational field testing, and an overall assessment of a systems capability. Prior to deploying a technology, TSA must ensure that it meets functional and technical requirements as well as reliability, maintainability, and availability requirements to ensure the checkpoint technology is effective and suitable for operational use. As part of laboratory testing it sometimes becomes apparent that certain technologies are not mature enough to comply with operational and technical requirements. When this occurs, those technologies or equipment are not deployed. In most cases the laboratory works with the vendor over time to correct deficiencies, and in some cases makes the determination that the technology does not meet the operational requirement.

Another factor which can delay the deployment of new passenger screening technologies is the technical maturity of the systems and their inability to satisfy TSA's requirements due to operational suitability. Oftentimes, systems that show promise in a laboratory environment lack the maturity to perform under more strenuous field conditions. Because TSA is serious about providing technology that our Transportation Security

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Officers (TSOs) can effectively use to detect and deter threats to aviation, we have established a strenuous Operational Test and Evaluation program to ensure the equipment will operate as required in an airport environment, providing the detection capability necessary, and is usable for the TSOs.

To expedite deployment of checkpoint technologies, TSA has taken several actions:

- We are working closely with Transportation Security Laboratory in Atlantic City to expedite testing for qualified vendors and to concurrently conduct field and laboratory testing where feasible.
- The Office of Security Technology is working with the Office of Acquisition to streamline our deployment contracts in order to reduce the time required to install equipment in airports.
- Our Industry Outreach group, described below, is working closer with airports to ensure they are aware of our efforts to identify new capabilities and technologies, communicate deployment schedules, and ensure that all parties stay informed regarding all activities leading up to and during deployments.

The deployment of new technology in FY 2007 increased threat detection and improved efficiencies in checkpoint throughput, and will continue to increase as the deployment of these technologies expand in FY 2008. TSA added 23 in-line Explosives Detection Systems (EDS) for checked baggage screening at airports. TSA plans to deploy over 600 Advance Technology (AT) x-ray machines by the end of 2008 to improve detection of improvised explosive devices and increase passenger throughput by providing enhanced, multi-view visual detection capabilities for TSOs. Bottled Liquid Scanners enhance our ability to discriminate between explosive or flammable liquids and benign liquids. Lastly, TSA introduced millimeter wave in Phoenix, and rolled out this technology at Los Angeles International Airport, John F. Kennedy International Airport, and Baltimore-Washington International Airport this spring. This technology can detect items concealed on the body, including plastics, through a robotic image that will be viewed from a remote location. TSA will be working to socialize this technology with the American public. It is already in use in international transportation venues, and will improve security while maintaining passenger privacy by ensuring that images will not be saved or stored. TSA anticipates deploying 30 millimeter wave machines by the end of 2008.

A report entitled "Report to Congress: Detection Equipment at Airport Screening Checkpoints" was provided to Congress on August 9, 2005. In September 2007, TSA submitted to Congress a report entitled "Development of a Passenger Checkpoint Strategic Plan." The Consolidated Appropriations Act, FY 2008, provided further

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direction on this issue and TSA is planning to deliver a final strategic plan to Congress in summer 2008.

Collaboration with our external security partners, including airport operators and technology vendors, is an essential element to the successful testing, evaluation, and deployment of checkpoint technologies. TSA also values the relationships that have been fostered with industry partners throughout the aviation and security technology communities.

There are also several examples of how TSA is working closely with industry to ensure that collaboration is effective and efficient amongst its external security partners such as technology vendors and airport operators. Staff from TSA's Office of Security Technology (OST) regularly participates in panels to discuss the technologies available for passenger screening. OST recently created the Office of Industry Outreach to establish and build relationships with external security partners, provide timely and accurate information to them, maintain a clear and consistent message, and to increase awareness and visibility. OST plans to use this new office to achieve optimum levels of security and customer service by establishing, nurturing, and maintaining internal and external partnerships. Additionally, TSA partners with the Department of Homeland Security to host technical interchange meetings and industry days where Original Equipment Manufacturers are invited to discuss future requirements for various technologies. The purpose of these exchanges is to convey our short and long-term screening needs in an effort to better align vendors' research and development efforts with TSA's vision for efficient, effective checkpoints. These efforts should ultimately reduce costs and development time as vendors work to meet TSA's screening requirements.

TSA recognizes there are ongoing opportunities to improve coordination. Therefore, we will continue to work with our industry partners to collaborate on their information needs to enable the development of testing protocols related to aviation passenger screening.

Question#:	83
Topic:	search - 1
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: At the hearing, I asked you whether DHS conducted searches at the border of the contents of laptops or cell phones belonging to U.S. citizens without first determining that there was reasonable suspicion of a crime. You responded, "I think that searches with respect to documents at the border, whether they're reduced to paper form or electronic form, don't necessarily require a reasonable suspicion . . . requirement."

In fact, in determining whether reasonable suspicion is required, the Supreme Court has drawn a distinction between the search of certain personal property, such as a car, and the search of a person, which implicates the "dignity and privacy interests of the person being searched." United States v. Flores-Montano. However, the Supreme Court has not yet ruled on whether the search of a laptop – which can contain vast amounts of deeply personal information and can amount, in practice, to a search of the laptop owner's thoughts – is more akin to the search of a person or the search of a car. A federal district court recently ruled that the search of a laptop implicates significant privacy and dignity interests and therefore does require reasonable suspicion.

Do you take the position that a laptop containing vast amounts of personal information implicates no greater privacy or dignity interests than the contents of a car trunk, purse, or wallet?

Response: On April 21, 2008, the United States Court of Appeals for the Ninth Circuit overruled the lower court decision you reference in your question, holding "that reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border." See U.S. v. Arnold, --- F.3d --- (9th Cir. Apr. 21, 2008). We argued in support of the position ultimately taken by the court, a position that is also consistent with Supreme Court and Circuit Court precedent. See U.S. v. Flores-Montano, 541 U.S. 149 (2004); U.S. v. Ramsey, 431 U.S. 606 (1977); U.S. v. Ickes, 393 F.3d 501 (4th Cir. 2005).

Question#:	85
Topic:	search - 3
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: You testified that, "as a matter of practice," DHS searches the contents of laptops or cell phones "only . . . where there's a reasonable suspicion."

Is there any written directive implementing this practice? If not, given DHS's position that laptop and cell phone searches are permissible even without reasonable suspicion, why are border agents limiting themselves to searches based on reasonable suspicion, and what is your evidence that they are doing so?

I assume that DHS would not follow a practice of conducting searches of laptops and cell phones only upon reasonable suspicion (as you testified) if you considered such a practice insufficient to address valid security concerns. Given that the agency has apparently found it sufficient to limit these searches to cases in which reasonable suspicion exists, will you commit to making this practice a binding policy, regardless of whether you believe such a policy to be legally required?

Response: As explained in the prior question, and as I stated at the hearing, CBP has the legal authority to conduct searches at the border of laptop computers and other items absent reasonable suspicion. My statement concerning CBP's "practice" was intended only to reflect operational realities at ports of entry: CBP typically encounters well over a million travelers every day, and is responsible for enforcing over 600 federal laws at the border. Even if it was desirable to do so, it simply is not feasible for CBP to conduct searches of every laptop or cell phone in the possession of every traveler. As a result, when CBP conducts such a search it is ordinarily premised on facts, circumstances, and inferences that give rise to individualized suspicion. This being so, however, CBP must retain sufficient flexibility and nimbleness to accomplish its varied law enforcement and antiterrorism mission.

CBP has a written policy concerning its implementation of these border search authorities, which is posted on its website. A copy is attached for your reference.

Question: You testified that you believed the agency uses a "probable cause" standard before seizing a searched laptop or cell phone or retaining copies of their contents. You also stated that you would verify whether this was, in fact, the standard applied. Please indicate what standard the agency uses when seizing laptops or cell phones or retaining copies of their contents.

Question#:	85
Topic:	search - 3
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

You testified that any copies of the contents of laptops or cell phones were destroyed if not pertinent to a violation of the law. How is this destruction requirement communicated and enforced?

If DHS has issued any written guidance to its agents regarding the searching of laptops or cell phones or any policies regarding the copying and/or retaining of their contents, please provide a copy along with your answers.

According to the Washington Post, a customs training guide states that "[i]t is permissible and indeed advisable to consider an individual's connections to countries that are associated with significant terrorist activity." In response to my questioning, you testified that a U.S. citizen's national origin could not, on its own, be considered a "connection" to a country associated with significant terrorist activity, but that the person's "travel pattern" might be relevant.

Of course, a U.S. citizen of Pakistani origin, for instance, could be expected to have relatives in Pakistan and other valid reasons for visiting that country on a regular basis. If a U.S. citizen of Pakistani origin were to travel frequently to Pakistan, would that fact on its own, in your view, be a trigger for looking more closely at that individual when he or she crossed the border?

Response: When an initial inspection of property gives rise to probable cause of a violation of U.S. law, CBP (or ICE) may seize the property consistent with the Fourth Amendment. The Supreme Court and lower courts have held that copying materials is permissible without a heightened level of suspicion when the materials were discovered as part of a lawful search. Under CBP procedures, however, it may copy materials when (i) there is heightened suspicion of a possible violation of U.S. law, such as possession of child pornography or a connection to terrorism; or (ii) there is a need for technical assistance, such as translation, to determine what the materials are. Any U.S citizen's information that is copied to facilitate a search is retained only if relevant to a lawful purpose such as a criminal or national security investigation, and otherwise is erased. If, for example, technical assistance reveals the information to be not relevant, it is destroyed.

At the hearing, in response to your question on a person's connections to countries associated with significant terrorist activity, I stated that "U.S. citizens are not treated differently based upon their ethnic background, but their individualized behavior could be a basis for singling them out, or if they matched a physical description it could be a basis for singling them out." When encountering an arriving person, CBP officers rarely have advance knowledge about whether that person's frequent travel is for valid reasons or

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otherwise. One of the primary objectives of the CBP inspection process is to establish that a person is lawfully entering the United States and does not pose a threat to the safety and welfare of our nation. Thus, a U.S. citizen's frequent travel to countries associated with significant terrorist activity may give our officers reason to question that person's reasons for travel. As soon as the officers are satisfied that the person had valid reasons for the frequent travel, and there are no other areas of concern or potential violations, the person would be cleared.

Question#:	86
Topic:	real ID
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: The regulations implementing the REAL ID Act leave it entirely up to your discretion to decide whether to require REAL IDs for additional purposes beyond those listed in the regulations. This had led to concerns from a number of interested parties. South Carolina Governor Mark Sanford, in a five-page letter expressing concern about REAL ID, said "we have no assurances that at some point we won't need a REAL ID to open a bank account or purchase a gun." Will you commit to a process that involves public notice and comment before you expand the scope of REAL ID to include additional purposes?

Response: As DHS explained in its responses to comments in the REAL ID final rule's preamble, DHS will implement any changes to the definition of 'official purpose' or determinations regarding additional uses for REAL ID consistent with applicable laws and regulatory requirements.

Question#:	87
Topic:	real ID
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: In January, you stated at a press conference, "We are not going to have a national database." Yet the REAL ID implementing regulations are unclear on this point, and many organizations have expressed grave concerns that they will ultimately result in a central ID database on Americans. As we know from many private and public sector database security breaches, such a centralized database would create rampant opportunities for identity theft. It also presents a range of other privacy issues.

In the letter from South Carolina Governor Mark Sanford that I referred to in question 7, Governor Sanford cautions that "central depositories have never proven to be great bulwarks in the world of security." Can you assure us that REAL ID will not result in a centralized database of information about Americans, held by either the federal government or a private entity?

Response: REAL ID does not create a national database. Under the REAL ID Act, States will continue to manage and operate their databases for driver's license and identification card issuance. As they do now, only authorized Department of Motor Vehicle (DMV) officials and law enforcement will have access to DMV records. Licensing authorities will be able to verify that an individual holds only one REAL ID document, and is not attempting to obtain multiple documents from multiple States. Personally identifiable information, beyond the minimum information necessary to appropriately route verification queries, will not be stored. Neither the REAL ID Act nor this final rule creates greater access to state DMV records by the Federal government than already exists under current statutes. The Federal government will not collect information about driver's license and identification card holders pursuant to REAL ID.

Question#:	88
Topic:	HMONG
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: For years, Hmong refugees and asylees have been denied immigration benefits because their support for the United States in the Vietnam War was considered "material support for terrorism" under the statute's overly broad definition. Last December, Congress attempted to address this problem with legislation mandating that groups affiliated with the Hmong would not be considered "terrorist organizations" under the law. But in a memorandum dated March 26 of this year, DHS took the position that, while the groups themselves would not be considered "terrorist organizations," individual members or supporters of the groups could still be found to have engaged in "terrorist activity." The memorandum stated that DHS "currently is considering" such individuals "as possible candidates for additional terrorist-related inadmissibility provision exemptions."

A "terrorist organization" is statutorily defined as a group that engages in (or has been designated as a group that engages in) "terrorist activity." Given that Congress just declared groups affiliated with the Hmong not to be terrorist organizations, it makes little sense to find that their individual members may still have engaged in "terrorist activity" based on the group's actions, or that people who supported those groups were guilty of supporting "terrorist activity." But if that interpretation of the law is correct, is there a need for further legislation, in your view, to make clear that Hmong individuals who provided support to U.S. efforts in Vietnam are not terrorists?

Regardless of what Congress decides to do, will you commit to granting waivers to members of groups affiliated with the Hmong who would otherwise be barred because they supported U.S. efforts in Vietnam?

Response: Prior to the enactment of the CAA, the Administration requested that Congress pass legislation expanding the scope of the discretionary authority provided in section 212(d)(3)(B)(i) of the INA to enable it to provide relief to the full range of deserving aliens who would otherwise be inadmissible as a consequence of the broad reach of the terrorist provisions of the INA. Significantly, the pre-CAA discretionary authority did not permit exercises of authority on behalf of former combatants, even when these individuals fought on behalf of the United States. This prevented USCIS from providing relief to certain high-profile individuals, including Hmong and Montagnard former combatants.

Section 691(b) of the CAA lists 10 groups, including the Hmong, which do not qualify as terrorist organizations for activities before December 26, 2007. As a result of the CAA,

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an individual who did any of the following is no longer inadmissible based on the related inadmissibility ground:

- Solicited funds or other things of value on behalf of one of these name groups (INA § 212(a)(3)(B)(iv)(IV)(cc));
- Solicited an individual for membership in one of these named groups (INA § 212(a)(3)(B)(iv)(V)(cc));
- Committed an act that provided material support to one of these named groups (INA § 212(a)(3)(B)(iv)(VI)(dd));
- Is a representative of one of these named groups (INA § 212(a)(3)(B)(i)(IV)(aa));
- Is a member of one of these named groups (INA § 212(a)(3)(B)(i)(VI));
- Persuaded others to support one of these named groups (INA § 212(a)(3)(B)(i)(VII));
- Received military-type training from one these named groups (INA § 212(a)(3)(B)(i)(VIII)).

The CAA does not, however, extend automatic relief to individuals who served as combatants with one of these groups, and these individuals are still subject to the terrorist grounds of inadmissibility related to the use of dangerous weapons or other devices. For this reason, DHS has drafted a broader exemption for the 10 groups that would cover individuals that were not provided automatic relief by the CAA. This exemption authority is currently in the interagency review process.

Question#:	89
Topic:	no match
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: DHS recently re-issued the so-called "no-match" regulation, which encourages employers to fire workers whose records don't match those of the Social Security Administration if those mismatches are not corrected within 90 days. This time, before re-issuing the regulation, the agency conducted an economic analysis and concluded that the regulation would impose no significant costs on businesses. But in performing this analysis, DHS refused to consider the costs to businesses of terminating and replacing workers, on the ground that "those costs of terminating and/or replacing illegal workers are attributable to the Immigration and Nationality Act, not to this rule."

This conclusion assumes that every worker who is fired because of the rule is unauthorized. If an authorized worker has a no-match that takes longer than 90 days to resolve, and if this regulation causes a risk-averse employer to fire that person, then the regulation, not the Immigration and Nationality Act, has obviously imposed a real cost on that employer.

The preamble to the original regulation states that "SSA has informed DHS that . . . a 90-day timeframe [for resolving no-matches] will be sufficient for all but the most difficult cases." It is not at all clear that SSA's estimate took into account the massive increase in workload that would result from the agency being faced with literally millions of requests to resolve no-matches. The Social Security Administration is already strained to the limit performing its core tasks of distributing benefits, and many informed observers believe the 90-day time frame to be unrealistic. But even if the 90-day estimate is accurate for the bulk of cases, SSA has indicated that it may not be sufficient in "the most difficult cases." Do you acknowledge that at least some no-matches pertaining to authorized workers will take longer than 90 days to resolve?

I understand that this regulation does not impose automatic sanctions on employers who fail to fire workers with unresolved no-matches. It does make very clear, however, that employers risk serious legal repercussions if they do not fire employees with no-matches after 90 days. That specific warning was never given before this regulation. Assuming that there will be at least some no-matches with innocent explanations that take longer than 90 days to resolve, do you acknowledge that there will be some employers who choose to fire those workers rather than take the risk of being held liable if the worker turns out to be unauthorized?

Assuming you answered yes to questions (a) and (b), has DHS conducted an analysis and arrived at an estimate of (1) how many no-matches qualify as "the most difficult cases"

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and therefore will take longer than 90 days to resolve, and (2) how many employers will choose to fire workers in such cases based on the regulation's assertion of potential liability? If not, how can you conclude that the regulation imposes no "significant costs" on employers in the absence of such an analysis?

Response: There appears to be a misunderstanding regarding the economic analysis that accompanied the "no match" Supplemental Proposed Rule. While termination and replacement of unauthorized employees will impose a burden on employers, INA section 274A(a)(1), (2), 8 U.S.C. 1324a(a)(1), (2), expressly prohibits employers from knowingly hiring or knowingly continuing to employ an alien who is not authorized to work in the United States. Accordingly, costs that result from employers' knowledge of their workers' illegal status are attributable to the Immigration and Nationality Act, not to the August 2007 Final Rule or the Supplemental Proposed Rule. However, we did not reach the conclusion that "every worker who is fired because of the rule is unauthorized" as the question states.

The district court ordered us to provide an economic analysis (that we still do not think is legally required), so we provided a conservative (i.e. high end) cost estimate for the impact on small entities. The reality remains that some legal workers might decide it was not worth their time to go to SSA and try to correct a no-match, and they could simply quit or sit out the 90 days and find work elsewhere, for a variety of different reasons. It is not hard to imagine such a calculus being made by some workers, especially in lower-wage positions where alternative employment may be readily found and the perceived cost to the worker to go to SSA and clear up the issue is higher than the cost to the worker of simply walking next door and taking another job. Neither the government nor employers can force workers to correct no-matches. Because we do not have sufficient data to prove that 100% of all legal workers will in fact try to correct their no-matches and work diligently to do so within the 90 day schedule set out in the rule, we believed it more prudent to estimate what it might cost employers if (1) some of their workers simply decided to leave their jobs after day 90 and/or (2) some workers (a) attempted but failed to complete the process of resolving their no-matches in 90 days; (b) those workers wouldn't or couldn't produce alternative documents to complete a new Employee Verification Form I-9 between days 90 and 93; and (c) an employer took a strict approach to terminate every person with unresolved no-matches after 93 days. We recognize that it will cost employers something to fill these vacancies, and we have estimated that cost. We believe, however, that very few vacancies will be the result of individuals who actually tried to correct their no-match, failed, and were fired. For the purpose of the cost analysis, we assumed that employers incurred "*employee replacement (turnover) costs*," for a range of approximately 15,000 to 70,000 employees.

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In addition, the Supplemental Rule recognizes that even though the cost of replacing illegal aliens is not a cost of the rule, it is still a cost incurred by employers. The Supplemental Rule states "some employers may find the costs incurred in replacing employees that are not authorized to work in the United States to be economically significant." 73 FR 15953. Consequently, we did not conclude that the costs of complying with preexisting immigration law would impose no "significant cost."

Question#:	90
Topic:	detain
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: Last year, DHS spent about $1.2 billion to detain over 320,000 immigrants, including asylum seekers and families with children. The government spends almost $100 per day for each person detained. By comparison, alternatives to detention, such as electronic monitoring or intensive supervision, cost about $6.00 to $14.00 per day.

In 2006, the DHS Inspector General recommended that the agency intensify efforts to provide ICE with the resources needed to expedite the development of alternatives to detention. Despite this recommendation, DHS currently uses such alternatives for only about 10,000 immigrants. Even taking into account the fact that not all immigrants are eligible for these programs, that's an extremely small percentage of the total.

Obviously, detaining someone is the most effective way to ensure that they won't evade justice. But as a society, we've made the judgment that it is not worth the social and financial costs to simply detain everybody. Even in the criminal justice context, a survey of the 75 largest counties performed by DOJ's Bureau of Justice Statistics showed that only about 40% of felony defendants in state court are imprisoned until the final disposition of their cases. For felony defendants accused of violent crimes, the rate of incarceration pending final disposition is still only about 60%, while the rest are released on bail or other conditions.

Why is DHS not making greater use of alternatives to detention?

Do you agree that more resources should be made available to research, develop, and implement effective alternatives to detention going forward?

Response: DHS began using alternatives to detention in FY 2003 because it recognized the potential for their use for aliens pending immigration hearings and/or removal who meet criteria for release under conditions of supervision. The reach of these programs has grown steadily since their inception.

There are currently two initiatives that involve close supervision as an alternative to detention for individuals in immigration proceedings: the Intensive Supervision Appearance Program (ISAP) and the Enhanced Supervision/Reporting (ESR) Program.

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Topic:	detain
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

The ISAP contract was awarded in June 2004 and initially operated in eight locations (Baltimore, MD; Denver, CO; Kansas City, MO; Miami, FL; Philadelphia, PA; Portland, OR; San Francisco, CA; and St. Paul, MN). In October 2006, ISAP expanded to Delray Beach, FL. In November 2007, ISAP expanded to Los Angeles, CA; New York, NY; and Orlando, FL for a total of twelve ISAP locations. The ISAP contract was modified in September of 2007 to increase the number of participant slots to 4,000.

The ESR Program contract was awarded in September of 2007 and is composed of a full-service component and an Electronic Monitoring-Only (EM-Only) component. The EM-Only component of ESR commenced operations in December 2007 and is available nationwide to an unlimited number of participants. The full-service component of ESR is available to 24 Office of Detention and Removal Operations (DRO) Field Offices and three DRO Sub-Offices (Charlotte, NC; Hartford, CT; and Orlando, FL). Fifteen locations commenced operations in February 2008 with the remaining 12 locations opened in March 2008. The number of participant slots for ESR Full-Service is 7,000.

The nationwide availability of ATD programs, increased slots in the Full-Service supervision ATD programs, and unlimited capacity for ESR EM-Only offers much flexibility to DRO officers when they encounter possible candidates who are deemed not to be a flight risk or threat to the community in which they will reside.

While Alternatives to Detention remains a viable option for specific groups of aliens pending immigration hearings and/or removal, the cost is not necessarily less than secure detention due to the length of proceedings for non-detained cases. The national average length of detention for detained cases is approximately 38 days. At a daily cost of approximately $97.00 per detainee, the approximate average cost per alien held in secure detention is $3,686.

While processing times and costs vary among the ATD programs, the average length of time to conclude immigration proceedings for ISAP cases is 332 days. Based on this average, the approximate average cost per alien in ISAP is $5,893.00 (approximately $17.75 per day per participant). The cost data associated with the ESR programs is unavailable for comparison as these programs have only recently commenced.

Moreover, enrolling an alien into an Alternative to Detention (ATD) program is often not as effective as detaining the alien in a secure environment for purposes of assuring that the alien will depart the country after receiving a final order of removal. The removal rate for cases in an ATD program averages 33%, whereas the removal rate for secure detention cases averages 99%.

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Notwithstanding the above, ICE remains committed to using ATD upon careful review of case-specific considerations and, as evidence of this interest, has increased participant slots in all the ATD programs. Both the ESR and ISAP contracts allow for periodic increases in participant slots as dictated by available funding. In short, the agency's ATD programs remain an important enforcement option for eligible participants and will receive continued support going forward.

Question#:	91
Topic:	CSI - 1
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: On February 28, DHS Undersecretary Jamison testified about the administration's cyber-security initiative at an open hearing of the House Homeland Security Committee. He stated that with regard to the government's cyber-security activities, which are aimed at federal computer systems, "we're currently not looking at content," referring to the content of communications. However, he then stated the government is proposing to look at content, and indicated that a privacy impact assessment was being prepared.

I appreciate that DHS has reached out to Congress and others about this new initiative in advance, rather than letting us know after the fact. Proposing to look at the contents of communications presents serious privacy issues. Can you assure us that the privacy impact assessment referred to by Mr. Jamison will be completed and shared with Congress before the initiative moves in that direction? Additionally, will that assessment be made public?

Response: The Department of Homeland Security (DHS) Privacy Office, in consultation with the National Cyber Security Division, has finalized the required Privacy Impact Assessment for the Einstein program. It is available on the DHS public website at http://www.dhs.gov/privacy and has been provided to:

House Homeland Security Committee
Senate Committee on Homeland Security and Governmental Affairs
House Appropriations Committee
Senate Appropriations Committee
House Appropriations Subcommittee on Homeland Security
Senate Appropriations Subcommittee on Homeland Security
House Appropriations Subcommittee on Defense
Senate Appropriations Subcommittee on Defense
House Budget Committee
Senate Budget Committee
House Judiciary Committee
Senate Judiciary Committee
House Intelligence Committee
Senate Intelligence Committee
House Armed Services Committee
Senate Armed Services Committee

Question#:	92
Topic:	CSI - 2
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: At a roundtable discussion with bloggers last month, you stressed that the Administration's cyber-security initiative was focused on securing the systems of the federal government. You said that you already had the statutory authority to do that.

Do you believe that any extension of the initiative beyond the federal domain would require new statutory authorities?

If so, can you assure us that the Administration will come to Congress with legislative proposals long before any move to expand the initiative beyond the federal government?

If not, can you assure us that the Administration will come to Congress with a detailed analysis of whether an extension of the initiative would require new authorities?

Response: At this time, the Administration does not believe that it requires any additional statutory authorities with regard to the Comprehensive National Cybersecurity Initiative (CNCI).

Question: If so, can you assure us that the Administration will come to Congress with legislative proposals long before any move to expand the initiative beyond the federal government?

Response: The Department has provided Congress with numerous briefings, responded to questions, and provided senior-level witnesses to testify regarding the CNCI. The Department values the support Congress has given to this important initiative. We are committed to working closely with you and your staff on all aspects of the CNCI.

Question: If not, can you assure us that the Administration will come to Congress with a detailed analysis of whether an extension of the initiative would require new authorities?

Response: Any plans by the Administration to extend the scope of the initiative will take into account existing statutory authorities and consider the need for new authorities and require a detailed analysis. Again, we are committed to working closely with you and your staff on all aspects of the initiative.

Question#:	93
Topic:	data mining
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: In July 2006, DHS issued a report on its data mining activities in response to a congressional reporting requirement that Senator Sununu and I spearheaded. In that report, the DHS Privacy Office made seven recommendations for privacy and security protections that DHS should implement for data mining programs. In July 2007, a year later, DHS issued a second data mining report, and in it acknowledged that "the Privacy Office is at the earliest stage of addressing the July 2006 recommendations."

It appears very little was done in that year to move forward on the recommendations to incorporate stronger privacy protections for data mining programs.

Please provide an update about the current status of implementing the Privacy Office's recommendations.

As Secretary of Homeland Security, will you make it a priority to achieve additional progress on those recommendations as soon as possible?

Response: In the last two and one half years, the DHS Privacy Office has reported to Congress on DHS data mining activities three times using three different definitions of "data mining." In its 2006 Data Mining Report, the Privacy Office relied on a definition used by both the Congressional Research Service and the Government Accountability Office. For its 2007 Report, the Privacy Office used the definition provided in House Report No. 109-699, which directed the Office to use a definition consistent with Section 549 of the Senate version of the H.R. 5441 Appropriations bill. Finally, the Department issued a 2008 Letter Report, which used the definition recently provided by Congress in the Federal Data Mining Reporting Act of 2007. As discussed in the Letter Report, the Privacy Office is currently engaged in a review of the Department's data mining activities as it prepares its comprehensive 2008 Report.

With each new definition, it has been necessary for the Privacy Office to reevaluate every program identified as a "data mining" effort in previous reports. In addition, the Privacy Office has had to conduct Department-wide data calls to determine whether programs excluded by earlier definitions should be captured in the current data mining report. The Privacy Office will be better able to evaluate privacy protection strategies if there is certainty about the definition of data mining.

As the Privacy Office's 2008 Letter Report indicates, the Office is planning to hold a public data mining workshop in 2008 to explore whether the current state of technology

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Topic:	data mining
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

supports the implementation of the 2006 report's recommendations as written, and whether other recommendations should also be considered. The workshop will enable the Privacy Office to bring academics, technologists, and privacy policy leaders together to discuss the privacy impact of data mining and how such searches can be carried out in a manner that respects privacy. The Privacy Office intends to report on the workshop outcomes in its comprehensive report to Congress.

I look forward to following the progress of this workshop and to helping the Privacy Office implement whatever measures they determine will ensure individual privacy is preserved in all of the Department's data mining activities.

Question#:	94
Topic:	ADVISE
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: The DHS program entitled ADVISE (Analysis, Dissemination, Visualization, Insight, and Semantic Enhancement), in development since 2003, has been described as a framework into which data will be loaded and mapped to discern relationships between people, organizations, and other objects. According to the DHS Privacy Office, the ADVISE project was halted in early 2007 in response to privacy concerns raised by the House Appropriations Committee, the Government Accountability Office (GAO), and the DHS Inspector General's office (DHS IG).

In 2007, GAO, DHS IG, and the DHS Privacy Office all released reports raising concerns about whether (and when) ADVISE had begun running live datasets for the purpose of analyzing personal information, without proper privacy controls. GAO recommended in its report that DHS conduct a privacy impact assessment (PIA), while the DHS Privacy Office discussed ongoing work to create a new Privacy Technology Implementation Guide (PTIG) that addresses the unique nature of ADVISE.

Has ADVISE now been assessed for privacy concerns in accordance with the E-Government Act of 2002, the Office of Management & Budget's guidelines, and DHS Privacy Office guidance, either in the form of a PIA or in a modified assessment such as a PTIG? If so, please describe the form of the privacy assessment, provide a copy of that assessment, and explain what steps have been taken to address the issues identified in the assessment. If the PTIG described by the DHS Privacy Office is complete, explain how the PTIG assesses privacy concerns, including ways in which the PTIG differs from the traditional PIA.

Is ADVISE still subject to an administrative halt, or has it been deployed? If ADVISE is currently operational, describe all past and ongoing ADVISE deployments, and explain any features that have been built into the ADVISE framework to protect privacy during these operations.

Response: The Science and Technology Directorate (S&T) cancelled the Analysis, Dissemination, Visualization, Insight and Semantic Enhancement (ADVISE) program in late 2007. Therefore, the Department will not issue subsequent privacy compliance documentation related to ADVISE.

While it is true that ADVISE was suspended for a time due to privacy concerns described in reports authored by GAO, the DHS Office of Inspector General, and the DHS Privacy Office, the program was not cancelled because of privacy concerns. During the Privacy

Question#:	94
Topic:	ADVISE
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Office's review of ADVISE, S&T worked closely with the Privacy Office to fulfill privacy compliance requirements and establish a "way forward" that would allow the program to become operational while preserving privacy rights. The Department's decision to seek other technology options reflected a change in our priorities and the increasing availability of more cost-effective solutions. And though the ADVISE program was ultimately terminated, S&T will use the knowledge (algorithms, data, and software) gained from the development process to improve future research and will continue to build on what was learned from ADVISE to create technologies that could prevent terrorist events and save American lives. As they do so, they will continue to ensure that the privacy lessons-learned from ADVISE are implemented as well.

The PTIG is a guide to assist developers and managers of operational IT systems understand the nature of privacy protection in the context of system development. While the PTIG draws from the questions contained in the PIA and in the SORN as well as other DHS Privacy Office guidance, the PTIG itself is not a privacy compliance requirement. In specific situations (driven by the criteria of the E-Government Act of 2002 for the PIA, and the Privacy Act of 1974 for the SORN), the PIA and SORN documents must be completed before a particular system can use personally identifiable information. The PTIG attempts to gather the privacy issues and related privacy protections that ultimately are reflected in the PIA and SORN, and present them as guidance for developers before development. With this tool, developers and managers can understand what privacy protections they need to build into their systems from the start.

Question#:	95
Topic:	NIE
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: The 2002 US National Intelligence Estimate on the Ballistic Missile Threat stated that the "Intelligence Community judges that US territory is more likely to be attacked with WMD using non-missile means . . ."

Do you concur with this assessment?

DHS has invested large sums in improving port security to prevent the transmission of radiological, nuclear or other dangerous materials into the United States. In your view, do you currently have the resources needed to address this threat?

Response: DHS will be happy to respond to this question in a classified setting at a time and place of the Committees choosing.

Question#:	96
Topic:	task forces
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: The Assistant Secretary of Defense for Homeland Defense has proposed the creation of Task Forces for Emergency Response that would hire National Guard officers to prepare State Homeland Security Plans. FEMA has indicated to the Wisconsin National Guard that it supports the proposal and is considering using Regional Catastrophic Preparedness Grant Program funds for this purpose.

Is FEMA in fact considering using Regional Catastrophic Preparedness Grant Program funds to implement the Assistant Secretary of Defense's proposal? If so, given the relative lack of resources for the Department of Homeland Security in comparison to the Department of Defense, would this be the best use of those grant program funds?

Response: FEMA is currently exploring a joint pilot of the TFER concept with the Department of Defense and select States. This includes exploring how Department of Defense resources will be used to support the program, as well as defining the purpose and objectives to ensure support for State and local efforts. Participants in the RCPGP may be asked to voluntarily participate and provide resources in support of the pilot.

Question#:	97
Topic:	GAO
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: GAO reported last year that of 24 performance expectations for DHS in the area of emergency preparedness and response, DHS has generally not achieved 18. What steps are you taking to address these concerns?

In particular, GAO found that DHS has failed to effectively coordinate implementation of a national incident management system (NIMS), in part because DHS relies on states to self-certify that they are compliant with NIMS' requirements. I understand that, in 2007, you provided states with a specific set of metrics to measure their compliance, but it is still essentially a self-reporting system. In your view, does self-reporting by states, even paired with metrics for measuring compliance, provide a sufficient means for DHS to monitor states' compliance?

Response: Self-assessments, particularly when paired with metrics for measuring compliance, can certainly provide a sufficient reliable means for DHS to monitor States' compliance. Reliability is generally taken to mean that the measure used is reproducible, consistent, and free from error, to a reasonable extent. Regardless of the measure used, some uncertainty will always be present in this type of survey instrument. However, well developed measures will generally minimize this uncertainty. The conclusions drawn from self-assessments are sometimes considered to lack certainty, due to the perceived subjective nature of these assessments. However, experience has shown self-assessments to in fact be generally reliable across a wide spectrum of competencies, and are successfully and commonly employed by multiple Federal and state government agencies. For example, the Department of the Treasury uses self-assessments prepared by the U.S. Treasury, the National Association of Insurance Commissioners (NAIC), and other U.S. government agencies (including the Departments of Commerce and Labor and the Office of Management & Budget) and private sector bodies to measure 12 standards identified by the Financial Stability Forum (FSF) as priorities for countries to implement in order to promote financial stability and to help prevent financial crises. As another example, the State of Washington uses self-assessments as part of its Government Management Accountability and Performance (GMAP) program. Each State agency performs a self-assessment as part of a framework designed to simplify and integrate multiple performance mandates.

In the case of the NIMS compliance survey, FEMA realized several advantages in this survey type in that it was of relatively low-cost, reached in excess of 18,000 users and was frequently validated. The validation process was both formal, using a corrective action plan process which was coordinated between the FEMA Region and the State and

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informally by the frequent interactions of the Federal NIMS Coordinators positioned in each FEMA Region, the State and local NIMS coordinators required in state and local jurisdictions and finally by the annual audits conducted by DHS/FEMA Grants Program Directorate Preparedness Officers during their annual monitoring of the Homeland Security Grant Program grant programs. In accordance with the provisions of OMB Circular A-133 (Revised, June 27, 2003), "Audits of States, Local Governments, and Nonprofit Organizations," States that expend financial assistance of $500,000 or more in Federal awards (or receive property, or a combination of both, within the fiscal year) will have a single or a program-specific audit conducted for that year. Furthermore, the integrity of NIMS self-assessments is protected by POCs in every FEMA Region and in every State that works with the Grants Program Directorate.

It is valid criticism that confounding personality variables can be a factor in self-assessments. But NIMS has been designed to countervail the influence of these variables. A great deal of time and energy was put in the survey and design of a system that could adequately measure NIMS compliance, an effort that involved survey design experts from the Homeland security institute and focus groups that involved hundreds of state and local stakeholders and subject matter experts. As of today, all 50 States and 6 territories use the FEMA sponsored online tool *NIMSCAST* to report NIMS compliance. While IMSI has enhanced the 2008 NIMS Implementation Compliance Objectives to respond to feedback from the State and local community, the process of compliance determination is the same as in 2007. Additionally, the National Preparedness Directorate is currently working with the leadership of the National Advisory Council to review and revise NIMS compliance evaluation. In accordance with the FY 2009 grants guidance, States will be required to utilize the NIMS Capability Assessment and Support Tool. The MOA with GPD will be continued.

Question#:	98
Topic:	NIMS
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: The assessments I have received from local officials regarding the value of NIMS training have been mixed. I'm concerned about whether substantial compliance can be achieved if some local officials do not see the value in putting their first responders through NIMS testing and training.

What is DHS doing, if anything, to give state and local officials a broader range of training options?

One aspect of the training that local officials have questioned is online testing. Could online testing be replaced with tabletop, functional, and command post exercises?

Response: The National Incident Management System (NIMS) is successful in ensuring responders from different jurisdictions and disciplines work together to respond to natural disasters and emergencies, including acts of terrorism. NIMS brings a standard approach to incident management, standard command and management structures, and an emphasis on preparedness, mutual aid, and resource management. Because of its inherent value, Federal, State, local, and tribal entities have overwhelmingly adopted NIMS doctrine and have willingly participated in training and compliance activities. FEMA recognizes the value of NIMS and considers continued training and compliance assessment as an essential function of the Agency. FEMA is currently working to ensure the quality of training and compliance activities meet the already high standards of the widely adopted NIMS.

FEMA provides training at the introductory and advanced level, both online and in the classroom. NIMS on-line training is strictly for introductory purposes. It is a baseline/foundational training that reinforces NIMS concepts, terminology, and doctrine. While the completion of NIMS online training (IS-700 An Introduction to NIMS; IS-800B An Introduction to the National Response Framework (NRF); ICS-100, An Introduction to ICS and ICS-200, Basic ICS) is required as part of NIMS compliance requirements, advanced classroom training is also available. FEMA has found that a sound baseline or foundation in NIMS is critical to acceptance and implementation. Additionally, the online training has provided a sound foundation for the nearly 7.8 million first responders and disaster workers that have completed NIMS/NRF-related classroom courses through FEMA's Emergency Management Institute (EMI).

While awareness training provides the baseline/foundation additional more skills oriented or actual practice training is also needed for first responders and disaster workers.

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Additional NIMS training requirements have expanded to now include more advanced training with a focus on the training of personnel deemed likely to fill specific ICS roles during an incident. This skill oriented training comes in the form of ICS-300 and ICS-400 training. This training is conducted in a classroom and requires the students to actually perform elements of the incident command system (i.e. establishing command based on an exercise scenario; developing an actual incident action plan under ICS, etc.). ICS-300 is a NIMS training requirement of FY08. ICS-400 is a NIMS training requirement for FY09. EMI has been working with State Emergency Management agencies across the nation for the past several years to qualify instructors to teach ICS-300 and ICS-400 training courses. States across the nation have been teaching ICS-300 and ICS-400 training for the past several years to middle management and command and general staff personnel.

FEMA does, however, appreciate the need to assess the value of provided coursework. Through continuous review, FEMA works to improve and update current coursework and develop new programs. Through this evaluation, FEMA looks to the stakeholder community to provide feedback on which platforms are more or less effective in achieving ultimate outcomes—a more prepared community. Today, EMI in conjunction with the United States Fire Administration (along with other Federal agencies) is working together to develop, pilot/test, qualify instructors and conduct ICS position specific training. As the national training program for NIMS progresses, stakeholders will be able to train more personnel to greater depth. Eventually all training programs related to NIMS should be tied to the credentialing of personnel for specific disaster related job assignments. The initial national training program for NIMS is presented in detail in the NIMS Five-Year Training Plan.

Other forms of NIMS training available include drills, tabletop, functional, and full-scale exercise, which are included as part of yearly NIMS compliance activities. EMI currently offers NIMS compliant exercise-based training in the form of our Integrated Emergency Management Course (IEMC) series, which focuses on community based elements of NIMS to include communication and information management, resource management, ICS, multi-agency coordination, and public information. This year EMI will also initiate a State IEMC program that is an exercise based training course for State EOC staff. This program will test the skill base of State personnel in the State emergency operations center environment while emphasizing the doctrine established in the new National Response Framework (NRF) and NIMS.

For now, online awareness training is an important element of the overall NIMS training plan and will continue to be provided and expanded. These courses will continue to be

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targeted at the thousands of new first responders and disaster workers that need to be trained at a foundational level in any given year.

Assessing NIMS compliance is the logical follow-on to training. Compliance activities are designed to ensure that the widely adopted concepts of NIMS are implemented correctly and constantly across all jurisdictions. The NIMS Compliance Assessment Support Tool (NIMSCAST) has been a voluntary web-based data collection tool utilized throughout the country for the last few years. It has provided a large amount of data on NIMS implementation and has been a key indicator of NIMS adoption by jurisdictions. FEMA does, however, recognize that improvements can be made to the current tools.

In order to build a more effective Comprehensive Assessment System, FEMA's National Preparedness Directorate (NPD) is currently evaluating its entire existing suite of evaluation systems, including the NIMSCAST, with the aim of integrating best practices of current processes to provide a streamlined, effective approach to assessing capabilities. The specific assessment systems under review are:

- ***NIMS Compliance Assessment Support Tool (NIMSCAST):*** NIMSCAST is a voluntary web-based data collection tool used to assess NIMS compliance. 56 States and territories and 18,000 local and tribal entities have NIMSCAST accounts.
- ***Gap Analysis Program (GAP)***: GAP assesses 7 response mission areas in 20 hurricane-prone States and territories. For example, as depicted in figure 84, GAP data reveals that the assessed State would require significant Federal assistance in commodity distribution, evacuation, and the provision of fuel.
- ***Pilot Capabilities Assessment (PCA)***: PCA has completed three pilots (as of November 2007) to develop a capability assessment methodology.
- ***National Preparedness System:*** The National Preparedness System has completed field tests in 10 States to evaluate all 37 capabilities in the TCL.
- ***State Preparedness Reports (SPR):*** All 56 States and territories have submitted SPRs to the FEMA Administrator. SPRs contain assessments of current capability levels, descriptions of unmet target capabilities, and assessments of resource needs to meet preparedness priorities.
- ***Capabilities Assessment for Readiness (CAR)***

The final Capabilities Assessment System will capture best practices and lessons learned from these DHS efforts to create a streamlined, yet comprehensive, approach. The goal is to build an effective national system for enhancing preparedness that integrates planning tools, assesses capabilities defined by the Target Capabilities List, and measures progress at the local, State, and Federal levels.

Question#:	99
Topic:	DOD
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: Section 1815 of the 2008 defense authorization legislation requires the Secretary of the Department of Defense to consult with you and determine the military-unique capabilities that the Department of Defense should provide in order to support civil authorities in an incident of national significance or a catastrophic incident. What is the status of this process, and when do you anticipate that it will be completed?

Response: The Department of Homeland Security (DHS) and Department of Defense (DoD) are collaborating on a number of efforts, both DoD and DHS-led, that inform the potential military unique requirements issue, to include the following:

Coordination – DHS/Federal Emergency Management Agency (FEMA) coordinates with DoD through the Assistant Secretary of Defense for Homeland Defense, and specifically coordinates with the Joint Staff through the Joint Director of Military Support. The support from the Secretary of Defense and the DoD in preparing for and responding to all types of disasters is critical. Beneficial support may be provided by any of several different DoD components including the following:

- US Northern Command (USNORTHCOM)
- Defense Logistics Agency (DLA)
- US Army Corps of Engineers (USACE)
- National Guard Bureau (NGB)
- National Geospatial-Intelligence Agency (NGA)
- US Transportation Command (USTRANSCOM)
- US Pacific Command (USPACOM)
- US Southern Command (SOUTHCOM)
- Marine Corps Systems Command
- US Strategic Command (STRATCOM) and Defense Threat Reduction Agency (DTRA)

Planning – DHS established the Incident Management Planning Team (IMPT) as a permanent planning element within the National Operations Center at DHS. The IMPT supports a unified inter-agency planning effort for incidents requiring a coordinated national response and develops strategic guidance, concepts, and plans, which are used for actual or potential domestic incidents. The team is currently developing plans to support the 15 National Planning Scenarios. DoD assigned a full-time representative to the IMPT to more fully synchronize and integrate DoD and DHS/FEMA planning and response activities. DoD and DHS planners also engage daily at the action officer level, and this dialogue supports the identification of needed capabilities. In another example

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of close planning, FEMA has forged new relationships with DLA as part of FEMA's transformation of its logistics activities. This new initiative is the National Logistics Forum and includes all of the main DoD organizations.

FEMA Pre-Scripted Mission Assignments (PSMAs) – FEMA uses mission assignments (MAs) to direct federal agencies to perform certain tasks in anticipation of or in response to disasters and emergencies declared by the President. As part of the MA process, PSMAs have been developed in advance to facilitate a more rapid delivery of the types of federal assistance that is frequently requested. FEMA and DoD continue to collaborate closely on the development of pre-scripted mission assignments (PSMAs) to facilitate Defense Support to Civil Authorities (DSCA) and to describe the DoD resources or capabilities that are commonly called upon during an incident response. For example, 23 operational PSMAs (excluding USACE and NGA PSMAs discussed below) are now in place with DoD components for the 2008 Hurricane Season covering response activities such as transportation, communications, air lift, medical and patient evacuation, aerial imagery, and mass care. In addition, as part of FEMA's close working relationship with USACE, the coordinator/primary agency for Emergency Support Function # 3, Public Works and Engineering, 40 PSMAs have been developed. Of these, 36 USACE PSMAs cover operational activities such as providing water, ice, housing, and roofing and four cover activation of assets. Six PSMAs have been developed with NGA, including four operational PSMAs to support geospatial intelligence.

FEMA-Led Gap Analysis – The FEMA Gap Analysis Program (GAP) focuses on gathering information needed to ensure operational readiness at the local, state, and federal levels. The initial application of the GAP, conducted in 18 hurricane-prone states, was completed in preparation for the 2007 hurricane season; in 2008 FEMA has expanded the GAP to include all states and all hazards. GAP gives FEMA officials a better understanding of what preparations state and local governments have made, what assets they have, and where additional assistance might be needed. With such needs identified in advance, FEMA can more rapidly access support and resources from its interagency partners, including DoD. Similar to FEMA's GAP Analysis program is a GAP Analysis tool developed by NGB. Having data available from these complementary tools can enhance disaster planning and response operations—this information is also further analyzed by USNORTHCOM.

Disaster Response Coordination and Support – Coordination of disaster planning and response activities between military components and DHS/FEMA continues to be strengthened. For example, there are routine daily conference calls between the NRCC/Watch, NGB/Joint Operations Center (JOC), and USNORTHCOM's Command Center to review current operational activities and share information. During disaster

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response operations, DoD components deploy additional staff to support NRCC response operations. Most recently, as part of an agreement with DoD, FEMA will also deploy liaisons to US Army North in San Antonio, Texas, during significant disaster events to ensure maximum coordination of response activities. In addition, DoD leadership at very senior levels actively participate in the Interagency video-teleconferences to ensure sufficient DSCA support and coordination of disaster response activities. FEMA also hosts a bi-weekly Gap Analysis video-teleconference with its USACE, USNORTHCOM, and NGB partners. These video-teleconferences help to identify important planning issues and associated requirements.

Capabilities Based Assessment – DHS works closely with the DoD/USNORTHCOM Capabilities Based Assessment working group in order to analyze capabilities that allow DoD to anticipate, detect, deter, prevent, defend, and defeat external threats or aggression to the Homeland, respond to catastrophic incidents, and to integrate and operate with non-DOD and international partners to achieve unity of effort. Participation in this requirements and gaps analysis lays the foundation for DoD to define and resource DHS' capability needs.

Commission on National Guard and Reserves Working Group – Congress charged the Commission on the National Guard and Reserves to recommend changes in law and policy to ensure the Guard and Reserves are organized, trained, equipped, compensated, and supported to best meet the national security requirements of the country. The Commission states that DHS has the responsibility to coordinate the overall federal response in most national emergencies but that DoD must be fully prepared to play a primary role, at the President's request, in restoring order and rendering assistance in aftermath of catastrophes. DHS is actively engaged with and supporting the Office of the Secretary of Defense Work Group that was stood up to respond to the Commission's recommendations.

In support of each of these areas, DHS and DoD continue to build a robust interface with strategically placed liaison officers in each department. At the Departmental level, DHS hosts a DoD liaison officer in the Office of the Military Advisor to the Secretary, which promotes understanding, collaboration, and sharing of information between DoD and DHS. Coordination has also been enhanced through the exchange of full time liaisons between FEMA and DoD. DoD has assigned liaisons officers to FEMA Headquarters to represent JDOMS, USNORTHCOM, and the NGB; and FEMA has assigned two full time staff members at USNORTHCOM to facilitate coordination. Similarly, USNORTHCOM has assigned full-time Defense Coordinating Officers (DCO), supported by Defense Coordinating Elements, in each of the ten FEMA regions to

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facilitate coordination of disaster response activities and to share expertise. In addition to acting as the single point of contact for all federal agency requests for DoD assets during response operations, DCOs routinely coordinate with the State Adjutants General/State National Guards and other key stakeholders to fully understand State response plans, capabilities, and gaps and to allow DoD assets to be assigned quickly and effectively, when requested. The liaisons help ensure effective coordination of activities, provide advice, prepare reports, and facilitate relationship building for more effective and timely DSCA. Ultimately, the Departments have an active and cooperative effort supporting the identification of military capabilities that may be required by the Department of Homeland Security in support of civil authorities during major incidents.

Question: When do you anticipate that it will be completed?

Response: This is an ongoing, iterative process that, as local, state and federal plans are refined, and the Incident Management Planning Team, Gap Analysis Program, Pre-Scripted Mission Assignments, Capabilities Based Assessment, liaison exchanges, disaster response coordination, and the Commission on the National Guard and Reserves Working Group efforts proceed, will continue to support the identification of needed capabilities.

Question#:	100
Topic:	safe skies
Hearing:	Oversight Hearing
Primary:	The Honorable Russell D. Feingold
Committee:	JUDICIARY (SENATE)

Question: During consideration of the Senate version of the Department of Homeland Security appropriations bill last year, I offered an amendment (S.Amdt 2507) that would require a study of and improvements to the Voluntary Provision of the Emergency Service Program (VPESP). This amendment was accepted on July 26, 2007, and the 2008 Consolidated Appropriation Act (P.L. 110-161) required the Transportation Security Administration (TSA) to comply with my amendment. What progress has TSA made on studying the implementation of VPESP, publishing a report that provides information on how first responders could volunteer, and developing a mechanism to report and respond to problems? When are these actions expected to be completed?

Response: The Transportation Security Administration (TSA) has been engaged with aircraft operators and their associations to complete this study and report required by the fiscal year 2008 Consolidated Appropriations Act. We are continuing to collect various input and information from aircraft operators with regard to the implementation of the Voluntary Provision of the Emergency Service Program. In addition, we are reviewing the feasibility of instituting the other recommendations contained within the amendment. TSA fully intends to complete this study within the 180 day requirement and submit this report in accordance with the Act.

U.S. Customs and Border Protection

Policy Regarding Border Search of Information

July 16, 2008

This policy provides guidance to U.S Customs and Border Protection (CBP) Officers, Border Patrol Agents, Air and Marine Agents, Internal Affairs Agents, and any other official of CBP authorized to conduct border searches (for purposes of this policy, all such officers and agents are hereinafter referred to as "officers") regarding the border search of information contained in documents and electronic devices. More specifically, this policy sets forth the legal and policy guidelines within which officers may search, review, retain, and share certain information possessed by individuals who are encountered by CBP at the border, functional equivalent of the border, or extended border. This policy governs border search authority only; nothing in this policy limits the authority of CBP to act pursuant to other authorities such as a warrant or a search incident to arrest.

A. Purpose

CBP is responsible for ensuring compliance with customs, immigration, and other Federal laws at the border. To that end, officers may examine documents, books, pamphlets, and other printed material, as well as computers, disks, hard drives, and other electronic or digital storage devices. These examinations are part of CBP's long-standing practice and are essential to uncovering vital law enforcement information. For example, examinations of documents and electronic devices are a crucial tool for detecting information concerning terrorism, narcotics smuggling, and other national security matters; alien admissibility; contraband including child pornography, monetary instruments, and information in violation of copyright or trademark laws; and evidence of embargo violations or other import or export control laws.

Notwithstanding this law enforcement mission, in the course of every border search, CBP will protect the rights of individuals against unreasonable search and seizure. Each operational office will maintain appropriate mechanisms for internal audit and review of compliance with the procedures outlined in this policy.

B. Review of Information in the Course of Border Search

Border searches must be performed by an officer or otherwise properly authorized officer with border search authority, such as an ICE Special Agent. In the course of a border search, and absent individualized suspicion, officers can review and analyze the information transported by any individual attempting to enter, reenter, depart, pass through, or reside in the United States, subject to the requirements and limitations provided herein. Nothing in this policy limits the authority of an officer to make written notes or reports or to document impressions relating to a border encounter.

C. Detention and Review in Continuation of Border Search

(1) Detention and Review by Officers. Officers may detain documents and electronic devices, or copies thereof, for a reasonable period of time to perform a thorough border search. The search may take place on-site or at an off-site location. Except as noted in section D below, if after reviewing the information there is not probable cause to seize it, any copies of the information must be destroyed. All actions surrounding the detention will be documented by the officer and certified by the Supervisor.

(2) Assistance by Other Federal Agencies or Entities.

(a) Translation and Decryption. Officers may encounter information in documents or electronic devices that is in a foreign language and/or encrypted. To assist CBP in determining the meaning of such information, CBP may seek translation and/or decryption assistance from other Federal agencies or entities. Officers may seek such assistance absent individualized suspicion. Requests for translation and decryption assistance shall be documented.

(b) Subject Matter Assistance. Officers may encounter information in documents or electronic devices that is not in a foreign language or encrypted, but that nevertheless requires referral to subject matter experts to determine whether the information is relevant to the laws enforced and administered by CBP. With supervisory approval, officers may create and transmit a copy of information to an agency or entity for the purpose of obtaining subject matter assistance when they have reasonable suspicion of activities in violation of the laws enforced by CBP. Requests for subject matter assistance shall be documented.

(c) Original documents and devices should only be transmitted when necessary to render the requested assistance.

(d) Responses and Time for Assistance.

(1) Responses Required. Agencies or entities receiving a request for assistance in conducting a border search are to provide such assistance as expeditiously as possible. Where subject matter assistance is requested, responses should include any findings, observations, and conclusions relating to the laws enforced by CBP.

(2) Time for Assistance. Responses from assisting agencies are expected in an expeditious manner so that CBP may complete its border search in a reasonable period of time. Unless otherwise approved by the principal field official such as the Director, Field

Operations or Chief Patrol Agent, responses should be received within fifteen (15) days. This timeframe is to be explained in the request for assistance. If the assisting agency is unable to respond in that period of time, CBP may permit extensions in increments of seven (7) days. For purposes of this provision, ICE is not considered to be a separate agency.

(e) Destruction. Except as noted in section D below, if after reviewing information, probable cause to seize the information does not exist, any copies of the information must be destroyed.

D. Retention and Sharing of Information Found in Border Searches

(1) By CBP.

(a) Retention with Probable Cause. When officers determine there is probable cause of unlawful activity—based on a review of information in documents or electronic devices encountered at the border or on other facts and circumstances—they may seize and retain the originals and/or copies of relevant documents or devices, as authorized by law.

(b) Other Circumstances. Absent probable cause, CBP may only retain documents relating to immigration matters, consistent with the privacy and data protection standards of the system in which such information is retained.

(c) Sharing. Copies of documents or devices, or portions thereof, which are retained in accordance with this section, may be shared by CBP with Federal, state, local, and foreign law enforcement agencies only to the extent consistent with applicable law and policy.

(d) Destruction. Except as noted in this section, if after reviewing information, there exists no probable cause to seize the information, CBP will retain no copies of the information.

(2) By Assisting Agencies and Entities.

(a) During Assistance. All documents and devices, whether originals or copies, provided to an assisting Federal agency may be retained by that agency for the period of time needed to provide the requested assistance to CBP.

(b) Return or Destruction. At the conclusion of the requested assistance, all information must be returned to CBP as expeditiously as possible. In addition, the assisting Federal agency or entity must certify to CBP that all

copies of the information transferred to that agency or entity have been destroyed, or advise CBP in accordance with section 2(c) below.

(i) In the event that any original documents or devices are transmitted, they must not be destroyed; they are to be returned to CBP unless seized based on probable cause by the assisting agency.

(c) Retention with Independent Authority. Copies may be retained by an assisting Federal agency or entity only if and to the extent that it has the independent legal authority to do so—for example, when the information is of national security or intelligence value. In such cases, the retaining agency must advise CBP of its decision to retain information on its own authority.

E. Review and Handling of Certain Types of Information

(1) Business Information. Officers encountering business or commercial information in documents and electronic devices shall treat such information as business confidential information and shall take all reasonable measures to protect that information from unauthorized disclosure. Depending on the nature of the information presented, the Trade Secrets Act, the Privacy Act, and other laws may govern or restrict the handling of the information.

(2) Sealed Letter Class Mail. Officers may not read or permit others to read correspondence contained in sealed letter class mail (the international equivalent of First Class) without an appropriate search warrant or consent. Only articles in the postal system are deemed "mail." Letters carried by individuals or private carriers such as DHL, UPS, or Federal Express, for example, are not considered to be mail, even if they are stamped, and thus are subject to a border search as provided in this policy.

(3) Attorney-Client Privileged Material. Occasionally, an individual claims that the attorney-client privilege prevents the search of his or her information at the border. Although legal materials are not necessarily exempt from a border search, they may be subject to special handling procedures.

Correspondence, court documents, and other legal documents may be covered by attorney-client privilege. If an officer suspects that the content of such a document may constitute evidence of a crime or otherwise pertain to a determination within the jurisdiction of CBP, the officer must seek advice from the Associate/Assistant Chief Counsel or the appropriate U.S. Attorney's office before conducting a search of the document.

(4) Identification Documents. Passports, Seaman's Papers, Airman Certificates, driver's licenses, state identification cards, and similar government identification documents can be copied for legitimate government purposes without any suspicion of illegality.

F. No Private Right Created

This document is an internal policy statement of CBP and does not create any rights, privileges, or benefits for any person or party.

SUBMISSIONS FOR THE RECORD

WASHINGTON
LEGISLATIVE OFFICE

The American Civil Liberties Union

Written Statement
For a Hearing on

Homeland Security Oversight

Submitted to the Senate Judiciary Committee

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Introduction

The American Civil Liberties Union ("ACLU") commends the Senate Judiciary Committee for conducting an oversight hearing of the Department of Homeland Security ("DHS"). We urge the Committee to initiate a rigorous oversight process to ensure that DHS is held accountable to Congress and the public for its enforcement practices. The following written statement, submitted on behalf of the ACLU, will address a range of problematic practices at the Immigration Customs Enforcement ("ICE"), a sub-department of DHS, during the interrogation, detention, and removal stages, as well as DHS's collection of personal data on millions of Americans, its use and misuse of that data, and its attempts to build an ever-expanding surveillance infrastructure.

The ACLU is a nonpartisan public interest organization dedicated to protecting the constitutional rights of individuals. The ACLU consists of more than half a million members, countless additional activists and supporters, several national projects, and 53 affiliates nationwide. The ACLU was born during the "Red Scare" in 1920, a time when then U.S. Attorney General A. Mitchell Palmer ordered immigrants summarily detained and deported because of their political views. Since its founding, the ACLU has consistently defended and protected immigrants' rights. The ACLU has the largest litigation program in the country dedicated to defending the civil and constitutional rights of immigrants. Through a comprehensive advocacy program including litigation, public education, and legislative and administrative advocacy, the ACLU is at the forefront of major struggles securing immigrants' rights including legal challenges to ICE's unconstitutional laws and practices.

Part 1 – Problems with ICE Interrogation, Detention, and Removal Practices

People charged with being removable are entitled to due process including a hearing before an immigration judge and review by a federal court. Among the specific rights that apply in removal proceedings are the right to be represented by counsel (at no expense to the government); to receive reasonable notice of the charges and of the time and place of the hearing; to have a reasonable opportunity to examine adverse evidence and witnesses; to present favorable evidence; to receive competent language interpretation; and to have the government prove its case by clear, convincing, and unequivocal evidence.

ICE has systematically chipped away at these core constitutional protections by pursuing an unprecedented campaign of interrogations, detention, and removal of immigrants. Since 2006, with the initiation of Operation Return to Sender, ICE has aggressively ramped up punitive deportation-only initiatives including:

- large-scale, mass raids in worksites and homes;
- dramatic increase in detention beds;
- expansion of federal immigration enforcement to include state and local police;
- denial of access to counsel for people facing removal from the U.S.;
- mass transfers of detainees to facilities hundreds of miles from their homes;
- incarceration of detainees in unsanitary inhumane conditions;

- denial of medical and dental care to detainees, including those with serious, life-threatening conditions.

I. Unprecedented large-scale round-up raids

Since the launch of Operation Return to Sender in 2006, ICE has engaged in an unprecedented round of raids, both at worksites and in homes, hitting many regions of the country. Below is a snapshot of just a few of the regions that have been hard hit by large-scale immigration raids:

Swift raids: On December 12, 2006, six Swift & Company facilities located in Greeley, Colorado; Cactus, Texas; Grand Island, Nebraska; Hyrum, Utah; Marshalltown, Iowa and Worthington, Minnesota were raided by ICE. ICE estimates that approximately 1,282 Swift employees were detained on immigration violations, and 65 were charged with criminal violations related to identity theft.

New Bedford, Massachusetts raid: On March 6, 2007, the New Bedford community was devastated by one of the nation's largest immigration raids, resulting in the arrest of 361 workers of the Michael Bianco factory. All but a few were detained, and 206 were transferred to detention facilities in Texas, hundreds of miles from their families, homes, and counsel. An estimated 100 to 200 children were separated from their parents. In response, the ACLU and a coalition of groups filed a lawsuit, challenging ICE's misconduct during the raid.

Van Nuys, California raid: On February 7, 2008, more than 100 ICE agents raided a printer supply manufacturer in the San Fernando Valley, taking into custody over 130 employees on immigration-related charges and arresting eight on federal criminal charges. Following the raid, ICE officials denied the workers access to counsel during ICE's interrogation of the workers, even after the attorneys had filed Form G-28s Notice of Entry of Appearance. The ACLU, the National Immigration Law Center, and the National Lawyers Guild recently filed a lawsuit on behalf of the workers, challenging ICE's denial of access to counsel.[1]

Long Island suburbs raids: In September 2007 teams of 6 to10 armed ICE agents raided the homes of Latinos without court-issued search warrants. The raids were conducted during late night or pre-dawn hours. ICE agents pounded on and/or broke down doors and windows while screaming loudly at the inhabitants inside the house. ICE agents represented themselves as "police" and bullied or forced their way into people's homes without obtaining their consent to enter. The ACLU filed a lawsuit challenging that ICE violated the immigrants' Fourth amendment rights by entering and searching their homes without valid warrants or voluntary consent and in the absence of probable cause and exigent circumstances. Furthermore, following the raid, Nassau County Police Commissioner Lawrence Mulvey stated that his officers would no longer cooperate with ICE, because they do not support ICE's "cowboy tactics."[2]

[1] See Appendix A: Perdomo, Daniela. "Workers in Raid Get Right to Legal Counsel." Los Angeles Times. March 14, 2008.
[2] See Appendix B: "New York Officials Denounce Tactics Used in Immigration Raids." Fox News. October 3, 2007.

Georgia raids: In September 2006 armed federal agents searched and entered private homes without warrants and detained and interrogated people solely on the basis that they looked "Mexican." These raids swept so broadly that they covered homes where all the residents are U.S. citizens. In addition, the agents used excessive and wholly unnecessary force and destroyed private property without cause. The ACLU filed a class action suit on behalf of U.S. citizens who "appear Mexican," challenging that the federal agents violated the citizens' Fourth amendment rights by entering and searching homes without valid warrants or voluntary consent and in the absence of probable cause or exigent circumstances. The ACLU suit further challenges that the federal agents violated the citizens' Fifth amendment rights by targeting them on the basis of race/ethnicity and/or national origin in violation of the Equal Protection Clause.

DHS Secretary Chertoff has claimed that the ICE enforcement operations launched in 2006 are aimed at capturing "fugitive aliens," with the highest priority on apprehending individuals who pose a threat to national security or the community and whose criminal records include violent crimes. However, 94 percent of those arrested by the San Francisco Fugitive Operations Team between January 1 and March 31, 2007, did not fit within the category of "criminal fugitives." A majority were not even subject to outstanding removal orders according to a letter from the acting ICE director to Congresswoman Anna Eshoo. These numbers indicate that ICE's raids, though purportedly targeted at "fugitive aliens," in reality have swept so broadly that the vast majority of people arrested under Operation Return to Sender were innocent bystanders.

Among the thousands of people who have been rounded up by ICE under the auspices of Operation Return to Sender is Kebin Reyes, six years old at the time of his arrest in March 2007. A native-born U.S. citizen, Kebin was sleeping when ICE officers stormed into his home. Kebin's father Noe told the ICE agents that Kebin is a U.S. citizen, and asked permission to call a relative to care for Kebin while Noe was detained. The ICE agents refused. Instead they made Noe wake up Kebin, who watched as officers handcuffed his father, and then took father and son to the ICE booking station in San Francisco. Kebin spent 10 hours locked in a room with his father. ICE agents never allowed Noe to call someone to pick up Kebin. It was only when a relative heard from neighbors what happened and came to the ICE facility that Kebin was able to leave. [3]

Like Kebin, children all over the country have been traumatized by seeing their parents swept up and taken away or by being left behind without care after school when parents have been arrested without notice. After the raids in which Kebin was arrested, the San Rafael City Schools Board of Education wrote to Congresswoman Lynn Woolsey, reporting, "The ICE raids sent our schools into a state of emergency. Many students were and remain distracted from school work as they worry about their loved ones. Most of these children are, by and large, American-born, full-fledged citizens with a right to a quality education and to live in this country for the rest of their lives." To vindicate Kebin's rights under the Fourth Amendment and to prevent future abuses, the ACLU, the Lawyers' Committee for Civil Rights, and the law firm of Coblentz Patch Duffy & Bass filed a lawsuit against ICE in April 2007.

[3] See Appendix C: McKinley, Jesse. "San Francisco Bay Area Reacts Angrily to Series of Immigration Raids." New York Times. April 28, 2007.

Just as troubling as the sweeping breadth of recent raids are accompanying reports of rampant constitutional violations. Both DHS Secretary Chertoff and ICE Assistant Secretary Myers have publicly stated that administrative warrants cannot be used by ICE agents to enter people's homes. However, in practice, ICE agents have been entering people's homes, even without consent. ICE's response that people are voluntarily consenting to questioning is insupportable when considering that ICE agents, fully armed and identifying themselves as "police," are banging on people's doors and windows in the pre-dawn hours as the inhabitants are sleeping. Sweeping and overbroad raids are terrorizing immigrant communities across the U.S. while doing little, if anything, to improve the safety and security of the U.S. [4]

Recommendations: The ACLU urges that ICE:

- Halt large-scale, pre-dawn raids, both at worksites and in homes;
- Refrain from investigating and/or detaining family members, roommates, housemates, neighbors, and other bystanders, without individualized suspicion.
- Clarify standards for determining "consent"
- Not identify themselves as "police."
- Not question any persons represented by counsel without counsel present during the interview.

II. Expansion of federal immigration enforcement to include state and local police

In recent years ICE has entered into an increasing number of 287(g) agreements with states and localities. Under 287(g) agreements, state and local law enforcement can identify, process, and detain immigrants whom they encounter during their daily law-enforcement activity, including traffic stops. The ACLU has challenged such 287(g) agreements on the basis that state and local law enforcement lack the inherent authority to arrest individuals for civil immigration violations. Enforcement of federal immigration laws is an exclusive federal function based on Congress's plenary powers to regulate immigration.

For example, the ACLU has sued Danbury, Connecticut for arresting 11 immigrants in September 2006 in a public park in an undercover immigration sting operation at a public park. A Danbury police officer disguised himself as a contractor/employer looking to hire day laborers. The ACLU lawsuit challenges the arrests on civil immigration violations on the basis of failure to have valid warrants, lack of probable cause, or lack of reason to believe that the detained were engaging in unlawful activity. Additionally, the suit challenges Danbury's immigration enforcement activities on the grounds that federal law preempts state or local police from civil immigration enforcement activity, thereby leaving Danbury without appropriate authority cognizable under 8 U.S.C. § 1357. The case also challenges the detentions on the basis on race, ethnicity, perceived national origin, asserting that the 11 immigrants were subjected to selective law enforcement arising out of a malicious and bad faith intent to drive them out of Danbury.

[4] See Appendix D: Bernstein, Nina. "Citizens Caught Up in Immigration Raid." New York Times. October 4, 2007.

Supporters of 287(g) agreements often have little or no understanding of immigration law and its complexities. Some proponents envision a fictional database system where a local police officer can enter a person's name in the computer and immediately get an answer from ICE that the person is "legal" or "illegal." In reality, determining an individual's immigration status requires extensive training and expertise in immigration law and procedures, and thus is simply not suitable for state and local law enforcement.

Section 287(g) supporters fail to understand that immigration status is complex, fluid, and very case-specific. For example, many people are in the U.S. pursuant to a non-immigrant visa for employment, study, investment, travel, and other reasons. Most of them are typically admitted to the U.S. for a certain period of time, but many can then request to extend their stay or to change to a different status with the DHS Citizenship Immigration Services ("CIS"). During the pendency of their application, they may have no documentation that proves they are in current lawful status even though CIS is aware of their presence in the U.S. and permits them to remain here until a decision is made on their application. Many people in the U.S. are in the midst of applying for permanent resident status, sponsored by a family member or employer. Others are seeking refugee protection. Others have been granted special status based on being a victim of family abuse, trafficking in persons, or a violent crime. Still others are in immigration removal proceedings but are applying for relief with an immigration judge. Still others have been denied relief by an immigration judge but are appealing their removal orders to the Board of Immigration Appeals. Finally, it is not uncommon for a single individual to be pursuing simultaneously multiple forms of immigration relief. These are just a few of the many permutations that could apply to a single individual who is arrested by a local police officer.

The practice of deputizing state and local police to enforce federal immigration laws has proven to be highly ineffective and dangerous. No case illustrates this better than that of Pedro Guzman, a U.S. citizen born in California who was deported to Mexico because an employee of the Los Angeles County Sheriff's Office determined that Mr. Guzman was a Mexican national. Mr. Guzman, cognitively impaired and living with his mother prior to being deported, ended up in Mexico – a country where he had never lived – forced to eat out of trash cans and bathe in rivers. His mother, also a U.S. citizen, took leave from her Jack in the Box job to travel to Mexico in search of her son. She combed the jails and morgues of northern Mexico in search of her son. After he was located and allowed to reenter the U.S., Mr. Guzman was so traumatized that he could not speak for some time. To vindicate Mr. Guzman's rights and to prevent future DHS errors and abuses, the ACLU and the law firm of Morrison & Foerster filed a lawsuit against ICE last year.[5]

In addition, deputizing state and local law enforcement to become deportation agents pushes immigrant communities farther and farther away from police protection. Fearful that a call to the police will result in deportation, immigrant victims of crime, including battered women, are choosing not to summon the police, thereby subjecting themselves and their children to further violence. Ultimately this dynamic jeopardizes all segments of society, not just immigrant communities. Police rely heavily on tips from witnesses or people familiar with suspects. If the

[5] See Appendix E: Esquivel, Paloma. "Suit Filed Over Disabled U.S. Citizen's Deportation Ordeal." Los Angles Times. February 28, 2008.

police are cut off from these sources of information, they will encounter greater difficulties in apprehending suspects and solving criminal cases.

Finally, charging state and local law enforcement with the responsibility of enforcing immigration laws opens the door for law enforcement to engage in racial profiling. Latinos, Asians, and other immigrants will be at risk of being stopped, arrested, interrogated, and detained by state and local law enforcement for no reason other than looking or sounding "foreign."

Recommendations: The ACLU urges that ICE:

- Halt entering into future 287(g) agreements with states and localities;
- Cease recognition and compliance with 287(g) agreements currently in operation.
- Halt implementation of the Secure Communities plan which seeks to expand state and local law enforcement powers to enforce federal immigration laws.

III. Growth and expansion of inhumane immigration detention

Immigration detention has more than quadrupled over the past 15 years. Each year Congress allocates more money to ICE for detention bed space and more personnel. The vast majority of detainees have no counsel to represent them in bond matters or immigration removal proceedings. Free or low-cost immigration legal services are completely absent in many regions. Frustrated by the unending incarceration and the lack of assistance in navigating the immigration system, many detainees – even those with legitimate immigration applications – simply give up and are deported. Their stories are the product of a failed immigration system – a system that purports to be premised on due process, but in actuality pushes people out of the U.S. by subjecting them to long periods of incarceration in unsanitary inhumane conditions, without access to appointed counsel.

These due process violations have been exacerbated by ICE's growing practice of transferring detainees to facilities far from their location of arrest, often hundreds of miles away from their homes and workplaces. For example, in October 2007 ICE closed down the San Pedro detention facility in Southern California and subsequently transferred over 420 detainees to facilities in Texas, Arizona, Washington State, and other parts of California. Prior to transferring the detainees to remote facilities, ICE did not notify the detainees' counsel. In many cases an immigration judge had already commenced merits hearings on the detainees' cases. The mass transfer of detainees out of state has resulted in unnecessary prolonged detention, with many detainees forced to start their cases all over again before a new immigration judge in a different jurisdiction.

In addition to challenging the constitutionality of mandatory detention and prolonged detention, the ACLU has been at the forefront of challenging ICE's inhumane unsanitary conditions of confinement including ICE's policy of family detention which resulted in the prolonged detention of families with children. In 2007 the ACLU and the University of Texas Law School sued on behalf of children incarcerated at the Hutto, Texas prison as their parents were pursuing bona fide asylum claims. At the time the lawsuits were filed, the children were receiving only one hour of education per day, were required to wear prison uniforms, were held in jail cells for much of the day, and were often disciplined by guards with threats of separation from their

parents. In August 2007 the parties reached a settlement which mandated major improvements in conditions at Hutto. Although those families represented by the ACLU and University of Texas were eventually released from Hutto, other families with children are being detained in Hutto and other facilities.

In 2007 the ACLU filed a class action lawsuit against a Corrections Corporation of America facility in San Diego where detainees were incarcerated in grossly overcrowded quarters. A separate ACLU lawsuit against the San Diego facility challenged the inadequate medical and mental health care afforded to detainees. One of the detainees whose serious medical needs was grossly neglected was Francisco Castaneda, who testified before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee on October 4, 2007, at a hearing on "Detention and Removal: Immigration Detainee Medical Care." Detained for eight months in the San Diego facility, Mr. Castaneda suffered extremely painful bleeding and discharge from his penis. Numerous health care professionals—both on-site and off-site—stated that Mr. Castaneda required a biopsy to determine whether he was suffering from penile cancer. But the biopsy was never authorized. Instead of diagnosing and treating his serious condition, medical professionals provided Mr. Castaneda with pain medication and an order for clean boxer shorts on a daily basis, to replace the boxer shorts that he regularly soiled with blood and discharge. Only after relentless advocacy by the ACLU was Mr. Castaneda released from ICE custody. Mr. Castaneda promptly received a biopsy at the emergency room and learned that he had developed metastatic penile cancer that had already spread to other parts of his body. In February 2008, just four months after testifying before this Subcommittee, Mr. Castaneda passed away, succumbing to the cancer.[6]

Recommendations for Congress:

- Congress should strengthen the long-established statutory right to counsel for all people facing removal from the U.S. by assuring access to government-appointed counsel.
- Congress should mandate that no detainee be housed in a facility that fails to comply with the detention standards. ICE shall codify, through the promulgation of regulations, national detention standards that are consistent with internationally recognized human rights principles.
- Congress should require that all immigration deaths in detention—including deaths at SPCs, CDFs, and IGSAs—be publicly reported by ICE to Congress on a regular basis.

Recommendations for ICE oversight:

- ICE shall develop non-penal alternatives to detention to decrease the number of people detained and/or subject to ICE supervision, especially with respect to asylum seekers, torture survivors, victims of human trafficking, juveniles, families with children, sole caregivers, survivors of domestic abuse and other violent crimes, and long-term permanent residents.
- ICE shall ensure that all detainees be given a constitutionally adequate custody review before an immigration judge or impartial adjudicator. In cases where ICE seeks to detain an individual beyond six months, ICE shall bear the burden of proving by clear and

[6] See Appendix F: Weinstein, Henry. "Judge Calls Immigration Officials' Decision 'Beyond Cruel.'" Los Angeles Times. March 13, 2008.

convincing evidence that prolonged detention is justified. Where ICE cannot make its burden, ICE shall release such detainees on bond with reasonable conditions.
- ICE shall not transfer detainees to remote facilities where a Form G-28 Notice of Entry of Appearance has been filed on behalf of a detainee, where the detainee has requested a bond hearing, where the detainee has filed an application with the immigration court, and/or when an immigration judge has conducted a merits hearing in the detainee's case.
- ICE shall ensure the transfer of complete medical records along with detainees so that receiving facilities have all of the information needed to ensure prompt, necessary treatment.

IV. Privatization of Immigration Detention

DHS has entered into more and more contracts with private companies, including the Corrections Corporation of America, to incarcerate immigrants. Some of the facilities with the poorest conditions are run by CCA, including the facilities in Hutto and San Diego. Private prisons are less accountable than public prisons about their daily operations, in part because they claim they are not required to provide information to the public or the government (at the federal level) under the Freedom of Information Act.[7] As a result of the opening created by decreased oversight, private companies will often disregard guidelines on a range of issues such as types of detainees to be housed, staffing levels, and medical care to be provided. This results in greater profitability for the private companies, without reducing the cost to taxpayers. Ronald T. Jones, a former CCA manager recently told Time Magazine that CCA uses a reporting system in which accounts of major, sometimes violent prison disturbances and other significant events were often masked or minimized in reports provided to government agencies with oversight over prison contracts. Jones claimed that the company even began keeping two sets of books — one for internal use that described prison deficiencies in telling detail, and a second set that Jones describes as "doctored" for public consumption, to limit bad publicity, litigation, or fines that could compromise CCA's multimillion-dollar contracts with federal, state, or local agencies.[8]

CCA, as previously mentioned, runs Hutto, the detention facility that settled with the ACLU after it was disclosed that it kept children in a prison facility; it provided no child care; and children were forced to sit by their parents as they conferred with attorneys, often having to hear brutal tales of rape and torture.[9]

Recommendations for ICE oversight:
- ICE should develop protocols to regularly inspect privately-owned detention facilities and ensure that they are held accountable for their daily operations.
- Congress should mandate that privately-owned detention facilities be held to federal reporting standards and the Freedom of Information Act.

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[7] Holden, Honorable Tim [PA-17] (2007). Testimony before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary. November 8, 2007.

[8] See Appendix G: Zagorin, Adam. "Scrutiny for a Bush Judicial Nominee." Time Magazine. March 13, 2008. http://www.time.com/time/printout/0,8816,1722065,00.html#

[9] Echergaray, Chris. "Inmate Sues CCA After Ear Torn Off." Tennessean. March 27, 2008. http://www.tennessean.com/apps/pbcs.dll/article?AID=/20080327/NEWS03/803270395/1017/NEWS01.

- In light of the reported corruption and abuse by for-profit detention facilities, DHS should stop using them for immigration detention.

Part 2 – The Homeland Security Infrastructure: The Emperor Has No Clothes

The ACLU has documented in numerous statements for the Congressional Record our concerns about the many DHS programs that endanger Americans' privacy and civil liberties. The Department's collection of personal data on millions of Americans, its use and misuse of that data, and its attempts to build a larger and more intrusive surveillance infrastructure should raise alarms for this committee and for the public at large. But perhaps just as alarming is the fact that the shocking majority of these programs simply do not work; they provide the illusion of security but no actual security benefit to our nation. Like the fabled emperor in the Hans Christian Anderson story, the Bush Administration security empire, with DHS at its center, has no clothes.

I. Passenger Screening

Since its creation, DHS has been attempting to build a domestic, identity-based airline passenger screening scheme. Proposals have included searching and storing the travel histories of every American, attempting to use data mining and predictive software to evaluate potential terrorist threats among the general population and comparing Americans against terrorist watch lists. A look back at these attempts reveals a story of one misstep after another – broken promises, deadlines missed (and missed again), illegal testing of personal information, rules broken, and sloppy handling of information.

We have gone from CAPPS I – computer assisted passenger profiling – to CAPPS II computer assisted passenger prescreening, to CAPPS 2.1, 2.2, 2.3, and now Secure Flight versions 1, 2 and 3. None of the new schemes have worked and none are operational. In August 2007, DHS issued a new Federal Register notice describing a scaled back version of Secure Flight that will focus on watch list checks.[10] The problems with this version of Secure Flight are illustrative of the larger problem with air passenger prescreening. The program relies on government watch lists, which are a bloated, useless mess. In June 2007, *60 Minutes* obtained a copy of the list, and found that it contained numerous common American names such as John Williams and Robert Johnson, the names of dead people, and even the president of Bolivia. The Department of Justice Office of the Inspector General found in a September 2007 report that the government's watch lists are not only riddled with errors and inconsistencies, but are also extremely bloated, and still growing fast.[11] According to the size and rate of growth reported in September by the IG, the watch list today stands at approximately 941,100 records.[12]

Perhaps more importantly for the Committee, the legal and constitutional implications for individuals who have wrongly come under suspicion by their government remain unclear. The "blacklists" created by DHS and applied by an ever-increasing number of DHS officials as they

[10] 72 C.F.R. 48365.
[11] *Follow-up Audit of the Terrorist Screening Center*, U.S. Department of Justice Office of the Inspector General Audit Division, Audit Report 07-41, September 2007.
[12] See www.aclu.org/watchlist

interact with the public are increasingly likely to prevent law-abiding U.S. persons from exercising their full legal and constitutional rights and privileges.

II. US VISIT

US VISIT is another program that, despite years of work, remains functionally inoperative. Last week, DHS touted the fact that it was now collecting 10 fingerprints from all international visitors at New York JFK International Airport.[13] However, as has been widely reported, DHS may have built the entry portion but it is nowhere near completion of the exit portion. In other words, we generally have no idea of whether our visitors – whether they are tourists or terrorists – are still in the U.S., which was supposed to have been the entire purpose of this white elephant (defined in the dictionary as "a possession entailing great expense out of proportion to its usefulness or value"). The Government Accountability Office (GAO) put it in June 2007 as follows: "After investing about $1.3 billion over 4 years, DHS has delivered essentially one-half of US-VISIT."[14] We have forced our friends to submit to fingerprints and a digital photograph before they enter the U.S. (at unknown cost to the U.S. tourist industry). We keep all that personal data in a huge database where it has very little legal protection, but also provides little benefit to our security. As the GAO concluded, DHS's US-VISIT programs "are not well-defined, planned, or justified on the basis of costs, benefits, and risks."[15]

III. Real ID

The Department's lackluster attempt to implement the Real ID Act has been nothing short of a joke. After taking two and a half years to promulgate regulations for implementation of the Act, DHS's final regulations fail to address many of the most basic concerns over Real ID – including identity theft, privacy, danger to victims of domestic violence and religious liberty. Worse from a security perspective, DHS pushed the implementation deadline for Real ID to the year 2014 for those under 50, and 2017 for those over 50. It is difficult to understand how a program that has been touted as so urgent for our security can be left unimplemented for more than a decade.

IV. Western Hemisphere Travel Initiative

Over the last three years DHS has endlessly repeated the need for consistent and uniform standards for drivers' licenses – describing Real ID as the cure for everything from terrorism to illegal immigration to identity theft. Yet DHS abandoned principle in a related program on travel and license security: the Western Hemisphere Travel Initiative (WHTI). WHTI regulations authorize the state of Washington to create an enhanced drivers' license (EDL) for the purpose of crossing the border. In those regulations, DHS make clear that "Each EDL program is specific to each entity based on specific factors such as the entity's level of interest,

[13] "DHS Begins Collecting 10 Fingerprints from International Visitors at New York's John F. Kennedy International Airport," DHS Press Release, March, 25, 2008.

[14] http://www.gao.gov/new.items/d071044t.pdf
[15] http://www.gao.gov/highlights/d071065high.pdf

funding, technology, and other developmental and implementation factors."[16] DHS cannot have it both ways – either consistent licensing standards are a key to security or they are just window dressing designed to provide the appearance of security.

V. Border Fencing

SBINet, shorthand for "Secure Border Initiative Network," will be, if it is ever built, a 'virtual' border fence that relies on sensors and long-range cameras mounted on high observation towers. In addition to the serious privacy concerns raised by long-range surveillance cameras capable of observing the activities of everyday Americans living along the border, to date, and as recently highlighted by a hearing before the House Homeland Security Committee, SBINet has repeatedly failed to achieve its operational objectives. Volatile weather and the untamed environment have resulted in fuzzy, unfocused images produced by cameras, and the technology is incapable of achieving the tasks for which it was created.[17] In addition, the communication between the surveillance towers and the command center in Tucson is delayed because of the physical distance, creating even more problems with SBINet.[18] The Committee on Homeland Security described the programs as providing "'marginal' functionality at best."[19]

VI. Data Mining

Another exhibit in the DHS catalogue of incompetence is the Automated Targeting System (ATS). This program utilizes computer software to analyze the travel patterns of Americans so that "authorized CBP employees can access risk-scored passenger information."[20] These risk scores are essentially determinations of American travelers' potential to be terrorists. This type of score is the worst sort of computerized, identity-based, ineffective dragnet security. In fact, as security experts note, it cannot be effective in apprehending terrorists. US airlines transported 769.4 million travelers in 2007, and no one thinks there were likely to be more than a handful of terrorists at most.[21] Even if the program were 99% effective (a very questionable assumption) it would identify 7.7 million false positives – innocent travelers. These false positives would swamp the system, wiping out any possible investigative advantage.

Recognizing the uselessness and potential harmfulness of this kind of data mining, Congress enacted a prohibition on the use of "algorithms assigning risk to passengers whose names are not on government watch lists."[22] Yet DHS has disregarded this prohibition. It continues to employ data mining as part of the ATS program, arguing against logic that the restriction only applies to the aforementioned domestic passenger prescreening program Secure Flight.

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[16] Designation of an Enhanced Driver's License and Identity Document Issued by the State of Washington as a Travel Document under the Western Hemisphere Travel Initiative, US Customs and Border Protection, Pg 3 (not yet published in the Federal Register).
[17] GAO Report, Observations on Selected Aspects of SBInet Program Implementation, October 24, 2007, Report GAO-08-131T, pg. 7.
[18] *Id.*
[19] Press Release, House Committee on Homeland Security, February 22, 2008.
[20] October 2, 2007 response to ACLU FOIA
[21] Press Release, US Department of Transportation, Bureau of Transportation Statistics, March 13, 2008.
[22] Public Law 109-295, Title V, Sec. 514 (e).

The problem of the use of data mining extends well beyond DHS to other parts of the federal government. The *Wall Street Journal* recently reported that the National Security Agency has constructed a massive ongoing domestic surveillance system that involves the collection and mining of large amounts of data about Americans' routine transactions.[23] This program, according to the report, is tantamount to a revival of the Total Information Awareness program, which Congress supposedly banned in 2003, and includes passenger data provided by DHS.

A competent security agency would not waste resources trying to construct vast systems that treat every person as a suspect, and try to filter out the one-in-a-billion traveler who might be a terrorist using unreliable personal information and computer algorithms. Instead, it would concentrate on the basic, old-fashioned legwork that is the only way genuine terror plots have ever been foiled.

Complex new programs can be difficult and time-consuming to implement, and delays and dead ends might be understandable in any one of these programs. But when the pattern is repeated across so many different programs, the obvious conclusion to draw is that there is a larger systemic problem. Clearly, DHS, as currently constituted, is not competent to implement these programs. In addition, even aside from implementation issues, many of these programs were ill-conceived at the outset – failing to account for the fact that they run counter to privacy, due process, and other deep-rooted American principles established to assure fairness to the innocent. The result has been that these programs have become caught up in a morass of troubling implications and dilemmas. It is time for Congress to take a hard look at these programs and recognize the Bush Administration's security apparatus for what it is: naked.

The ACLU appreciates the opportunity to submit this written statement and urges the Committee to exercise meaningful oversight over DHS and ICE by implementing the proposed recommendations.

[23] Siobhan Gorman, *NSA's Domestic Spying Grows As Agency Sweeps Up Data*, The Wall Street Journal, March 10, 2008.

Appendix A:

Los Angeles Times

http://www.latimes.com/news/local/los_angeles_metro/la-me-immigration14mar14,1,6100997.story
From the Los Angeles Times

Workers in raid get right to legal counsel
A settlement between civil rights groups and federal officials allows immigrants seized in Van Nuys to be accompanied by a lawyer at all meetings and interrogations.
By Daniela Perdomo
Los Angeles Times Staff Writer

March 14, 2008

Civil rights groups said Thursday that they had reached a settlement with federal officials guaranteeing that workers nabbed in an immigration raid last month in Van Nuys can be accompanied by an attorney to all meetings and interrogations.

The settlement, finalized Wednesday, was reached after groups, including the American Civil Liberties Union of Southern California, the National Lawyers Guild and the National Immigration Law Center, sought a restraining order in federal court last month against federal immigration officials who they alleged had repeatedly blocked attorneys from accompanying workers to interviews. The settlement applies to about 130 workers at Micro Solutions Enterprises detained Feb. 7 on immigration violations.

Immigration and Customs Enforcement officials said the terms of the settlement were confidential but the agency was "very pleased with the result."

"It should be emphasized that ICE conducts work site enforcement operations lawfully, professionally and with extreme consideration to humanitarian concerns," said spokeswoman Lori Haley. Haley said the agency advises detainees of "their right to legal counsel and communication with consular officers by telephone or in person, after initial processing is completed."

According to Angelica Salas, executive director of the Coalition for Humane Immigrant Rights of Los Angeles, ICE officials said the meetings to which lawyers were denied attendance were "administrative" and did not require the presence of legal counsel.

The organizations seeking the restraining order contended that the workers had a right to have an attorney present in those initial interviews, as well as any others.

"The government won't pay for the attorneys, but if the worker has access to one, they are allowed to meet with them," said Ahilan Arulanantham, a staff attorney with the ACLU of Southern California and one of the attorneys representing the workers pro bono.

Arulanantham said the groups hoped that the case would set a legal precedent.

"The government would have a hard time explaining why the rights of these people are different from those of others" detained in similar raids, he said.

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Appendix B:

New York Officials Denounce Tactics Used in Immigration Raids

Wednesday, October 03, 2007

Associated Press

GARDEN CITY, N.Y. —

Federal agents displayed a "cowboy" mentality while running roughshod over local police officers — at times pointing their weapons at cops — and ensnared more suspected illegal aliens than targeted gangsters in raids on Long Island last week, officials said Tuesday.

"There were clear dangers of friendly fire," Nassau County Police Commissioner Lawrence Mulvey said. "We did have members that were actually drawn upon."

Mulvey and County Executive Tom Suozzi want Homeland Security Secretary Michael Chertoff to investigate the tactics used by Immigration and Customs Enforcement agents; ICE is under the jurisdiction of the Homeland Security department.

The furor erupted after agents rounded up 186 people last week in what was billed as a crackdown on gang activity on Long Island. Federal authorities said many of the people arrested were gang members, but local officials believe that claim was exaggerated and that the raids were largely an attempt to round up illegal immigrants.

Nassau County officials contend only eight of the 92 arrested in their county had any ties to gangs.

Mulvey has said his officers would no longer cooperate with the raids unless tactics and policies are changed.

Mulvey contended that better cooperation between ICE agents and Nassau cops could have led to more arrests of targeted gang members. In one case, Mulvey said, "ICE sought a 28-year-old defendant using a photograph taken when he was a 7-year-old boy."

He also said the ICE agents appeared to have come from various locations across the country and didn't even wear the same uniforms; some wore cowboy hats. During some raids, ICE agents momentarily pointed their weapons at Nassau County officers in apparent confusion.

ICE special agent Peter J. Smith did not immediately return a telephone call for comment, but on Monday dismissed the police complaints as a misunderstanding.

Appendix C:

The New York Times
nytimes.com

April 28, 2007

San Francisco Bay Area Reacts Angrily to Series of Immigration Raids
By JESSE McKINLEY

SAN FRANCISCO, April 27 — It was not the typical Bay Area morning. Before dawn on March 6, dozens of federal immigration agents conducted surprise raids in San Rafael and nearby Novato, two comfortable Marin County suburbs where the idea of early morning excitement usually involves a trip to Starbucks.

The raids are part of the government's Operation Return to Sender, in which more than 23,000 people have been arrested nationwide, including more than 1,800 in Northern and Central California, immigration officials said.

And while the raids have upset many pro-immigrant groups nationwide, that displeasure has been particularly acute in the Bay Area, a region that generally bends left politically and where many cities consider themselves so-called "sanctuaries" for illegal immigrants.

"These people have been here many, many years and they have an investment in the community," said Mayor Al Boro of San Rafael, a city of about 56,000 residents, a quarter of whom are Latino. "And we need to respect that."

Several city councils have passed resolutions expressing their anger about the raids, and local religious leaders have issued stern proclamations. The Roman Catholic Archdiocese of San Francisco, for example, said in late March that they were inhumane and called for their immediate end. The raids have also led to protests in several cities, with another round planned for Tuesday in the area's three largest cities: San Francisco, San Jose and Oakland.

The raids have even upset people in more conservative regions to the east. In Mendota, an agricultural town in the Central Valley that calls itself the "Cantaloupe Center of the World," the City Council passed a resolution last month condemning them. The raids, according to the resolution, had driven much-needed migrant workers underground and caused "emotional turmoil and financial hardship."

In Richmond, another economically challenged city just east across the bay from San Francisco, Mayor Gayle McLaughlin, a member of the Green Party, wrote a bill restating an ordinance that prohibits city employees from cooperating with federal immigration authorities. It passed the City Council unanimously in February.

That sanctuary sentiment was also echoed on Sunday in a speech by Mayor Gavin Newsom of San Francisco, a Democrat, who repeated his city's noncooperative status, a move that drew a rebuke from a Republican lawmaker in Washington, Representative Tom Tancredo of Colorado, who called the mayor's actions "a clear and direct violation of the law."

The anti-raid sentiments have also energized some opponents of immigration. A recent protest in San Rafael was also attended by nearly 100 members of anti-immigrant groups, including members of the Northern California chapter of the Minuteman Civil Defense Corps, a group that advocates stronger borders.

Much of the debate has been focused in San Rafael, a genial bayside commuter city about 20 miles north of San Francisco. Shortly after the raids, Mr. Boro sent a letter to Senator Dianne Feinstein, Democrat of California, saying they had "left our city in turmoil," with residents now distrustful of the police and children fearful of losing their parents.

"Waking people up in the dark of night, at 5 a.m., in their homes seems more like a scare tactic than a law enforcement necessity," Mr. Boro wrote.

Calls to the local police have decreased in recent weeks, Mr. Boro said, and he attributed the dropoff to the immigration raids' "chilling effect because people think our police were involved."

Educators in San Rafael said the raids sent schools into "a state of emergency" as American-born children were suddenly without one or both parents who had been caught up in the sweeps. Shortly afterward, absenteeism at school spiked, and school officials asked teachers and others to ride buses with students to make sure a caregiver picked them up.

A school board member, Jenny Callaway, said she feared that test scores of anxiety-ridden students would suffer. "Our charge is to provide a quality education regardless of citizenship," Ms. Callaway said. "How do we do this when children are afraid to come to the bus stop?"

One student caught up in the raids was 7-year-old Kebin Reyes, who was with his father, Noe, when he was arrested early in the morning of March 6. Mr. Reyes, 37, a Guatemalan, said that after his arrest, he was not allowed to call relatives to come to pick up his son, and that they both

were held all day in a locked room at the offices of Immigration and Customs Enforcement in San Francisco, an experience he says left his son traumatized.

"Before the arrest, my son was very friendly and would speak to most anyone, very active," Mr. Reyes said, through a translator. "Since the day of the arrest, Kebin has turned to be very reserved and quiet and not as open to speak to anyone."

On Thursday, the American Civil Liberties Union filed suit on behalf of Kebin, who was born in the United States and is an American citizen, charging that federal authorities had violated his constitutional rights. Immigration officials would not comment on the specifics of the case, but said agents had acted appropriately.

"When we encounter minors in the course of an enforcement action, we will not leave them unattended," said Virginia Kice, a spokeswoman for the immigration agency. "This young man was not arrested; he was transported along with this father to the I.C.E. office, where he was supervised until a family member came to get him."

Immigration agency officials say Mr. Reyes was ordered deported in 2000, the same year his son was born. He is fighting that order, and a hearing is scheduled in June. But there is no question, Mr. Reyes said, about his son's status.

"My son has the same rights as any American citizen," he said. "He is born here in California."

Appendix D:

The New York Times
nytimes.com

October 4, 2007

Citizens Caught Up in Immigration Raid
By NINA BERNSTEIN

Peggy Delarosa-Delgado, a United States citizen, Long Island homeowner and mother of three, was fast asleep when someone banged at the door before 6 a.m. last Thursday.

Her son Christopher, 17, a high school senior, opened the door, and more than a dozen federal immigration agents and one Suffolk County police officer pushed past him, he said later.

Only after the agents had herded her other children into the living room, frightened her aunt and uncle, and drawn a gun on a family friend staying in the basement, Ms. Delarosa-Delgado said, did she awake to discover that her house in Huntington Station had been the mistaken target of a raid by Immigration and Customs Enforcement.

It was not the first time. In the summer of 2006, she said, agents waving the same photo of a deportable immigrant named Miguel had stormed into her house before dawn. No Miguel has ever lived there, she said — at least not since she bought the place in 2003.

This time, the raid on her house was part of a series of antigang sweeps on Long Island. The raids, which resulted in 186 immigrant arrests, were denounced by officials in Nassau County as riddled with mistakes and marked by misconduct. But on Ms. Delarosa-Delgado's side of the county line, the Suffolk County police commissioner, Richard Dormer, hailed the sweeps as a successful operation that made the community safer.

Ms. Delarosa-Delgado, 42, a school aide who was born in the Dominican Republic, moved to the United States 24 years ago and became a citizen in 1990, does not feel safer.

"It's not right," she said. "My kids were scared. They had to sit in the living room like little criminals."

"Sure, look for criminals. But they've got to make 100 percent sure that the house they're going into, the person's there. They can't come in just because my address pops up in the computer."

Suffolk County police officials said they stood by their statements praising the raids. But Ms. Delarosa-Delgado's complaint is one of many that have been emerging in Suffolk County as employers, church workers and lawyers learn who was arrested.

"They took guys who I see in church every single week, whose homes I've gone into and everything," said Sister Margaret Smyth, a nun who attends church in Greenport, where she said 12 immigrant men were arrested last Thursday. "Some of them work on farms, some of them work construction," she said. "They're family men."

One man who was arrested, Walter Tzun, has been in the country for a decade, she said. She described him as married, a father, a taxpayer and a construction worker whose employer has been trying to sponsor him for a green card. He has been moved from a New Jersey jail to two detention centers in Pennsylvania, she said, and has been told that he is headed to Texas. She said the man's boss drove to Pennsylvania "to try to bond him out" and help him stay.

Eberhard Müller, formerly the executive chef of the restaurant Lutèce and now the owner of a 180-acre farm on the East End of Long Island, said he had spent a week trying to locate the brother, cousin and roommate of one of his workers, a legal immigrant from El Salvador. The three were arrested in a raid at their home in Greenport early last Thursday, he said, leaving babies and two distraught wives behind.

Mr. Müller said he finally learned with the help of a lawyer that two of the three, Omar Mena Lopez and Marvin Lopez, were at the federal Metropolitan Detention Center in Brooklyn, and that one, Valentin Rudy Escobar Montenegro, was in a detention center in York, Pa.

"They accuse them of being gang associates, which makes no sense," Mr. Müller said, describing all three as holding down two or three jobs as roofers, restaurant workers and farmhands.

"Marvin Lopez is a librarian in his country, the sweetest person in the world. He works 14 hours a day, seven days a week. How is he able to be a gang member?"

Accounts of the Suffolk County raids are similar to those criticized in Nassau County.

"These were like dragnets being cast over entire houses," said Nadia Marin-Molina, director of the Workplace Project, an immigrant advocacy organization in Hempstead that has gathered many of the complaints.

The complaints echo a federal lawsuit filed last month in Manhattan contending that immigration agents unlawfully force their way into the homes of Latino families in violation of the Fourth Amendment's protection from unreasonable searches.

"We have been inundated with calls," said Cesar Perales, director of the Puerto Rican Legal Defense and Education Fund, which filed the lawsuit. "People are terrified by these indiscriminate raids."

Mr. Perales said yesterday that by week's end he would seek an emergency restraining order to stop such raids.

Appendix E:

Los Angeles Times

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http://www.latimes.com/news/local/la-me-guzman28feb28,0,4185060.story
From the Los Angeles Times

Suit filed over disabled U.S. citizen's deportation ordeal
The man was left in Tijuana with $3 and wandered in Mexico for months while worried family members searched for him.
By Paloma Esquivel
Los Angeles Times Staff Writer

February 28, 2008

A U.S. citizen who was wrongly deported to Tijuana last year while in the custody of the Los Angeles County Sheriff's Department on Wednesday filed a lawsuit against the county and the federal government, alleging that his constitutional rights were violated.

Pedro Guzman, 30, who is developmentally disabled, was missing for nearly three months before he was found in Mexico and released to his family, his attorneys said. Guzman had been dropped off in Tijuana with $3 in his pocket and spent much of his time wandering Baja California on foot, eating from dumpsters and bathing in rivers, they said.

The lawsuit was filed on behalf of Guzman and his mother, Maria Carbajal, in U.S. District Court and named the Sheriff's Department and U.S. Immigration and Customs Enforcement among the defendants. The family is seeking unspecified damages.

Guzman's ordeal began when he was arrested last March after he entered a private airport in Lancaster and tried to board a plane, the lawsuit states. He pleaded guilty to trespassing and was sentenced to 120 days in county jail, but that was later cut to 40 days.

On May 11, before his sentence was up, Guzman called his family from Tijuana and told them he had been deported, according to the lawsuit. Sheriff's officials had turned Guzman over to federal immigration agents.

But Guzman and immigration officials differ over what happened.

ICE officials said Guzman was deported after he told agents he was born in Nayarit, Mexico, and was in the U.S. without authorization.

"Mr. Guzman repeatedly told ICE officers and Customs and Border Patrol officials and others that he was born in Mexico and signed a document agreeing to voluntarily return," said Lori Haley, ICE spokeswoman.

Guzman's lawyers dismissed ICE's claims as "unmitigated lies" during a news conference Wednesday attended by Carbajal and other family members.

"He never said that he was born in Mexico," said Mark Rosenbaum, legal director of the ACLU, which with a private law firm is representing the plaintiffs.

Rosenbaum also pointed out that several sheriff's documents, including the incident report filed after the arrest, showed that Guzman was a U.S. citizen. Sheriff's officials also knew that Guzman complained of hearing voices while in custody and was prescribed anti-psychotic medication, according to his lawsuit.

Rosenbaum also criticized Sandra Figueras, the sheriff's custody agent who interviewed him about his citizenship status, as "inadequately trained."

"Our government treated the color of Mr. Guzman's skin as conclusive, irrefutable evidence that Peter was not and could not be a U.S. citizen," Rosenbaum said.

Sheriff's officials declined to comment Wednesday.

Guzman's mother and two brothers, Michael Guzman and Juan Carlos Chabes, said they wanted the government to acknowledge its wrongdoing.

"I want them to see that what they did was not right," said Carbajal, who tearily described spending several days wandering through Tijuana looking for her son, leaving fliers with his

photo at the morgue, hospitals, churches and shelters.

When her money ran out after three days, she slept in the closet-sized backroom of a banana warehouse, where she was allowed to stay in exchange for cooking for the warehouse workers, according to the suit.

Since returning from Mexico, Guzman, who did not attend the news conference, has been terrified of strangers and has been unable to return to work, Carbajal said.

"He had some of these problems before, but now he's worse," Carbajal said. "I have to accompany him when we go out. He doesn't talk. His mind wanders."

ICE officials called Guzman's deportation an isolated incident. "This is a one-of-a-kind case," ICE's Haley said.

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Appendix F:

Los Angeles Times

http://www.latimes.com/news/local/la-me-cruel13mar13,0,2053450.story?track=ntothtml
From the Los Angeles Times

Judge calls immigration officials' decision 'beyond cruel'
The ruling says a detainee who later died of penile cancer was denied a biopsy of a lesion though several doctors said the procedure was urgently needed. His family will be allowed to seek damages.
By Henry Weinstein
Los Angeles Times Staff Writer

March 13, 2008

In a stinging ruling, a Los Angeles federal judge said immigration officials' alleged decision to withhold a critical medical test and other treatment from a detainee who later died of cancer was "beyond cruel and unusual" punishment.

The decision from U.S. District Judge Dean Pregerson allows the family of Francisco Castaneda to seek financial damages from the government.

Castaneda, who suffered from penile cancer, died Feb. 16. Before his release from custody last year, the government had refused for 11 months to authorize a biopsy for a growing lesion, even though voluminous government records showed that several doctors said the test was urgently needed, given Castaneda's condition and a family history of cancer, Pregerson said.

But rather than test and treat Castaneda, government officials told him to be patient and prescribed antihistamines, ibuprofen and extra boxer shorts, the judge wrote in a decision released late Tuesday. In summary, the judge wrote, the care provided to Castaneda "can be characterized by one word: nothing."

Pregerson blasted public health officials' "attempt to sidestep responsibility for what appears to be . . . one of the most, if not the most, egregious" violations of the constitutional prohibition against cruel and unusual punishment that "the court has ever encountered."

At this stage of the proceedings, "the only question is whether" the plaintiffs' allegations, if true, show that government officials "were deliberately indifferent to his condition. The court finds that they do," Pregerson said.

"Everyone knows that cancer is often deadly. Everyone knows that early diagnosis and treatment often saves lives," the judge wrote. The government's own records, he emphasized, "bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker 'cruel' is inadequate," Pregerson concluded in permitting the case to move forward.

Conal Doyle, an Oakland attorney who is co-counsel for Castaneda's family members, said the Salvadoran immigrant spent eight months in custody on a charge of possession of methamphetamine with intent to sell, then was transferred to immigration custody because he did not have legal residency.

He first informed the Immigration and Customs Enforcement medical staff at the San Diego Correctional Facility on March 27, 2006, that "a lesion on his penis was becoming painful and growing," the judge wrote. The next day, a physician assistant at the facility examined Castaneda and issued a treatment plan calling for a consultation with a urologist "ASAP" and a request for a biopsy, according to government records cited by the judge.

Over the next 11 months, several doctors, with increasing urgency, made the same recommendations. For example, after conducting an examination June 7, 2006, Dr. John Wilkinson, an oncologist, wrote a report saying he strongly agreed that Castaneda had an urgent need for a biopsy and an assessment by a urologist because he might have "penile cancer. . . . In this extremely delicate area . . . there can be considerable morbidity from even benign lesions which are not promptly treated."

That same day, Pregerson said, Dr. Esther Hui of the Division of Immigration Health Services acknowledged Castaneda's condition but said the government would not admit him to a hospital because her agency considered a biopsy "an elective outpatient procedure."

Pregerson, who became a federal judge in 1996, said evidence presented by the plaintiffs suggested that Hui, one of the defendants, characterized the surgery as elective so the federal government would not to have to provide or pay for it.

In February 2007, after the American Civil Liberties Union intervened, a biopsy was finally scheduled. A few days before the procedure, however, Castaneda was abruptly released, the judge wrote. He went to the emergency room of Harbor-UCLA Medical Center and was diagnosed with metastatic squamous cell carcinoma. His penis was eventually amputated, and chemotherapy ultimately proved unsuccessful.

Four months before he died, Castaneda testified at a hearing held by the House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, as his teenage daughter listened.

"Mr. Castaneda's case was just outrageous," Rep. Zoe Lofgren (D-San Jose), chairwoman of the subcommittee, said in an interview Tuesday.

Lofgren said one of the things she found most troubling was that "bureaucrats" at Immigration and Customs Enforcement in Washington have the power to overrule recommendations of doctors who have actually seen the medical problems of detainees. "That is a recipe for disaster," she said.

Lori Haley, an ICE spokeswoman from Laguna Niguel, said in an e-mail that she could not comment on the Castaneda case but that the agency spent nearly $100 million on medical, dental and psychiatric care for detainees in fiscal 2007.

The government had argued that its employees were immune from this lawsuit. A spokesman for the U.S. attorney's office said the Justice Department might appeal Pregerson's ruling.

Last year, the U.S. Government Accountability Office issued a report on medical care at immigration detention facilities that said officials at some of the sites "cited difficulties in obtaining approval for outside medical and mental health care as . . . presenting problems in caring for detainees."

Doyle said Castaneda's death "would have been prevented by the exercise of basic human decency."

Loyola Law School professor Laurie Levenson said the decision was legally significant and factually compelling. "This was not a detainee with a hangnail," she said. "You should not have to have your penis fall off to get medical treatment from the government."

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Appendix G:

Thursday, Mar. 13, 2008

Scrutiny for a Bush Judicial Nominee
By Adam Zagorin/Washington

As the top lawyer for America's biggest private prison company, Corrections Corporation of America (CCA), Gus Puryear IV is known to sport well-pressed preppy pink shirts, and his brownish mop of hair stands out among most of President Bush's graying nominees to the federal bench. A favorite of G.O.P. hard-liners, Puryear, 39, prepped Dick Cheney for the vice presidential debates — both in 2000 and 2004 — and served as a senior aide to two former Senators and onetime presidential hopefuls, Bill Frist and Fred Thompson.

Political connections, though, may not be enough to get Puryear a lifetime post as a federal district judge in Tennessee. Puryear recently confronted tough questions about his conduct, experience and potential conflicts of interest from Democrats on the Senate Judiciary Committee, which must approve him before a full Senate vote. Now, a former CCA manager tells TIME that Puryear oversaw a reporting system in which accounts of major, sometimes violent prison disturbances and other significant events were often masked or minimized in accounts provided to government agencies with oversight over prison contracts. Ronald T. Jones, the former CCA manager, alleges that the company even began keeping two sets of books — one for internal use that described prison deficiencies in telling detail, and a second set that Jones describes as "doctored" for public consumption, to limit bad publicity, litigation or fines that could derail CCA's multimillion-dollar contracts with federal, state or local agencies.

CCA owns or operates 65 prisons, housing some 70,000 inmates across the U.S. According to the company's website, it has a greater than 50% share of the booming private prison market. CCA is also a major contributor to Republican candidates and causes, and spends millions of dollars each year lobbying for government contracts. (Puryear enjoys a friendship with Cheney's son-in-law, Philip Perry, who lobbied for CCA in Washington before serving as general counsel for the Department of Homeland Security, which has millions of dollars in contracts with CCA, from 2005 to 2007.) The company has likewise given financial support to tax-exempt policy groups that support tough sentencing laws that help put more people behind bars. Like other prison companies, CCA has faced numerous lawsuits that stem from allegedly inadequate staff levels that can be a cause of high levels of violence in the prisons. Though hundreds of such lawsuits are often pending at any given time, many brought by inmates in its own facilities, CCA under Puryear has mounted an especially vigorous defense against them, refusing to settle all but the most damaging.

Jones knows CCA intimately. Until last summer, the longtime Republican was in charge of "quality assurance" records for CCA prisons across the U.S. He says that in 2005, after CCA found itself embarrassed on several occasions by the public release of internal records to government agencies, Puryear mandated that detailed, raw reports on prison shortcomings carry a blanket assertion of "attorney-client privilege," thus forbidding their release without his written consent. From then on, Jones says, the audits delivered to agencies were filled with increasingly vague performance measures. "If the wrong party found out that a facility's operations scored low in an audit, then CCA could be subject to litigation, fines or worse," explains Jones. "When Mr. Puryear felt there was highly sensitive or potentially damaging information to CCA, I would then be directed to remove that information from an audit report." Puryear would not comment on the allegations. Jones resigned from CCA last summer to pursue a legal career.

According to Jones, Puryear was most concerned about what CCA described as "zero tolerance" events, or ZT's — including unnatural deaths, major disturbances, escapes and sexual assaults. According to Jones, bonuses and job security at the company were tied to reporting low ZT numbers. Low numbers also pleased CCA's government clients, as well as the company's board, which received a regular tally, and Wall Street analysts concerned about potentially costly lawsuits that CCA might face.

In 2006, for example, Jones says CCA had to lock down a prison in Texas to control rioting by as many as 60 inmates. Despite clear internal guidelines defining the incident as a ZT, Jones says he was ordered not to label it that way. Instead it was logged as, "Altered facility schedule due to inmate action". And this was not unusual, says Jones: "Information was misrepresented in a very disturbing way concerning the company's most important performance indicators, which included escapes, suicides, violent outbreaks and sexual assaults."

Companies often try to show their best face to customers, and safeguard internal records with "attorney-client privilege." But according to Stephen Gillers, a leading expert on legal ethics at New York University, CCA's use of that privilege seems like "a wholesale, possibly overreaching claim," similiar to the blanket assertions of major tobacco companies that tried to keep damaging internal documents from public view. Those assertions of privilege have been rejected by federal judges as an attempt to improperly conceal their internal data on the dangers of smoking from customers, the courts and legal adversaries. CCA could also be in legal trouble if it minimized the tally of serious prison incidents and, by implication, its possible financial liability. As chief legal counsel, Puryear would have also had an obligation to ensure his board had all the information it needed, good or bad, to make decisions. If Puryear's reporting system had the effect of withholding information relevant to official prison oversight, that could bear on his suitability as a federal judge by suggesting his "disdain for the proper operation of an important function of government," notes Gillers.

Contacted by TIME, CCA says that Puryear, "has served the company well and honorably as general counsel and will be an outstanding judge." The company denies allegations that it keeps two sets of books, saying: "A final audit report is made available to our customers. Appropriate information gathered in the audits is separately provided to our legal department." The company adds that "CCA has produced all relevant, non-privileged documents in litigation," that its board

is regularly apprised of the most serious prison incidents, and that "all appropriate" information is given to the financial community.

President Bush recently called Puryear and his 27 other judicial nominees facing Senate confirmation "highly qualified." Whether or not the Senate agrees on Puryear, Bush is likely to leave the White House with fewer judges approved than Bill Clinton or Ronald Reagan, both two-term chief executives.

THE ASSOCIATE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

MAR 2 0 2008

The Honorable Michael Chertoff
Secretary of the Department of Homeland Security
Washington, D.C. 20528

Dear Secretary Chertoff:

Over the past few years, the Department of the Interior (Interior) and the Department of Homeland Security have been working together to secure our Nation's border. More specifically, we have cooperated in the placement of border security infrastructure along the Southwest border in the States of California, Arizona, New Mexico, and Texas.

We recognize that the primary purpose of border infrastructure is to prevent terrorists and terrorist weapons from entering our Nation, as well as stem the flow of illegal aliens and drug trafficking coming into the United States from Mexico. Because our visitors and employees are at risk, we have had to close off substantial portions of our lands. This infrastructure will improve the security of Interior lands and increase the safety of both our visitors and our employees. Finally, these pedestrian and vehicle fences will decrease some adverse environmental effects of illegal activities upon fragile plant and animal communities located within Interior lands.

Since Interior lands comprise nearly 800 miles of this border and include uniquely beautiful and environmentally sensitive areas, it has been imperative for our agencies to work in a cooperative fashion to protect these resources and lands. In working together, we very much appreciate your goal of completing the project in a timely fashion with your commitment of building the infrastructure in a way that minimizes the effects on the environment.

Interior managers have attempted to facilitate the construction of these facilities. In doing so, we have come to realize that some of our governing authorities and statutes do not accommodate approval of these projects. For instance, we have a legal obligation to manage and oversee many Interior lands in a way that is consistent with statutes such as the Wilderness Act and the National Wildlife Refuge System Administration Act. We have determined that we cannot, consistent with these legal obligations, provide the approvals that would be necessary to allow DHS to construct certain infrastructure on Interior lands that are subject to these laws.

Similarly, we have also come to realize that the process for gaining access to Interior lands that would otherwise allow such construction is too lengthy to allow the completion of these projects in a compressed time frame, as required by the Congress. Although we have tried to accommodate DHS, we are again bound by our own governing authorities and processes set forth for reviewing and approving DHS's access to such lands. As a result, we see the need for you to invoke a Real ID Act waiver of Interior statutory requirements.

Although we agree with the need to invoke a waiver, we also expect to continue to work together in a mutually acceptable fashion to reduce impacts to public lands, cultural and historic resources, and wildlife. In particular, we look forward to reaching agreement with you to mitigate the adverse impacts of border security infrastructure upon Interior lands. We also look forward to strengthening existing relationships and building others as this project transitions from construction to operational phases in the not-too-distant future.

In closing, we support the mission of your Department to secure our Nation's borders. We also acknowledge that it is in our best interests to work with you in supporting this mission since Interior lands have already suffered the consequences of these illegal border activities. Thank you for your efforts to date and please contact me if you have any questions or concerns.

Sincerely,

James E. Cason

James E. Cason

Statement for the Record

The Honorable Michael Chertoff

Secretary
United States Department of Homeland Security

Before the
United States Senate Committee on the Judiciary

April 2, 2008

Chairman Leahy, Ranking Member Specter, and Members of the Committee:

Thank you for inviting me to appear before the Committee to discuss the Department's progress in securing our homeland and protecting the American people. At the outset, I'd like to thank the Committee for its past support of the Department and your continued guidance as we take aggressive steps to achieve our mission.

As you know, on March 1st we reached an important milestone with the five-year anniversary of the Department's creation. In those five years, we have acted with great urgency and clarity of purpose to meet our five priority goals, which are protecting our nation from dangerous people, protecting our nation from dangerous goods, protecting critical infrastructure, strengthening emergency preparedness and response, and continuing to integrate the Department's management and operations.

Today I would like to focus my attention on one of those goals, namely protecting our nation from dangerous people. In particular, I would like to discuss the Department's efforts with respect to the critical issue of immigration. As you know, we are a nation of immigrants and our country draws tremendous strength from the fact that people all over the world choose the United States to live and work and raise their families. But we are also a nation of laws, and illegal immigration threatens our national security, challenges our sovereignty, and undermines the rule of law.

We remain committed to doing everything within our power and within the law to promote legal immigration and to end illegal immigration. For this reason, on August 10, 2007, Commerce Secretary Carlos Gutierrez and I announced a set of 26 reforms the Administration would immediately pursue to address our nation's immigration challenges within existing law. We have been aggressively pursuing this agenda since then, as my testimony will illustrate.

Today I would like to summarize the Department's efforts across five key areas:

I. Strengthening border security through greater deployment of infrastructure, manpower, and technology;
II. Enhancing interior enforcement at worksites, providing new tools to employers, and identifying and arresting fugitives, criminals, and illegal alien gang members;
III. Making temporary worker programs more effective;

IV. Improving the current immigration system; and
V. Assimilating new immigrants into our civic culture and society.

In each category, you will see clear progress over the past year, reflecting our determination to make a down-payment on credibility with the American people and to meet their rising demands to secure the border and tighten immigration enforcement.

But I want to emphasize at the outset that despite our substantial gains over the past year, enforcement alone will not permanently solve this problem. As long as the opportunity for higher wages and a better life draws people across the border illegally or encourages them to remain in our country illegally, we will continue to face a challenge securing the border and enforcing immigration laws in the interior. For this reason, I remain hopeful that Congress will once again work together to take up this issue and provide a solution that will fix this long-standing problem.

I. STRENGTHENING BORDER SECURITY

I would like to begin today by discussing our efforts to secure the border through installation of tactical infrastructure, including pedestrian and vehicle fencing; hiring and training new Border Patrol agents; and deploying a range of technology to the border, including cameras, sensors, unmanned aerial systems, and ground-based radar.

Pedestrian and Vehicle Fencing

We made a commitment to build 670 miles of pedestrian and vehicle fencing on the southern border by the end of this calendar year to prevent the entry of illegal immigrants, drugs, and vehicles. We are on pace to meet that commitment. As of March 17, we have built 309 miles of fence, including 169 miles of pedestrian fence and 140 miles of vehicle fence.

In building this fence, we have sought the cooperation of land owners, state and local leaders, and members of border communities. We are willing to listen to any concerns communities have with respect to fence construction and we are willing to seek reasonable alternatives provided the solution meets the operational needs of the Border Patrol.

Though we will try to accommodate landowner concerns, we cannot indefinitely delay our efforts or engage in endless debate when national security requires that we build the fence. Moreover, in areas where we use our authority to waive certain environmental laws that threaten to impede our progress, we do so in conjunction with the necessary environmental studies so that we can take reasonable steps to mitigate the impact of our construction. Of course, we will provide appropriate compensation for any property the federal government acquires through the process of eminent domain.

U.S. Border Patrol

Fencing is an important element of a secure border, but it does not provide a total solution. For this reason, we also have continued to expand the Border Patrol to guard our nation's frontline and respond to incursions with speed and agility.

Over the past year, we have accelerated recruitment, hiring, and training of Border Patrol agents. 15,500 Border Patrol agents are currently on board and we will have over 18,000 agents by the end of this year – more than twice as many as when President Bush took office. This represents the largest expansion of the Border Patrol in its history, and we have grown the force without sacrificing the quality of training the Border Patrol Academy prides itself on delivering.

As an additional force multiplier, we continue to benefit from the support of the National Guard under Operation Jump Start. This has been an extremely fruitful partnership. We are grateful to the Department of Defense as well as governors across the United States for allowing us to leverage the National Guard in support of our border security mission.

Technology and SBInet

A third critical element of border security is technology. While not a panacea, technology allows us to substantially expand our coverage of the border, more effectively identify and resolve incursions, and improve Border Patrol response time.

Over the past year, we have deployed additional technology as part of our Secure Border Initiative (SBI), which includes the development of the Project 28 (P-28) prototype in Arizona to test our ability to integrate several border technologies into a unified system. There has been some confusion about the purpose of the P-28 prototype and its role in the

Department's larger efforts at the border. Allow me to put P-28 into its appropriate context.

P-28 was designed to be a demonstration of critical technologies and system integration under the broader SBInet initiative. Specifically, its purpose was to demonstrate the feasibility of the SBInet technical approach developed by the contractor, Boeing, and to show that this type of technology could be deployed to help secure the southwest border. After successful field testing, we formally accepted P-28 from Boeing on February 21st of this year. We have a system that is operational and has already assisted in identifying and apprehending more than 2,600 illegal aliens trying to cross the border since September 2007.

It is important, however, to recognize that key outcomes of any prototype or demonstration are the lessons learned. These lessons learned are part of the true value of the technology demonstration. P-28 is no exception. Different segments of the border require different approaches and solutions. A P-28-like system would be neither cost-effective nor necessary everywhere on the border. Accordingly, we are building upon lessons learned to develop a new border-wide architecture that will incorporate upgraded software, mobile surveillance systems, unattended ground sensors, unmanned and manned aviation assets, and an improved communication system to enable better connectivity and system performance. This is Block 1 of our SBInet technology and will be deployed this year to two sites in Arizona.

As part of our broader SBI effort, we are continuing to deploy additional assets and technology along both the southern and northern borders. This includes a fourth unmanned aerial system, with plans to bring two more on-line this fiscal year. One of these systems will be operating on the northern border. We also anticipate expanding our ground-based mobile surveillance systems from six to forty. And we will acquire 2,500 additional unattended ground sensors this fiscal year, with 1,500 of those planned for deployment on the northern border and 1,000 on the southwest border. These will supplement the more than 7,500 ground sensors currently in operation. To continue to support our investment in border security, we have requested $775 million in funding as part of the President's Fiscal Year 2009 budget.

We are also mindful of the need to coordinate these strategies with our operational components in order to achieve effective situational awareness along the border.

Intelligence and information integration is a priority for the President and Congress, and we have taken steps to achieve this goal. The Department's Homeland Intelligence Support Team, or "HIST", working with DHS operational components, ensures that strategic fencing, border patrol personnel, and intelligence technology form the foundation of our Secure Border Initiative. The HIST, an initiative co-located at the El Paso Intelligence Center (EPIC), will coordinate the delivery of national intelligence and information-sharing capabilities in support of operational objectives along the border. The HIST will work directly with our Border Patrol, law enforcement personnel, and intelligence analysts to identify how intelligence can strengthen our enforcement activities and ensure information is coordinated with key stakeholders quickly and accurately.

Metrics of Success

Have our efforts achieved their desired impact? If we look at the decline in apprehension rates over the past year and third-party indicators such as a decrease in remittances to Mexico, the answer is unquestionably yes.

For Fiscal Year 2007, CBP reported a 20 percent decline in apprehensions across the southern border, suggesting fewer illegal immigrants are attempting to enter our country. This trend has continued. During the first quarter of Fiscal Year 2008, southwest border apprehensions were down 18 percent, and nationwide they were down 17 percent over the same period the previous year.

Through programs like Operation Streamline, we have achieved even greater decreases in apprehension rates in certain sectors. Under Operation Streamline, individuals caught illegally crossing the border in designated high-traffic zones are not immediately returned across the border. Instead, they are detained and prosecuted prior to removal. In the Yuma sector, for example, apprehension rates dropped nearly 70 percent in Fiscal Year 2007 after we initiated Operation Streamline. In the first quarter of this year, the Department of Justice prosecuted 1,200 cases in Yuma alone. And in Laredo, we experienced a reduction in apprehensions of 33 percent in the program's first 45 days.

In addition to the decline in apprehensions, our frontline personnel also prevented record amounts of illegal drugs from entering the United States last year. In Fiscal Year 2007, CBP officers seized 3.2 million pounds of narcotics at and between our official ports of

entry. Keeping these drugs out of our country not only protects the border, but it protects cities and communities where these drugs may have ultimately been sold or distributed.

Unfortunately, there is another sign our efforts at the border are succeeding: an increase in violence against the Border Patrol, up 31 percent in Fiscal Year 2007. Last month, for example, the Border Patrol discovered a piece of wire that had been stretched across a road between double fencing so it could be pulled tight to seriously harm or kill an agent riding on an all-terrain vehicle. We will not tolerate violence against our agents. The Border Patrol is authorized to use force as necessary and appropriate to protect themselves.

Ports of Entry

Of course, it makes little sense to secure the long stretches of border between our official ports of entry if we continue to have possible gaps in border security at the ports of entry themselves.

Since the Department's creation, we have continued to make major advances to prevent dangerous people from entering our country through official ports of entry. We have fully implemented US-VISIT two-fingerprint capabilities at all U.S. ports of entry. The State Department has deployed 10 fingerprint capabilities to all U.S. consulates overseas. We also have begun deploying 10 fingerprint capabilities to select U.S. airports (currently at 10 airport locations), with the goal of full deployment to airports by the end of this calendar year.

As you know, US-VISIT checks a visitor's fingerprints against records of immigration violators and FBI records of criminals and known or suspected terrorists. Checking biometrics against immigration and criminal databases and watch lists helps officers make visa determinations and admissibility decisions. Collecting 10 fingerprints also improves fingerprint-matching accuracy and our ability to compare a visitor's fingerprints against latent fingerprints collected by the Department of Defense and the FBI from known and unknown terrorists all over the world.

In January of this year, we also ended the routine practice of accepting oral declarations of citizenship and identity at our land and sea ports of entry. People entering our country, including U.S. citizens, are now asked to present documentary evidence of their

citizenship and identity from a specified list of acceptable documentation. Not only will this help reduce the number of false claims of U.S. citizenship, but it will reduce the opportunity for document fraud by narrowing the list of more than 8,000 different documents that a traveler might present to our CBP officers. These changes are improving security and efficiency at the ports of entry. Over the next 14 months, we will continue to create an effective transition period for implementation of the land and sea portion of the Western Hemisphere Travel Initiative (WHTI) beginning in June 2009.

I might add that we implemented these most recent changes in travel document requirements without causing discernable increases in wait times at the border. Compliance rates are high and continue to increase. U.S. and Canadian citizens are presenting the requested documents when crossing the border. This is a great "non-news" story, demonstrating that we can improve security at the ports of entry without sacrificing convenience.

Furthermore, as we move toward full WHTI implementation, we'll be utilizing radio frequency identification (RFID), which is a proven technology that has successfully facilitated travel and trade across our land borders since 1995 through our trusted traveler programs. RFID-enabled documents transmit a number (there is no personal information stored on the chip). WHTI will be implementing the latest state-of-the-art RFID technology, which has been assessed and tested to achieve a 95% read rate of up to 8 occupants in a vehicle at a range of 10 to 15 feet.

CBP has technology currently in place at all ports of entry to read any travel document with a machine-readable zone, including passports, Enhanced Drivers Licenses, and the new Passport Card to be issued by the Department of State. All CBP officers at the ports of entry are currently trained in the use of this technology.

In preparation for full WHTI implementation, CBP awarded a contract on January 10, 2008 to begin the process of deploying vicinity RFID facilitative technology and infrastructure to 354 vehicle primary lanes at 39 high-volume land ports of entry over the next two fiscal years. CBP deployed this new technology in vehicle primary lanes at the ports of Blaine and Nogales on February 12, 2008, in support of the anticipated RFID hardware installation.

II. ENHANCING INTERIOR ENFORCEMENT

Our second major area of focus is interior enforcement, which includes targeted worksite enforcement operations across the United States; increasing fines and penalties; seizing assets and when appropriate, seeking incarceration for those who break the law; providing better tools to help employers maintain a stable, legal workforce; and identifying, arresting, and removing fugitives, criminals, and illegal alien gang members who pose a threat to the American people.

In Fiscal Year 2007, Immigration and Customs Enforcement (ICE) removed or returned more than 282,000 illegal aliens as part of a comprehensive interior enforcement strategy focused on more efficient processing of apprehended illegal aliens and reducing the criminal and fugitive alien populations.

This strategy has resulted in sustained advances across multiple areas of ICE's mission, including the continuation of "catch and return," a reengineered and more effective detention and removal system, and new agreements with foreign countries to ensure prompt and efficient repatriation of their citizens, including most recently a Memorandum of Understanding with Vietnam which went into effect on March 22, 2008.

Worksite Enforcement

Fiscal Year 2007 represented a step forward for ICE's worksite enforcement efforts. ICE made 4,077 administrative arrests and 863 criminal arrests in targeted worksite enforcement operations across the country. Ninety-two of those arrested for criminal violations were in the employer's supervisory chain and 771 were other employees.

The majority of the employee criminal arrests were for identity theft. The employer criminal arrests included illegal hiring, harboring, conspiracy, and identity theft. Some cases also included money laundering charges.

Some recent worksite enforcement cases include:

Universal Industrial Sales, Inc: On February 7, 2008, fifty-seven illegal aliens were arrested during a worksite enforcement operation conducted at Universal Industrial Sales Inc. (UIS) in Lindon, Utah. ICE forwarded roughly 30 cases to the Utah County

Attorney's Office for possible criminal prosecution for offenses such as identity theft, forgery, and document fraud. On the federal side, the U.S. Attorney for the District of Utah unsealed two indictments charging the company and its human resource director with harboring illegal aliens and encouraging or inducing workers to stay in the United States illegally.

George's Processing: On May 22, 2007, a total of 136 employees were arrested at the George's Processing plant as part of this investigation into identity theft, Social Security Fraud, and immigration-related violations. Twenty-eight of these 136 employees were later indicted for identity theft and those have been adjudicated. As a result, a second indictment was returned in October 2007 charging eight human resource managers. One manager has pled guilty, and one was found guilty at a jury trial.

RCI Incorporated: On March 3, 2008, the former President, Vice President and Accountant of RCI Incorporated – a nationwide cleaning service – were sentenced to 120, 51 and 30 months respectively for harboring illegal aliens and conspiring to defraud the United States. The RCI corporate members also agreed to forfeit an aggregate sum of approximately $2.8 million. In addition, the RCI corporate members are also jointly and severable liable for approximately $16.2 million in tax penalties. A total of 244 illegal aliens were arrested as a result of this investigation.

Stucco Design Inc.: On March 7, 2007, the owner of an Indiana business that performed stucco-related services at construction sites in seven Midwest states pled guilty to violations related to the harboring of illegal aliens. He was sentenced to 18 months in prison and forfeited $1.4 million in ill-gotten gains.

These are the kinds of cases that have a high impact on those who would hire and employ undocumented and illegal aliens often facilitated through identity theft and document fraud.

Increasing Fines Against Employers

As a further disincentive to hire illegal aliens, we have partnered with the Department of Justice to increase civil fines on employers by approximately 25 percent, which is the maximum we can do under existing law. This action was one of the 26 administrative

reforms we announced in August and is intended to change behavior and hold unscrupulous employers accountable for their actions.

Expanding Workforce Tools

As we are holding employers accountable for breaking the law, we are also providing honest employers with an expanded set of tools to maintain a stable, legal workforce.

We are moving ahead with supplemental rule-making to our No-Match Rule published last year. As you may know, this rule provided a safe harbor for employers that followed a clear set of procedures in response to receiving a Social Security Administration Employer No-Match Letter that indicated a potential problem with an employee's records, or receiving a Department of Homeland Security letter regarding employment verifications. Unfortunately, the American Civil Liberties Union and others have sued the Department to stop the rule from taking effect. We have made progress in addressing the judge's concerns by releasing a supplemental proposed rule on March 21 that provides a more detailed analysis of our no-match policy. The supplemental No-Match proposed rule was published in the Federal Register on March 26, 2008 (73 FR 15944).

We are also working to promote the use of E-Verify, an on-line system administered by U.S. Citizenship and Immigration Services that allows employers to check, in most cases within seconds, whether an employee is authorized to work in the United States. Some states have begun to require employers to enroll in E-Verify, most notably Arizona, where the system is adding about 500 new users per week. Nationally, we are adding 1,000 new E-verify users per week. More than 58,000 employers are currently enrolled, compared to 24,463 at the end of Fiscal Year 2007, and nearly 2 million new hires have been queried this fiscal year. We are expanding outreach across the country in an effort to increase participation. To support this work, we have requested $100 million in the Fiscal Year 2009 budget.

We recognize no system is perfect, and some employers may not comply with all requirements of the program. For this reason, we are establishing a robust monitoring and compliance unit to check employers' use of E-Verify and respond to situations where employers could use the system in a discriminatory or otherwise unlawful manner. We are also increasing our outreach to employers and the American public to ensure that employers and employees understand their respective rights and obligations.

Additionally, we have added a new photo screening tool capability to E-Verify that will significantly reduce document fraud. With this new enhancement, employers are able to compare the photo on DHS-issued permanent residence cards, (green cards) and employment authorization documents (EAD) with the photo held in the DHS database to determine if the document is authentic.

E-Verify is a critical program that businesses across our country rely upon to obtain quick, accurate information about a worker's legal status. It is important that Congress take the appropriate action to reauthorize E-Verify this year so that employers can continue to benefit from this valuable system.

Finally, the federal government will continue to lead by example. In the near future, the Administration will take steps to require federal contractors to use E-Verify. As there are more than 200,000 companies doing business with the federal government, this will significantly expand the use of E-Verify and make it more difficult for illegal immigrants to obtain jobs through fraud.

Boosting State, Local, and International Cooperation

Of course, while immigration enforcement is primarily a federal responsibility, we also work with state and local law enforcement who want to participate in our immigration enforcement efforts by receiving training and contributing to joint federal, state, local, and international law enforcement initiatives.

Much of this work is organized through the ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ICE ACCESS) program, which includes training under the 287(g) program, participation in Border Enforcement Security Task Forces (BEST) and Document and Benefit Fraud Task Forces (DBFTF).

Through the 287(g) program, ICE delegates enforcement powers to state and local agencies who serve as force multipliers in their communities. As of March 20, 2008, ICE has signed 47 memoranda of agreement (MOAs) with state and local law enforcement agencies to participate in the program. Last year, ICE trained 422 state and local officers. In the program's last two years, it has identified more than 28,000 illegal aliens for potential deportation.

ICE also has continued to expand its BEST teams to work cooperatively with domestic and foreign law enforcement counterparts to dismantle criminal organizations operating near the border. In Fiscal Year 2007, ICE launched new BEST teams in El Paso and the Rio Grande Valley, and in San Diego, bringing the total number of teams to five. These task forces have been responsible for 519 criminal arrests and 1,145 administrative arrests of illegal aliens, the seizure of 52,518 pounds of marijuana and 2,066 pounds of cocaine, 178 vehicles, 12 improvised explosive devices, and more than $2.9 million in U.S. currency.

ICE DBFTFs are a strong law enforcement presence that combats fraud utilizing existing manpower and authorities. Through comprehensive criminal investigations, successful prosecutions, aggressive asset forfeiture and positive media, the DBFTFs detect, deter and dismantle organizations that facilitate fraud. The task forces promote the sharing of information, ensure the integrity of our laws, and uphold public safety. In April 2007, ICE formed six new task forces, bringing the total number of DBFTFs to 17. These task forces have been responsible for 954 criminal arrests and 635 criminal convictions.

Targeting Fugitives, Criminals, and Gang Members

Finally, our interior enforcement efforts have focused on identifying, arresting, and removing fugitives, criminals, and illegal alien gang members in our country.

In Fiscal Year 2007, ICE Fugitive Operations Teams arrested 30,407 individuals, nearly double the number of arrests in Fiscal Year 2006. The teams, which quintupled in number from 15 to 75 between 2005 and 2007, identify, locate, arrest and remove aliens who have failed to depart the United States pursuant to a final order of removal, deportation, or exclusion; or who have failed to report to a Detention and Removal Officer after receiving notice to do so. In Fiscal Year 2008, Congress authorized an additional 29 teams. Fugitive Operations Teams have arrested 14,047 individuals this year.

ICE also expanded its Criminal Alien Program (CAP) in Fiscal Year 2007, initiating formal removal proceedings on 164,000 illegal aliens serving prison terms for crimes they committed in the United States. ICE has already initiated 91,066 formal removal

proceedings against additional criminal aliens in the first quarter of Fiscal Year 2008. ICE is developing a comprehensive strategic plan to better address CAP.

In addition, in Fiscal Year 2007 ICE arrested 3,302 gang members and their associates as part of Operation Community Shield. This total includes 1,442 criminal arrests. For Fiscal Year 2008 (through March 20, 2008), ICE has arrested 1098 gang members and their associates.

As an added layer of protection against the entry of known gang members, we have worked with the Department of State to expand the list of known organized street gangs whose members are barred from entry into the United States. This action will ensure that any active member of a known street gang from El Salvador, Honduras, Guatemala, or Mexico will be denied a visa.

In all of these enforcement operations, we work cooperatively with state and local law enforcement to make sure we achieve our purpose with minimal disruption to surrounding communities. We also work with community organizations to ensure that children of illegal immigrants directly impacted by these operations are treated humanely and given appropriate care according to established protocols.

III. MAKING TEMPORARY WORKER PROGRAMS MORE EFFECTIVE

When Secretary Gutierrez and I announced the 26 reforms to strengthen border security and immigration last August, we noted the importance of improving the effectiveness of existing temporary worker programs to ensure the needs of our country's labor force continue to be met.

One of the consequences of our stepped-up enforcement has been that some economic sectors in our country have experienced labor shortages, most notably the agricultural sector. Of the 1.2 million agricultural workers in the United States, an estimated 600,000 to 800,000 are here illegally. This is not an argument for lax enforcement. Rather, we need to make sure our temporary worker programs are effective. To this end, we have joined the Department of Labor in proposing changes to modernize the H-2A seasonal agricultural worker program to remove unnecessarily burdensome restrictions on participation by employers and foreigners, while protecting the rights of laborers.

Under our proposed rule, which we announced in February, an employer will only need to identify an H-2A worker by name in its petition if the worker is already in the United States, even if there is only one worker. It is unreasonable to expect - given the realities of labor recruitment in the agricultural industry - that an agricultural employer in the U.S. would know the names of all the workers it hires from abroad. We have proposed to extend the amount of time a worker can remain in the United States after the end of his or her employment from 10 days to 30 days. This will make it easier for H-2A workers to extend their stay through a job with a new agricultural employer.

In addition, we have proposed to shorten the time period that a worker must wait outside our country before U.S. agricultural employers may petition again for that worker. Currently, workers must wait six months after their H-2A status expires before they can return. We want to cut that time in half to three months.

Of course, while it is important to make the H-2A process as flexible as possible for U.S. agricultural employers, we also want to protect workers. Our proposal requires an employer to attest, under penalty of perjury, that it will not materially change the scope of the foreign worker's duties and place of employment. This will help prevent the employment of H-2A workers in a manner different from what the employer stated on the petition. Employers will also be required to identify any labor recruiter they used to locate foreign workers to fill the H-2A positions. And employers and labor recruiters will be prohibited from imposing fees on foreign workers as a condition for H-2A sponsorship.

To ensure that we have appropriate law enforcement and security measures in place, we are also seeking to prohibit the approval of H-2A petitions for nationals of countries that consistently refuse or unreasonably delay repatriation of their citizens that we are trying to remove from the United States. We are requiring employers to notify us within 48 hours if an H-2A employee is fired or absconds from a worksite.

Finally, we are seeking to implement a land border exit pilot program for certain H-2A guest workers, requiring the temporary workers to register their departure through designated ports of departure before exiting the country. The objective is to ensure that temporary workers in the United States comply with the requirement to leave the country when their work authorization expires.

In addition to these proposed modifications to the H-2A program, we continue to work with federal partners on a number of other reforms announced last August to improve our temporary worker programs. These include reforms of the H-2B program for temporary or seasonal non-agricultural workers; an extension from 1 year to 3 years of the period that professional workers from Canada and Mexico may stay in the U.S. under the TN visa program; and potential improvements to visa programs for high-skilled workers. We will continue to keep the Committee apprised as these efforts proceed.

IV. IMPROVING EXISTING IMMIGRATION PROCESSES

As we take steps to meet the lawful needs of our economy, we are also working to improve existing immigration benefits and services for those seeking to live in, work in, or immigrate to the United States.

As you know, USCIS has faced a challenge keeping pace with unprecedented levels of citizenship applications. During Fiscal Year 2007, USCIS received 1.4 million requests for citizenship, which is nearly double the 730,000 received in Fiscal Year 2006. In June, July, and August 2007 alone, USCIS received more than 3 million immigration benefit applications and petitions of all types, compared to 1.8 million during the same period the previous year. In fact, for the months of June and July 2007, the spike in naturalization applications represents a 360 percent increase compared to the same period in 2006. We anticipate that it may take 13 to 15 months to work through these citizenship cases. The processing time goal is seven months.

Much of this spike in citizenship applications came in anticipation of an increase in application processing fees that USCIS implemented in July 2007 to add needed resources and capacity to its operations. USCIS is a fee-funded agency and draws its operating expenses from the fees it collects from applicants. By raising fees, USCIS has put itself on a path to modernize its aging business practices and meet an ever-expanding set of responsibilities.

Raising fee revenue gave USCIS the ability to begin to substantially expand capacity to process applications. As an agency primarily funded through fees, USCIS could only begin to take on more personnel once the new revenue structure was approved and in place. Nevertheless, USCIS began the planning process for this hiring and had shifted existing resources towards overtime. USCIS will hire 1,500 new employees resulting

from the new fee structure, 723 of whom are adjudicators. More than 869 permanent employees (442 adjudicators) have already been hired. USCIS will also hire an additional 1,800 employees as part of its backlog reduction plan and has been approved to rehire experienced retirees on a temporary basis to assist with adjudications.

Moreover, the Office of Fraud Detection and National Security (FDNS) continues to enhance the integrity of the legal immigration system by identifying threats to national security and public safety, detecting and combating benefit fraud, and removing other vulnerabilities. During Fiscal Year 2007, FDNS submitted approximately 8,700 fraud or criminal alien referrals to ICE. While USCIS works through the backlog of cases, it remains committed to ensuring the preservation of high quality standards and anti-fraud counter-measures.

In addition, USCIS has modified its background and security check policies with respect to applications for lawful permanent residence to make them consistent with those of ICE. Under this new guidance, USCIS will continue to require that a definitive FBI fingerprint check and Interagency Border Inspection Services (IBIS) check be obtained and resolved favorably before adjusting the status of an individual to that of a lawful permanent resident. USCIS will also continue to require initiation of the FBI name checks, but it will grant an adjustment of status application if it is otherwise approvable and the FBI name check request has been pending for more than 180 days. At that point, the name check will continue, and if actionable derogatory or adverse information is later received from the FBI, the Department will take appropriate action, which may include rescinding the individual's lawful permanent resident status and/or initiating removal proceedings against that individual. This change to security check policies will help reduce the backlog of adjustment of status applications without compromising our commitment to national security or the integrity of the immigration system.

Beyond the August 2007 initiatives to improve border security and immigration, USCIS also continues to work closely and cooperatively with the State Department to process refugees from foreign countries, including Iraqi nationals. The Department's role in this process is to interview and adjudicate cases, perform certain security checks, and make sure that cases are approved once all the necessary steps have been completed. The U.S. government has put in place the resources necessary to process and admit up to 12,000 Iraqi refugees this fiscal year. This remains an attainable but challenging goal. The results depend on a number of factors and variables outside our control.

While USCIS officers are interviewing Iraqi refugee applicants in Jordan, Syria, Egypt, Turkey, and Lebanon, limits on our refugee processing capacity in Syria continue to make it difficult for the program to reach its full potential. To further assist this process, we are implementing in-country refugee processing in Iraq for U.S. Embassy staff. This could potentially allow even greater numbers of individuals who have assisted U.S efforts in Iraq to seek resettlement in the U.S.

As of March 19, USCIS had completed interviews of over 7,600 Iraqi refugee applicants this fiscal year, and we expect that the total will exceed 8,000 applicants when the final figures for the second quarter – which just ended on Monday – are tallied. USCIS plans to interview approximately 8,000 more Iraqis during the third quarter. Since the program's inception last spring, a total of 21,847 individuals have been referred for resettlement. Altogether, USCIS has completed interviews of 12,163 individuals. To date, 3,835 Iraqi refugees have been admitted to the United States in Fiscal Years 2007 and 2008.

We remain committed to working with the State Department to process eligible Iraqis as efficiently as possible. However, we will not compromise our nation's security by relaxing our standards or cutting corners.

V. ASSIMILATING NEW IMMIGRANTS INTO OUR CIVIC CULTURE

Finally, we have continued to take the necessary actions to assimilate new Americans into the rich tapestry of American culture and society.

Part of this effort involves revising the naturalization test for U.S. citizenship to create a testing process that is more standardized, fair, and meaningful. The new test design, which USCIS announced last fall and expects to implement in October of this year, emphasizes fundamental concepts of American democracy and the rights and responsibilities of citizenship. It is designed to encourage citizenship applicants to learn and identify the basic values we all share as Americans, rather than simply memorize a set of facts.

Of course, knowledge of English is one of the most important components of assimilation. By learning English, immigrants are able to communicate and interact with

their fellow Americans. It is the first step to full integration. Assimilation does not mean losing cultural identity or diversity. It means learning English and embracing the common civic values that bring us together as Americans and adopting a shared sense of those values.

To promote assimilation, USCIS' Office of Citizenship provides a number of educational products, resources, and training opportunities for community and faith-based organizations, civic organizations, adult educators, and volunteers who work with immigrants. This includes hosting regional training seminars. Adult educators, volunteers, and other organizations also use USCIS' publications and videos to teach English as a Second Language and American history, civics, and the naturalization process to immigrant students. Several new educational resources are initiatives of the Task Force on New Americans.

USCIS and USA Freedom Corps' New Americans Project are also currently engaged in a public service and educational campaign to promote volunteer opportunities among both U.S. citizens and immigrants to help newcomers adjust to life in the United States. The project also offers opportunities for immigrants to get involved in their communities through volunteer service.

VI. CONCLUSION

Immigration is an issue that goes to the very core of what it means to be an American. We must continue to welcome new generations of immigrants to the United States to pursue their dreams and enrich our civic culture and our society. But, as we also know, immigration has become an issue that is inextricably linked to our national security.

What I hope is clear from my testimony today is that we take our commitments with respect to immigration seriously and that we have made a great deal of progress over the past year. We have set clear goals and established strategies and timelines to meet those goals using the resources and authorities currently available to us.

As I stated at the beginning of my testimony, however, an enforcement-only approach will not address the full breadth of the nation's immigration challenges over the long term. Only congressional action will achieve that goal.

We stand ready to work with Congress this year to build on our success at the border and in the interior and to advance reforms that will create the necessary temporary worker programs and pathways to citizenship for those already in our country. Taking these actions will remove pressure from the border and allow our Department to continue its focus on protecting our nation against dangerous people while making progress across all areas of our mission. I look forward to working with this Committee to achieve these very important objectives for our nation.

DIANNE FEINSTEIN
CALIFORNIA

COMMITTEE ON APPROPRIATIONS
COMMITTEE ON THE JUDICIARY
COMMITTEE ON RULES AND
ADMINISTRATION - CHAIRMAN
SELECT COMMITTEE ON INTELLIGENCE

United States Senate
WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

March 12, 2008

Secretary Michael Chertoff
U.S. Department of Homeland Security
Nebraska Avenue Center, N.W.
Washington, D.C. 20528

Dear Secretary Chertoff:

I was deeply troubled to receive a report from the Department of Homeland Security which indicates that a record number of cross-border tunnels were discovered in 2007. In light of these statistics, I am requesting that you make the enforcement of the Border Tunnel Prevention Act a top priority.

There were 19 cross-border tunnels that were discovered in 2007, which surpasses the record of 17 set in 2006. A total of 60 cross-border tunnels have been discovered since September 11, 2001. Of the 19 tunnels that were found in 2007, four of the tunnels were found in California, and the remaining tunnels were found in Arizona. Particularly troubling is the fact that tunnels are expanding to new areas. In 2007, the first tunnel was found near the San Luis, Arizona point of entry.

As you know, the Border Tunnel Prevention Act was enacted in October 2006. The Border Tunnel Prevention Act makes it a federal crime to finance, construct or use a border tunnel. I strongly urge you to enforce the provisions of this Act.

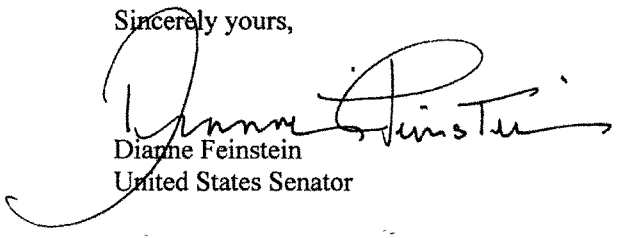
The Act criminalized two types of conduct. First, the Act makes it a crime to knowingly construct or finance the construction of a cross-border tunnel. Second, the Act provides that any landowner who recklessly permits the construction or use of a tunnel would face up to ten years in prison. The Act also prohibits the use of cross-border tunnels. Any person who uses a cross-border tunnel to smuggle aliens, weapons, drugs, terrorists, or illegal goods will be punished by doubling the sentence for the underlying offense if convicted.

It is imperative that the Department of Homeland Security work with the Department of Justice to investigate and prosecute those who construct and use border tunnels to smuggle drugs, guns or people in and out of the United States. Only through active enforcement of these provisions does this law become an effective deterrent to the further construction and use of border tunnels.

I appreciate your consideration of these concerns. I look forward to working with you to ensure that this vulnerability in our nation's security is not overlooked.

Best regards.

Sincerely yours,



Dianne Feinstein
United States Senator

United States Senate
WASHINGTON, DC 20510

March 3, 2008

Secretary Michael Chertoff
U.S. Department of Homeland Security
Nebraska Avenue Center, N.W.
Washington, D.C. 20528

Dear Secretary Chertoff:

We are writing to express our serious concerns regarding the Department's intention to expand the Visa Waiver Program without improving the security or integrity of this program or complying with the *Implementing Recommendations of the 9/11 Commission Act of 2007*. We believe any expansion is premature until these requirements are fully implemented.

The law requires that the Department of Homeland Security (DHS) certify that it has **"an air exit system in place that can verify the departure of not less than 97% of foreign nationals who exit through U.S. airports."** Section 711(c)(8)(A)(i). Only after this step is completed, may the Department expand the Visa Waiver Program.

This week, we learned that DHS has not determined a methodology for complying with this requirement, but that it is possible (we presume likely) that it does not intend to compare person for person who enters and who leaves the United States in meeting this 97% rate. Instead, we gather DHS intends only to track individuals who leave. Or, said another way, if two people come into the United States on a plane, but only one of them leaves, as long as DHS knows the identity of this one person, it could certify that 100% of foreign nationals have exited through the airports – as opposed to 50%.

It should be clear that if this is the methodology, it would be unacceptable. Since 1986, Congress has required the Executive Branch to develop an overstay system to track the arrivals and departures of visa waiver program travelers. Since then, Congress has directed that the Executive Branch track who is coming and going from our country.

As you know, tracking overstay rates is critical to our national security and the enforcement of our immigration laws. A methodology that ignores overstay data is ultimately meaningless and does not provide us with the critical information that we need to protect the integrity of the Visa Waiver Program.

Admitting new countries into the program without properly calculating overstays violates not only the legislative intent of this statute but also the letter of the law. Please tell us how DHS plans to comply with these requirements. If DHS moves forward to add new countries into this program without adhering to the law, we will look at all of our options to prohibit expansion of the Visa Waiver Program.

Best regards.

Sincerely yours,

Dianne Feinstein
United States Senator

Jon Kyl
United States Senator

Jeff Sessions
United States Senator

STATEMENT FOR THE RECORD

Department of Homeland Security Oversight Hearing

WEDNESDAY, APRIL 2, 2008

U.S. SENATE, COMMITTEE ON THE JUDICIARY
Washington, DC
Room 226 Dirksen Senate Office Building

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Chairman Leahy, thank you for calling this important hearing conducting oversight of the Department of Homeland Security (DHS). On March 1, 2008, DHS celebrated its five-year anniversary since Congress created the National Strategy for Homeland Security and the Homeland Security Act of 2002. In the past five-years the Department has worked to carefully manage the merger of a number of existing federal agencies into a new Cabinet level Department. This task was and remains daunting. I thank Secretary Chertoff for appearing today and look forward to asking him a number of questions.

Everyone on this Committee knows I am no stranger to oversight and believe that ensuring federal agencies in accordance with the law is our solemn duty under the constitution. Oversight of DHS is of the utmost importance given the difficult task of coordinating several entities securing the homeland. The management challenges facing any federal agency are enough to warrant oversight hearings and are only heightened when you have a new cabinet level Department.

I understand that the Secretary's testimony will largely address DHS's role in strengthening border security and efforts to reform immigration. While I am pleased to discuss the important reforms that are needed to our immigration laws, I view oversight hearings as an opportunity to ask about any matter with the Department. As such, I'd like to discuss H1-B visas, E-verify, and cooperation with state and locals to confront illegal immigration. I would also like to focus on some time on outdated law enforcement memorandums of understanding, my ongoing investigation into the lack of progress in establishing visa security units and the issuance of a student visa to Ahmed Mohamed, and if time permits DHS's chemical facility antiterrorism (CFATS) regulations.

On immigration, amnesty failed in this body because the American people didn't have faith in the government to enforce the laws on the books. People back home want the border secured, and they want illegal aliens apprehended, detained, and deported. The Department has a full plate – from the border to the workplace – and their efforts to protect the homeland from intruders and overstayers must not stop.

The Administration promised more than 25 reforms in August 2007. While it was an ambitious plan, I'm disappointed in the progress made on this front. I have yet to see substantial reforms to the H-1B visa program which is a major issue for U.S. companies and American workers. I'm waiting for rules to be proposed to require contractors of the federal government to

use the E-verify program. More also needs to be done to help our state and local law enforcement deal with illegal immigration.

Another issue I'd like to discuss relates to interagency agreements for law enforcement agencies. One of the most difficult tasks facing DHS during its creation was merging the various federal law enforcement agencies. DHS combined a number of federal law enforcement agencies that previously existed under other Departments. For example, the investigative arm of DHS, Immigration and Customs Enforcement (ICE) is now composed of the former Immigration and Naturalization Service (INS) from the Department of Justice and the U.S. Customs Service which was previously in the Department of the Treasury. This merger created complex issues that appear to have been successfully resolved. However, it has come to my attention that a number of the interagency working agreements for federal law enforcement, known as Memorandums of Understanding (MOUs) are extremely outdated and are signed between federal law enforcement agencies that were redefined by the creation of DHS.

The past relationships between federal law enforcement agencies have been blurred. These MOUs are helpful in resolving jurisdictional disputes that exist between law enforcement agencies that may have concurrent or competing jurisdiction. While not carrying the force of law, these contractual agreements create a set of boundaries and procedures for addressing disputes. I have recently learned that three MOUs affecting DHS are outdated. In fact, one MOU regarding investigative guidelines for firearms investigations is 30 years old and is an internal agreement between the Customs Service and the Bureau of Alcohol, Tobacco, and Firearms (BATF). The MOU is dated 1978 and is an intra-agency MOU because both BATF and Customs were within the Department of Treasury at the time. Now that Customs is part of ICE and BATF is at the Justice Department, this MOU makes little sense. I want to hear from Secretary Chertoff what efforts are ongoing to redraft these three outdated MOUs that impact DHS law enforcement entities.

I also want to talk about the failure of DHS and the State Department to establish Visa Security Units as required by law. This failure has led to at least one indicted terrorist, that we know of, entering the United States. Last Fall, I wrote to Secretary Chertoff seeking information about two University of South Florida students arrested near Goose Creek, South Carolina with explosives in their trunk. They are Egyptian nationals and have been charged with terrorism related offenses. I learned that one of them, Ahmed Mohammed entered the U.S. on a student visa despite having been previously arrested in Egypt. Worse than that, he had even declared his arrest on his visa application form. I launched an inquiry to find out why the State Department and DHS failed to use their shared responsibility over visa policy keep this individual out of the country. It took four months to get a reply from DHS, and even then all I got was a letter denying my request on the grounds that the indicted terrorist had not consented to the release of his records under the privacy act. This is outrageous. Concerns about the privacy of an indicted terrorist who is not even a citizen or legal resident of the United States should not trump the need for Congress to conduct oversight of the visa issuance process.

The Homeland Security Act required that DHS establish Visa Security Units (VSUs) around the world to ensure that the State Department isn't just rubber-stamping visa applications the way it did for the hijackers before 9/11. There are over 220 posts that issue visas. Nearly

seven years after 9/11, DHS has only established about 10 security units in 9 countries. That number is shamefully low. There was no VSU in Cairo at the time that Mohammed received his student visa, and if there had been, he would almost certainly have been denied entry into the U.S. because of his previous arrest. DHS and the State Department need to get these security units in place. It has been far too long since the 9/11 attacks to still have vulnerabilities this fundamental to our security.

Time permitting; I would also like to discuss an issue near and dear to my home state of Iowa, the issuance of federal regulations by DHS known as the Chemical Facility Anti-terrorism Standards (CFATS). These regulations were required by Congress and are meant to address security of dangerous chemicals at facilities across the country. These regulations became a concern to me when they included stored quantities of propane as a "chemical of interest". Because of an initial decision by DHS to require facilities to register if they had propane in excess of 7,500 pounds, many rural homeowners, agricultural producers, and small businesses in rural areas would have been subject to the regulations. By its own admission, DHS believed the cost to comply with this would have ranged from $2,300 to $3,500. I wrote to Secretary Chertoff in June of 2007 expressing my concerns but was merely thanked for my letter and heard little constructive feedback. So I took to the Senate floor and offered an amendment to the DHS appropriations bill limiting funding for this rule. Unfortunately, my amendment failed to get a vote but I continued the fight for rural Americans.

In August of 2007, I was joined by a bi-partisan coalition of 16 Senators who wrote to the Office of Management and Budget expressing our concerns with this proposed rule. Ultimately, DHS amended the regulation and raised the propane threshold to 60,000 pounds of propane, exempting most rural homeowners, agricultural producers and small businesses. While this limit still impacts a large number of agricultural producers, it's a step in the right direction, but DHS needs to keep Congress in the loop on the impact these adjusted regulations will have. I authored a provision in the Senate version of the Farm Bill that would require DHS to report this impact to Congress. While the Farm bill remains in flux, I want a commitment from Secretary Chertoff to provide this information to Congress.

I hope that Secretary Chertoff will provide answers to these important questions and commit to getting me the documents I'm seeking.

Senator Jon Kyl
Senate Judiciary Committee
DHS Oversight Hearing
21 April 2008

Statement for the Record

Chairman Leahy continues to use his opening statements to make partisan and often inaccurate statements about the Bush administration. I would like to address a few of the statements that Senator Leahy made at today's DHS oversight hearing.

- **The Chairman stated that "[t]his administration will not even share with this oversight Committee its legal justifications for waterboarding and other practices that we would condemn if visited upon an American anywhere in the world."**

  The Administration has offered its legal justifications for the past use of advanced interrogative techniques on multiple occasions, including having: (1) held three briefings for Congressional staff; (2) testified before Congressional Committees on at least six occasions; and (3) provided three letters outlining the legal justifications for the CIA's interrogation program. While the Chairman might disagree with the legal justifications offered by the Administration, it is inaccurate to suggest that the Administration has failed to cooperate with Congress on this issue.

- **The Chairman stated that the "administration has failed to live up to its promises to resettle Iraqis who have helped the United States in their home country."**

  It is true that our government has lagged in its efforts to admit Iraqi refugees to the United States in recent years. However, the Chairman fails to mention the many steps that this Administration has taken to address that problem.

  For instance, according to Ambassador James B. Foley, Senior Coordinator for Iraqi Refugee Issues at the State Department, 2,700 Iraqi refugees have arrived in the United Stated in 2008. Ambassador Foley has also stated that roughly 5,000 Iraqis have been approved for admittance, and another 8,000 are expected to be interviewed in the third quarter of this year. Ambassador Foley believes that the Administration will have met its goal of admitting 12,000 Iraqi refugees by the year's end.

  The Administration has significantly improved the process for admitting Iraqi refugees to the United States. The admittance of Iraqi refugees is not a partisan issue, and I believe that the Chairman's comments, which frame it as such, contribute little to advancing a solution.

- **The Chairman stated that the "[a] Republican Congress rejected efforts toward comprehensive immigration reform and adopted its so-called Secure Fence Act." The Chairman goes on to state that the Department of Homeland Security has**

"begun condemning the property of private citizens in Texas and Arizona who would prefer that you not construct a border wall on their property."

First, it is inaccurate for the Chairman to suggest that Republicans were responsible for the failure of comprehensive immigration reform. During the 109th Congress, the Comprehensive Immigration Reform Act of 2006 passed the Senate with bipartisan support. It was sponsored by Senator Specter and cosponsored by five Republicans and one Democrat. And, in the 110th Congress, which Democrats controlled, the comprehensive bill which Senator Graham and I cosponsored with Senator McCain and others failed on a cloture vote opposed by both Democrats and Republicans.

Likewise, it is inaccurate for the Chairman to suggest that a "Republican Congress" is solely responsible for the Secure Fence Act. Although Republicans controlled Congress at the time of its passage, the Chairman fails to mention that the Secure Fence Act passed the House with 64 Democrats voting for final passage, and in the Senate, more than half of all Democratic members voted for final passage, 26 in total. The Secure Fence Act was a bipartisan effort to secure our southern border, and, by all accounts, it is succeeding.

As for the Chairman's comments about the condemnation of private property, the Secure Fence Act requires that the Department of Homeland Security construct 700 miles of fencing along the southern border. Condemnation is necessary for a small portion of the right-of-way. The Department is acting to fulfill its legal mandate, as should be expected of any Executive agency. It is unclear why the Chairman appears to criticize the Department of Homeland Security for doing its job.

Statement of Senator Patrick Leahy
Oversight: Department of Homeland Security
Senate Judiciary Committee
April 2, 2008

The Judiciary Committee continues its important oversight responsibilities today as we hear from Secretary Chertoff of the Department of Homeland Security. I am confident Secretary Chertoff will tell us about what he views as the Department's successes. As I noted recently with respect to the publication of rules governing passport and entry requirements, the Department's record does not instill great confidence in how it has handled the Western Hemisphere Travel Initiative, the REAL ID Act, naturalization backlogs, the resettlement of Iraqi refugees and asylum seekers or the shameful, continuing aftermath from Katrina.

Recently, President Bush used the fifth anniversary of the Department to speak about spreading freedom and liberty around the world. Accordingly, in order to protect the freedom and liberties of Americans, we must adhere to the rule of law and honor America's commitment to basic human rights. The first Secretary of the Department, Thomas Ridge, has acknowledged that waterboarding is torture. This administration will not even share with this oversight Committee its legal justifications for waterboarding and other practices that we would condemn if visited upon an American anywhere in the world. Under this administration, we have sadly gone from the world's human rights leader to being lectured on human rights by the Pakistani and Chinese governments.

Sixty-six people have died since 2004 while in the Department's custody, some for lack of medical care or from outright neglect. There is no clearer indication that we have failed to adhere to the standards we would demand of others, and that we should demand of ourselves. Imagine the outrage if an American citizen were held in immigration detention in another country and died for lack of basic medical care. When it takes a lawsuit to improve substandard detention conditions for children and families at an immigration detention facility in Texas, the United States Government is failing its basic commitments to human rights and the rule of law.

I recognize that the Immigration and Customs Enforcement branch has worked with non-governmental organizations to make improvements in family detention standards and detention standards for asylum seekers who are fleeing to America to escape persecution in other parts of the world. But as the Department increased its enforcement activities, I would have expected it to have planned better.

We have also seen how this administration has failed to live up to its promises to resettle Iraqis who have helped the United States in their home country. This problem is compounded by the Department's inability to use the authority Congress has given it to address the terrible effects of the material support bar and related, overly broad definitions of 'terrorist organization'. The recent case of Saman Kareem Ahmad, now a language instructor for the U.S. Marines who has received commendations from General Petraeus for his service in Iraq, exemplifies these problems. Granted a special visa to come to the

United States, Mr. Ahmad's green card application was denied by DHS, which said that the pro-American, anti-Saddam group the Kurdistan Democratic Party, with which Mr. Ahmad served, was a terrorist organization. How many more cases like Mr. Ahmad's will the media have to highlight before DHS acts swiftly to address this problem?

Mr. Secretary, here at home, you are well aware of my concerns about the Department's implementation of the Western Hemisphere Travel Initiative. The Department must now make good use of the time Congress has given to make sure that implementation goes smoothly, and to minimize disruption in Americans' lives and in our relationships with our good neighbors to the north and south. I also share the view of many on both sides of the aisle and across the country about the so-called REAL ID Act and its unfunded mandates for States. I agree that there are benefits to be gained by encouraging the States to make improvements in the identification they issue—everyone wants that. But I share the view that far greater cooperation would have been gained by partnering *with* the States, rather than imposing a costly Federal mandate. Bullying the States is not the answer, nor threatening their citizens' right to travel. From Maine to Montana, States have said no.

A Republican Congress rejected efforts toward comprehensive immigration reform and adopted its so-called Secure Fence Act. My recollection is that their bill entrusted you with power to "take all actions" you determine necessary and appropriate to achieve and maintain operational control over our borders. The Department's virtual fence pilot program, which was apparently designed without adequate consultation with the Border Patrol, does not work. Your Department has begun condemning the property of private citizens in Texas and Arizona who would prefer that you not construct a border wall on their property. And just yesterday, you announced that the Department has waived all environmental laws in areas across 470 miles of border lands. I wonder whether today you will speak out for sensible enforcement policies or defend the billions in taxpayer dollars being wasted in this mean-spirited, costly effort. The border fence and related actions scar not only our landscape but our legacy as a nation of immigrants.

Another example of lack of foresight has resulted in the backlogs at the Citizenship and Immigration Services branch. Having told Congress that higher fees would bring faster and better services, you now preside over citizenship application backlogs that could and should have been anticipated. These are applications from legal permanent residents and people who have followed the rules but who are being prejudiced by incompetent government planning. While I appreciate the recent efforts of Director Gonzalez and his hardworking staff, what I will be looking for today is your commitment, as the person in charge, to aggressively deal with this issue. What commitment will you make to this Committee, the Senate and the American people? Can you assure those who applied for U.S. citizenship before March 31, 2008 that their applications will be fully processed in time to register for the upcoming elections?

The American people want security. But they also want a Federal government that works, and which respects principles of Federalism, and the basic human rights and civil liberties that we all hold dear.

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STATE OF ARIZONA

JANET NAPOLITANO
GOVERNOR

OFFICE OF THE GOVERNOR
1700 WEST WASHINGTON STREET, PHOENIX, AZ 85007

MAIN PHONE: 602-542-4331
FACSIMILE: 602-542-7601

March 11, 2008

The Honorable Michael Chertoff
United States Department of Homeland Security
Washington, D.C. 20528

Dear Secretary Chertoff:

From the many times we have met and corresponded, I know that we share a firm commitment to securing America's borders as a necessary part of broader comprehensive immigration reform. However, I am dismayed by recent reports indicating continuing problems with Project 28 – the "virtual fence" project, which is located in my State. These reports suggest that the broad implementation of high-tech security measures across our southern border is now many years away.

Yet, at the same time this delay was abruptly announced, we continue to remove and eventually terminate a successful program using the National Guard at our Border – Operation Jump Start.

In light of this newly announced delay, I urgently request that you reconsider the draw-down of Operation Jump Start, and instead retain National Guard personnel strength in numbers necessary to maintain the hard-won improvements in operational control of the international border.

As you fully know, in testimony before Congress last week, the Government Accountability Office confirmed that Project 28 is plagued with serious flaws that will require a redesign of the system. I appreciate the Department's dedication to resolving these problems and working toward a functional high-tech border security component. I also appreciate, as you have said, that the prototype Project 28 "virtual fence," as it existed, was of some value to Border Patrol officers. Nonetheless, the significant delays the project faces are of great concern. Your office has announced the system cannot be operational before 2011.

Real solutions to fix our broken borders cannot wait that long. Human and drug smuggling rings continue to thrive in Arizona, crossing our border and using our cities as major hubs to transport crossers throughout the country. While we wait for real progress on the "virtual fence," border communities in Arizona will continue to be strained by the millions of dollars in costs they must absorb due to the state of border security.

Also of concern is the timing. It is disturbing that, even though you and I met in Washington, D.C. in February, neither the State, nor apparently any of the local or tribal governments affected by Project 28, was informed by the Department of looming delays. Instead, our notification came from viewing news accounts of subcommittee hearings. The communities affected by Project 28 deserve more consideration and a greater opportunity to provide feedback.

Project 28 was a critical part of the Department's plan to bolster border security in the absence of action by Congress on comprehensive federal immigration reform. With its delay, it is now critical to maintain the strength and presence provided by Operation Jump Start.

Operation Jump Start has been highly effective. Since its launch in June 2006, the National Guard has flown 11,000 aviation flight hours, over 150 Customs and Border patrol officers were returned to law enforcement duties, and miles of high density lighting, vehicle barriers, road improvements, and fencing have been completed. When National Guard assistance was at its peak, data showed marked improvements in Border Patrol apprehensions.

Clearly, the support provided by Operation Jump Start has been invaluable. But in spite of objections from Arizona and other states, which must deal with the day-to-day issues associated with illegal immigration, the number of National Guard troops assigned to Operation Jump Start was cut in half in September 2007. A further drawdown of forces is slated to begin in April 2008 in anticipation of the current projected end date of July 15, 2008.

I have always believed that drawing down Operation Jump Start would be a mistake. Now that promised improvements in border security measures will not come to pass anytime soon, the federal government has no excuse to scale back the program. Common sense dictates that the drawdown should stop, and that a continued high National Guard presence should be maintained.

If, indeed, the drawdown continues, it is prudent to ask: what other steps will the Department take to shore up border security in lieu of the "virtual fence?"

We both know that border security is at the heart of the wellbeing of border communities, border states, and the nation as a whole. I look forward to your prompt reply regarding what measures the Department of Homeland Security will be taking to strengthen security on the Arizona border to compensate for expected improvements to high-tech enforcement that will not come nearly soon enough.

Yours very truly,

Janet Napolitano
Governor

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

February 15, 2008

The Honorable Michael Chertoff
U.S. Department of Homeland Security
3801 Nebraska Ave. NW
Washington, DC 20528

Dear Secretary Michael Chertoff:

I am troubled that thousands of deportable aliens who have been convicted of crimes in the United States, sometimes violent crimes, remain in the United States because their native countries refuse to repatriate them. Moreover, most of these aliens are released back into the population, as extended detention is untenable due to a lack of resources and the Supreme Court's *Zadvydas* decision.

Many of these recalcitrant nations receive substantial U.S. aid, and their citizens are regularly issued U.S. visas. The Congress has already attempted to address this problem, in section 243(d) of the Immigration and Naturalization Act, and I am curious as to why it is not utilized to greater effect. According to the statute, upon notification from the Attorney General that a country denies or unreasonably delays repatriation (such notification is now provided by the Secretary of Homeland Security), the Secretary of State "shall" suspend visa issuances until notified by the Attorney General that the country has accepted the alien.

This tactic is potent in theory, and was successful in practice when applied against Guyana several years ago. While I appreciate that foreign relations is a delicate affair involving balancing numerous interests, surely public safety in the United States is a priority of the highest order. Not only does refusal to repatriate often put convicted criminals with no right to be here back on the street, but drawn out repatriation negotiations divert scarce federal resources away from identifying and deporting other criminal aliens—as many as 300,000 of whom were incarcerated in 2007 and will be released rather than deported at the conclusion of their sentences.

It seems incongruous for the United States to continue admitting the citizens of an uncooperative country that refuses to take back those who are convicted criminals. Why then are we not more aggressive in our use of section 243(d) to ensure prompt repatriation, particularly of criminal undocumented aliens? I would appreciate your views on the efficacy of this provision and any obstacles to its utilization.

In a related development, this week, DHS noticed a proposed rule to prohibit H-2A visas for nationals of countries which refuse to repatriate. This is a welcome step, but why did DHS not instead dispense with time-consuming rulemaking, which ultimately will provide only limited leverage, and simply notify the State Department immediately of the non-cooperating countries?

I look forward to your response and your thoughts on this important issue. To aid the analysis, I would appreciate it if you could include a list of the notifications you have forwarded to the State Department pursuant to section 243(d) in the last 5 years, any actions upon them (e.g., suspension of non-immigrant visas), and whether they were ultimately successful in securing repatriation.

Sincerely,

Arlen Specter

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

February 15, 2008

The Honorable Michael B. Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave N.W.
Washington, D.C. 20530

Dear Attorney General:

I am troubled that thousands of deportable aliens who have been convicted of crimes in the United States, sometimes violent crimes, remain in the United States because their native countries refuse to repatriate them. Moreover, most of these aliens are released back into the population, as extended detention is untenable due to a lack of resources and the Supreme Court's *Zadvydas* decision.

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This tactic is potent in theory, and was successful in practice when applied against Guyana several years ago. While I appreciate that foreign relations is a delicate affair involving balancing numerous interests, surely public safety in the United States is a priority of the highest order. Not only does refusal to repatriate often put convicted criminals with no right to be here back on the street, but drawn out repatriation negotiations divert scarce federal resources away from identifying and deporting other criminal aliens—as many as 300,000 of whom were incarcerated in 2007 and will be released rather than deported at the conclusion of their sentences.

It seems incongruous for the United States to continue admitting the citizens of an uncooperative country that refuses to take back those who are convicted criminals. Why then are we not more aggressive in our use of section 243(d) to ensure prompt repatriation, particularly of criminal undocumented aliens? I would appreciate your views on the efficacy of this provision and any obstacles to its utilization.

I look forward to your response and your thoughts on this important issue. To aid the analysis, I would appreciate it if you could include a list of the notifications that were received pursuant to section 243(d) in the last 5 years, any actions upon them (e.g., suspension of non-immigrant visas), and whether they were ultimately successful in securing repatriation.

Sincerely,

Arlen Specter

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

February 28, 2008

The Honorable Michael Chertoff
Secretary of Homeland Security
U.S. Department of Homeland Security
3801 Nebraska Ave. NW
Washington, DC 20528

Dear Secretary Chertoff:

I am informed that large numbers of removable criminal aliens, particularly aggravated felons for whom there is no other reprieve, invoke without justification Article 3 of the U.N. Convention Against Torture (UNCAT) in order to obstruct removal proceedings. I am curious as to whether UNCAT necessarily condones such dilatory tactics.

Article 3 of UNCAT obligates the United States not to "return ... a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." However, in implementing UNCAT, Congress specified that, "[t]o the maximum extent consistent with" UNCAT obligations, "the regulations... shall exclude from the protection of such regulations" aliens who are security risks, such as terrorists, or those who have been convicted of "a particularly serious crime," such as an "aggravated felony" carrying a 5-year prison term. (*See* INA § 241(b)(3)(B).)

Notwithstanding this clear exclusion, DHS's regulations currently reflect no such exception for very dangerous aliens, and thus appear to leave aggravated felons eligible for deferral of removal. In contrast, Canada, another UNCAT signatory with a proud human rights record, maintains just such an exception in section 115(2) of its Immigration and Refugee Protection Act.

Without this exception, dangerous criminal aliens in the U.S. are able to abuse the laudable protections offered by UNCAT, burying worthy cases beneath a mountain of meritless claims. Even though 96% of UNCAT petitions are ultimately denied, the litigation can take years, during which time limited resources and decisions such as *Zadvydas* and *Nadarajah* may require release. Protracted UNCAT litigation puts convicted criminals with no right to be in the U.S. back on our streets. It also diverts scarce federal resources away from identifying and deporting other criminal aliens—as many as 300,000 of whom were incarcerated in 2007 and will be released rather than deported at the conclusion of their sentence.

I would like to know if DHS has issued or plans to issue any regulations to implement the express Congressional intent to exclude certain dangerous aliens from UNCAT protection. If not, I would appreciate your view of what the obstacles are and what might be done to remove them.

Sincerely,

Arlen Specter

I know you agree we should deport convicted illegal immigrants. Homeland Security should act on the regulation. Let me know. My Best

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

March 4, 2008

His Excellency Mohammed Hosni Mubarak
President of the Arab Republic of Egypt
Cairo, EGYPT

Dear President Mubarak,

I seek your assistance in repatriating a criminal alien currently in custody in my home state of Pennsylvania. I recognize that, as a rule, Egypt is quite cooperative in repatriation efforts and that, in this case, the source of the problem is the prisoner's refusal to cooperate in obtaining travel documents. Nevertheless, I am hopeful we might work together to overcome the obstacles and secure his prompt return.

Mr. Abdel Fattah entered the United States on a fraudulent Portuguese passport. He was convicted in 2002 of an aggravated felony and is now serving his sentence at the Pennsylvania State Correctional Facility in Camp Hill. Because he has already served the required minimum sentence, he is now eligible for repatriation. Accordingly, the administrative body responsible for overseeing repatriation, Immigration and Customs Enforcement (ICE), requested travel documents from the Egyptian consulate in New York in early October of 2005. That request included form I-217, which contained substantial biographical information. In 2006, ICE augmented the filing with formal proof that Mr. Fattah's Portuguese passport was fake.

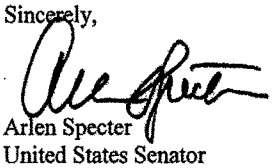
However, as part of the repatriation process and because Mr. Fattah does not have an Egyptian passport, he was required to fill out a passport request form in Arabic. In 2006, the Egyptian consulate advised ICE that the information Mr. Fattah provided in his passport request was insufficient. Mr. Fattah was asked to correct the problems and after some further communication, the final version was resubmitted on June 28, 2007. In August, the consulate informed ICE that Mr. Fattah had again improperly completed the form, filling it instead with gibberish and expletives, and that consequently travel documents would not issue unless ICE could produce an existing Egyptian passport belonging to Mr. Fattah.

Based on its research, ICE is confident that Mr. Fattah is an Egyptian national. Indeed, in a 2001 letter from prison, Mr. Fattah asked immigration authorities to let him "serve the time in my country Egypt." Nevertheless, I fully understand Egypt's desire to satisfy itself of that fact before it repatriates him. Although the ordinary methods of confirming nationality—either via an existing passport or a valid passport application—are not feasible in this case, I am hopeful we may find an alternative way to verify Mr. Fattah's status.

I could, for example, arrange for a visit to the prison by Egyptian experts who could then conduct an extensive background interview of Mr. Fattah in Arabic. If that is inconvenient, the prison has video conferencing equipment and could make Mr. Fattah available for remote interviews by your officials in New York, Washington or Egypt. Alternatively, if there is another arrangement your government would prefer I stand ready to assist.

Ordinarily, I might not intervene in such a matter, especially given Egypt's well-established cooperation in repatriation, but Mr. Fattah's detention cost over $250,000 last year and is draining scarce local resources. I would appreciate anything you can do to speed his return. You can reach me in my office at 202-224-9011 and my staff is prepared to assist you. Thank you very much.

Sincerely,



Arlen Specter
United States Senator

SENATE JUDICIARY COMMITTEE
HEARING ON

"Homeland Security Oversight"

WRITTEN STATEMENT OF THE HONORABLE NED NORRIS, JR.
CHAIRMAN OF THE TOHONO O'ODHAM NATION

Washington, D.C.

April 2, 2008

I. INTRODUCTION

On behalf of the Tohono O'odham Nation ("Nation"), I submit this written statement to apprise the Senate Judiciary Committee ("Committee") of the Nation's unique border and homeland security challenges that derive from its 75-mile stretch of shared international border with Mexico, where the Nation forms part of the first line of defense for U.S. homeland security and border protection. We feel that this information will greatly assist the Committee in addressing border security on tribal lands that are on or near the international boundaries of the United States. We also believe our statement will inform the Committee of the critical need for the United State Congress to acknowledge, respect and adhere to Tribal Sovereignty while developing and carrying out border security and related policy that affect our lands, resources and tribal members. With respect to the subject of the Committee's hearing, the Nation will be adversely and severely affected by the implementation of the Western Travel Hemisphere Initiative ("WHTI"), the REAL ID Act, and the Secure Fence Act. As more fully discussed below, the Nation respectfully requests that the Committee review and address our concerns. Before addressing the specifics of this issue, my statement will provide general background about the Nation and the historical background that created our current border security crises.

II. BACKGROUND

The Tohono O'odham Nation is a federally recognized Indian Tribe in South-Central Arizona with approximately 28,000 enrolled tribal members. The Nation's land base consists of four non-contiguous parcels totaling more than 2.8 million acres in the Sonoran Desert, and is the second largest Indian reservation in the United States. The largest community, Sells, is the Nation's capital. As a federally recognized Indian Tribe, the Nation possesses sovereign governmental authority over its territory and provides governmental services to its members. Moreover, the Nation spends up to $3 million annually from tribal revenues to meet the United States' border security responsibilities. The 75-mile international border along the Nation's land is the longest shared international border of any Indian Tribe in the United States and has created an unprecedented homeland security crisis for America.

Prior to European contact, the aboriginal lands of the O'odham extended east to the San Pedro River, West to the Colorado River, South to the Gulf of California, and North to the Gila River. In 1848, the United States and Mexico negotiated the terms of the Treaty of Guadalupe Hidalgo ("Treaty"), which among other things, established the southern boundary of the United States. The Treaty placed the aboriginal lands of the O'odham in Mexico. In 1854, through the Gadsden Purchase, the United States and Mexico further defined the southern boundary by placing the boundary at its present location cutting

into the heart of our aboriginal territory. The establishment of the boundary displaced the O'odham on both sides of the international border bisecting O'odham lands thereby separating the Nation's people from relations, cultural sites and ceremonies, and ultimately blocking access to much needed health care, housing, and transportation. Not surprisingly, neither the United States nor Mexico consulted with the O'odham during the Treaty negotiations in 1848 and 1854. Respect for the sovereign status of the O'odham was simply ignored. The U.S. Government's lack of consultation with or input from the O'odham continued throughout the generations leaving the Nation with a modern-day border security crisis that has caused shocking devastation of the Nation's lands and resources.

Today, the Nation forms part of the first line of defense for U.S. homeland security and border protection. However, without the benefit of consulting with the Nation, federal border security policy was developed focusing on closing down what were considered to be key points of entry along the U.S. southern border. This policy was implemented by extensively increasing manpower and resources at ports of entry and located at popular entry points such as San Diego (CA), Yuma (AZ), and El Paso (TX). In 1993, Operation Gatekeeper, the U.S. government's then border protection policy, was designed to close down the southern border in California, Arizona, and Texas in the effort to stop undocumented aliens from entering the United States. In Arizona, the broad policy directive focused on ports of entry, such as Douglas, Yuma, and Nogales. While this concentrated effort worked to reduce the flow at these entry points, it left a huge open area with undetected entry into the U.S. through the Nation's land base.

In 2002, the U.S. government expanded its border protection policies through the National Homeland Security Reorganization Plan, which essentially ignored the interests of the affected Indian Tribes, including the Nation. Last year, Congress amended the applicable laws to allow certain qualifying Indian Tribes, including the Nation, to be eligible to receive direct funding from the Department of Homeland Security. While the Nation welcomes and strongly supported these amendments, the level of funds available to support border and homeland security efforts is insufficient to adequately handle the overwhelming need on the Nation for border security. Due to the lack of border security resources and the shift in entry points, illegal immigration through the Nation's lands has become a prime avenue of choice for undocumented immigrants and alien smuggling into the United States. This has created urgent challenges to protect against possible terrorists coming through a very vulnerable location on our lands and has resulted in an increase in drug and human smuggling as well as other criminal and violent activities. Although the Nation has neither the sufficient manpower nor the resources to adequately address this crisis, we continue to be the first line of defense in protecting America's homeland security interests in this highly volatile and dangerous region.

III. THE BORDER SECURITY CRISIS AND ITS IMPACTS ON THE TOHONO O'ODHAM NATION

The modern day consequences of the border security crisis facing the Nation are indeed devastating to our members, our lands, our culture and precious resources. While illegal alien smuggling may have decreased on other parts of the southern border of the United States, levels have sky rocketed on the Nation causing a flood of crime, violence, chaos and environmental destruction on our lands.

Currently, it has been conservatively estimated that over 750 immigrants illegally cross daily into the United States via our lands. This number has been as high 1,500 per day in recent history. Often times,

our homes are broken into by those desperate for food, water and shelter. The Nation has a 69-member police force, the Tohono O'odham Police Department ("TOPD"), which serves as the first responders for border security and law enforcement needs along the vast stretch of international territory and expends more than 40 percent of its time on these issues, which diverts time and resources from community policing and protection. TOPD provides primary border security law enforcement services in addition to public safety within the Nation itself. There are at least 160 known illegal crossing sites in 36 locations along the Nation's 75-mile shared border with Mexico, and there are no barriers to prevent the influx. The TOPD officers travel in excess of 200 miles per shift or a yearly total of 48,000 miles. The Nation has been forced to spend more than $20 million of its own funds to address the impacts and burdens created by border security. The Nation lacks enough law enforcement personnel to adequately patrol and police the Nation's lads, its communities, as well as, the international border. As a result, tribal members live in fear for the safety of their families and their properties.

Recent intelligence sharing of information between the Nation and U.S. Customs and Border Protection ("USCBP") has revealed an increase of illegal border-related activity. Such activity includes an increase in the amount of undocumented alien foot traffic, narcotics smuggling and vehicular traffic, abandoned vehicles, and stolen vehicle recoveries within the Nation. All of these activities directly and adversely impact the daily lives of our tribal members.

In an effort to combat alien smuggling and its impact on our lands, the TOPD has expended scarce resources to increase border security, reduce crime on the Nation, and to improve the quality of life for its residents and visitors. The Nation has sustained a loss of millions of dollars annually to provide much-needed manpower, increase public safety, health care, sanitation, and address theft and destruction of our property and lands from the relentless flow of illegal immigration. Equally devastating is the adverse impact on our cultural resources and traditions as our Tribal elders no longer gather ceremonial plants in the desert for fear of their safety.

Border security, including the need to address alien smuggling, is clearly a federal responsibility. However, the Nation is left to pick up the tab and have stretched its resources to the limit. To date, the Nation has spent more than $20 million dollars in tribal resources on Homeland Security issues and spends **up to $3 million annually**, over half the TOPD budget, in direct response to border related incidents. Despite the Nation's position on the front line of this crisis, we have not received a commensurate level of funding from the federal government.

Many other areas on the Nation, such as our limited heath care clinic and ambulance services, have been similarly negatively affected by the expenses needed to address homeland security issues. Overall, it is estimated that the Nation expends up to $4 million of its tribal resources annually on services related to border issues for a total of $7 million. Part of the expenditure relates to health care and environmental clean up services, which both are direct results of alien smuggling. When the Nation pays for federal responsibilities, we are unable to address much needed education, health care, housing, roads, and infrastructure issues, to name a few. Below are a couple of key examples:

- The Nation loses approximately $2 million annually from its allocation of Indian Health Care funding due to emergency health care treatment of undocumented immigrants taken to our health clinic.
- The Nation spends millions of dollars a year to pay for the 6 tons of trash per day left by undocumented immigrants and the Nation is faced with cleaning up the 113 open pit dumps on the Nation.

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Senate Judiciary Committee
April 4, 2008

The Nation has been forced to deal with homeland security and border issues because we must protect our lands and tribal members. The Nation's efforts are complemented by the USCBP, and now the National Guard, which has increased its presence on our lands. However, this is not without concern over reports that USCBP is harassing tribal members, overburdening our roads system, and creating unnecessary roads. We also continue to remain concerned with the USCPB's slowness in the implementation of their duties to reach the level of trust required in developing a partnership with the Nation.

IV. WESTERN HEMISPHERE TRAVEL INITIATIVE ("WHTI")

The Nation's land base itself extends into Mexico, where our tribal members continue to live and practice our spiritual traditions. Tribal members of the Nation that live in the U.S. are connected politically, economically, socially and culturally to the approximately 1,500 tribal members who live in Mexico. The O'odham people have long exercised our right to freely cross the border for ceremonial, religious and other purposes, thus requiring free passage between the U.S. and Mexico.

The Nation's government recognizes and supports members on both sides of the border, regardless of other citizenship. The Nation expressly supports the ongoing right of all members to cross the border in order to work, participate in religious ceremonies and pilgrimages, receive services, visit relatives, and for other purposes. In addition, the Nation supports the issues of O'odham communities in Mexico, for example, by actively opposing a proposed hazardous waste facility near the traditional village of Quitovac, Sonora, which is evident in the Nation's Legislative Council Resolution No. 06-352.

Our historic passage rights and community unification has been threatened by the recent passage and implementation of the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), P.L. 108-458, which initiated the WHTI and required all persons traveling by air, land or sea between the U.S., Canada, Mexico, Central America, South America, the Caribbean, or Bermuda to present a valid passport. Under IRTPA, regulations governing land and sea travel requirements must go into effect on January 1, 2008. The deadline was extended by Congress to June 1, 2009.

On June 26, 2007 DHS and the Department of State ("Departments") released a Notice of Proposed Rulemaking ("NPRM") regarding land and sea border crossings in accordance with WHTI. Under the proposed rule, the Departments intend to issue standard document requirements for travelers entering the U.S. to enhance national security and to secure and facilitate the entry process. The Nation submitted extensive comments on August 27, 2007, (Tohono O'odham Legislative Council Resolution No. 07-542) to the proposed WHTI rule seeking to ensure that our tribal members will not be prevented from freely crossing the border on the Nation's lands, and to ensure that our tribal members in Mexico will not be prevented from receiving heath care, employment and other services, in the U.S. at the Nation's health clinic.

The Nation understands the need to protect the borders, but we are concerned that few exceptions will be made to the general passport requirements for Native Americans – the first Americans. Specifically, the Nation commented on the Departments' proposal to accept tribal documents ***only at traditional land border crossings*** and ***only to cross the border for "historic, religious or other cultural purpose(s)"***. The Nation supports the acceptance of its tribal enrollment card at <u>all</u> border crossing points, including those now designated as official ports-of-entry.

Although many of the Nation's members continue using traditional ports-of-entry, we have a significant number of tribal members located throughout Arizona and Mexico who cross the border at various crossing points, most of which have been identified to and are recognized by USCBP. The U.S. has

already restricted tribes to small land bases; it should not further restrict tribes in their ability to travel to other, traditional tribal lands that may not be included in the tribe's designated reservation.

The Nation also supported the acceptance of its tribal enrollment card for all purposes. Because the border bisects our community, there are many reasons for which our members must travel across the border, including simply to access other portions of our community. Many of our members cross the border to go to work, attend school, shop at tribal businesses, visit family and friends, receive government services, participate in social functions and more, the reasons for which are endless.

Finally, the Nation supported the pilot program proposed under Section IV(D) because it would allow the Nation's members to use a tribal identification card that will, like state-issued driver's licenses, be recognized as a valid border-crossing document. However, the technology and security criteria that would be accepted under such a program were not specified.

On March 27, 2008, the Departments announced the final rule regarding land and sea border crossings under the WHTI, and the regulations were published in the *Federal Register* on April 3, 2008. Under the final rule, tribal ID cards will be accepted if the issuing tribe agrees to: (1) establish identity and citizenship on its document; (2) meet WHTI tribal document security standards, yet to be established; and (3) provide USCBP access to the appropriate entries in its enrollment records. Document requirements were not included in the final rule, however tribes will be required to enter a voluntary agreement with the DHS Secretary setting forth the parameters of the tribal ID accepted for border-crossing purposes.

The Nation is willing to work with USCBP on elements to be included in an enhanced tribal identification card that will satisfy necessary security requirements. The Nation is also willing to cooperate on verification and validation of the Nation's tribal identification card. We suggest that the DHS work closely with the Department of the Interior to ensure such integrity for issuing tribal IDs by the Nation.

The Departments previously indicated that they would also send a letter to all tribes included on the 2008 BIA Tribal Leader's Directory announcing the release of the final rule under WHTI and inviting tribes to meet with DHS to develop an agreement with the DHS Secretary that would allow for the acceptance of tribal ID cards. It is unknown when DHS plans to send this letter to tribal leaders.

The Nation respectfully requests that the Committee follow up with DHS regarding the scheduled distribution of this letter to tribes and when DHS plans on inviting tribal leaders for consultation in developing the WHTI tribal documents standards.

V. REAL ID ACT

On January 10, 2008, DHS issued a final rule implementing the REAL ID Act of 2005. The final rule, effective immediately, sets forth the process for States to issue REAL ID-compliant drivers' licenses and identification cards. Despite an extension by Congress, providing DHS until the end of 2009 to issue a new rule, and over 21,000 comments largely opposing the rule, DHS decided to move forward with a final rule. The Nation also submitted comments on the DHS's proposed minimum standards for driver's licenses and identification cards acceptable by federal agencies for official purposes under the REAL ID Act of 2005.

Beginning May 11, 2008, States must issue REAL ID licenses and ID cards for official purposes. However, a State may request an extension until December 31, 2009, but only if a request was submitted by March 12, 2008. Such requests were required to have been submitted by the highest level executive official in the State overseeing its department of motor vehicles to the DHS REAL ID Program office.

DHS will notify a State of its determination within 45 days of receiving the request. An additional extension of the deadline for State compliance is available through May 11, 2011; however the applicant State must submit a request by October 11, 2009 and must demonstrate that it has achieved certain milestones implementing the REAL ID card issuance process by submitting a Material Compliance Checklist. States unable to demonstrate such progress will not receive an additional extension. Beginning May 11, 2011, drivers' licenses and ID cards will not be accepted from states that are not in full compliance with REAL ID provisions. Notably, after May 11, 2008, citizens of States that are not in compliance with the minimum requirements under REAL ID Act, or have not requested and received an extension, may not use their state-issued driver's licenses or ID cards to pass through security at airports.

The final rule establishes a two-phase enrollment process for individuals. Beginning December 1, 2014, Federal agencies will not be permitted to accept driver's licenses or ID cards that are not compliant with REAL ID for official purposes from individuals under the age of 50 (born after December 1, 1964). Individuals age 50 or older (born on or before December 1, 1964) have an additional three years, until December 1, 2017, to obtain REAL ID-compliant licenses or ID cards. However, after December 1, 2017, Federal agencies will not accept any driver's license or ID card that is not REAL ID-compliant.

DHS issued a NPRM in accordance with the REAL ID Act on March 9, 2007, establishing minimum standards for State driver's licenses and ID cards to meet in order to be accepted for official purposes by Federal agencies. The NPRM proposed a phase-in period through May 2013 and required certain information and security features; information to establish the identity and immigration status of an applicant before a card can be issued; and physical security standards for locations where driver's licenses and applicable ID cards are issued.

According to the NPRM, "Native American Tribal Documents" were considered as Proof of Identity but rejected by DHS. The Nation submitted comments urging DHS to delay implementation, engage in tribal consultation, accept tribal ID as REAL ID, and accept tribal ID as proof of identity. DHS indicated it had considered the comments, but made no changes to the final rule, as summarized below.

Under the proposed rule, those driver's licenses and ID cards that do not meet issuance standards can not be used for an "official purpose", including access to federal buildings and access to federally-regulated commercial aircraft. The Nation's tribal members consistently require access to federal buildings for various purposes, including government-to-government meetings with federal officials, to receive services through the Indian Health Service ("IHS"), to work with USCBP on border issues impacting both our lands and the U.S., and other reasons. We strongly encouraged DHS to re-consider the ability of tribal members to use tribal ID cards as sufficient proof of identity under REAL ID standards beyond the transition period for the Act.

In addition, the proposed rule specifies that only a passport, birth certificate, state-issued driver's license or ID card will be accepted as proof of identification. The proposed rule specifically noted that DHS considered *and rejected* "Native American Tribal Documents" as proof of identity. DHS noted that it had discussed the possibility of using such documents with the Bureau of Indian Affairs ("BIA") and determine that "since ALL tribes obtain State-issued documentation to verify birth, all tribal members will have, or can obtain, an eligible ID document rather than using tribal document." However, this statement is not entirely accurate. We know for the Nation's members, this statement does not hold true for all tribal members, particularly, those tribal members who lack a birth certificate and are thus unable to obtain State-issued documentation to verify birth or obtain other forms of ID considered as acceptable under the proposed rule. Furthermore, the Nation recently met with Carl Artman, Assistant Secretary of Indian Affairs at BIA, and he has disputed this statement and assured the Nation that DHS's reliance on such an assertion is misplaced and is not based on any communication that he is aware of or that he has

approved. In fact, Assistant Secretary for Indian Affairs, Carl Artman informed the Nation that he has contacted DHS on several occasions to provide similar rebuttals to what was attributed to the BIA in the proposed rule.

While DHS claims to have considered exceptions to the process in certain circumstances under the proposed rule, the exceptions proposed are extremely limited. Indian tribes should not be subjected to state process, as proposed under the rule.

In response to comments on tribal consultation requirements, the DHS noted that it did not believe that tribal consultation was required because DHS determined that the final rule would not have a substantial direct effect on one or more Indian tribe, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal law. DHS went on to note that it does not believe tribal governments will be substantially affected since tribal members "are licensed through State agencies." Based on these considerations, DHS apparently believes it was not required to follow tribal consultation policies set forth under Executive Order 13175. DHS also received comments noting that it is a violation of the government-to-government relationship that tribes have with the federal government to require a tribal government official to go to a State government official to obtain proof of identification to travel and conduct official tribal-Federal government business. DHS failed to address this comment in its response, only noting that the Secretary has authority to issue regulations and that they attempted to preserve State autonomy.

VI. SECURE FENCE ACT ("Act")

The Nation strongly believes that the Nation did not cross the border, rather the border crossed the Nation, which the Nation states in their "Official Tohono O'odham Nation Position on the U.S.-Mexico Border," which is attached to this testimony for the Committee's review.

Another aspect of where the Nation was excluded from consultation and coordination with DHS in homeland security planning is the Secure Fence Act of 2006 ("Act"), Public Law 109-367. First, construction of the fencing along the Nation's border would further the historical divide that has separated our tribal members from their relations and their homeland since the establishment of the international boundary itself. The international border created an artificial barrier that bisected the Nation's lands, and did so without accounting for the damaging effects it would cause to the Nation's members in Mexico by separating them from the tribal government that had always provided essential goods and services to them. Implementation of the Act on the Nation's lands and on sites of historical and cultural significance to the Nation will be extremely damaging to the Nation's members, and the Nation's historical and cultural sites near the proposed areas of construction, not to mention the fragile desert ecosystems of the American Southwest. This denial of tribal government protection continues to this day, including significant challenges and barriers preventing access to aboriginal and sacred lands, as well as limiting familial and cultural ties with their relations on the other side. This gulf will only be furthered by the construction of the fencing required by the Act, as it will serve as one more barrier to the desired unification of the Nation's people and lands.

The Nation fully supports the National Congress of American Indians ("NCAI") Resolution ("Resolution"), "Supporting Amendment of the Secure Fence Act and Requiring DHS Secretary to Consult and Coordinate with Tribes in Jointly Developing a Border Strategy for Tribal Lands along the United States' International Borders" (No. ECWS-08-001 adopted at NCAI's Winter Session on March 2-5, 2008). The Nation has attached the Resolution to this testimony for the Committee's review.

Testimony of the Tohono O'odham Nation
Senate Judiciary Committee
April 4, 2008

The Resolution states that the federal government's aggressive homeland security plan has focused on the border with Mexico, as demonstrated by the enactment of the Secure Fence Act of 2006, Public Law 109-367, signed into law on October 26, 2006, which mandates the DHS to construct over 700 miles of two layers of reinforced fencing along the southwestern international border along portions in California, Arizona, New Mexico and Texas, including through tribal lands and tribal historic and culturally sensitive sites. The Act, along with other homeland security initiatives, violates tribal consultation mandated by Executive Order 13175, and Indian tribes have not been consulted on the implementation of the Act. However, it is the Nation's lands and cultural areas where the massive wall is being constructed, and yet, as a sovereign Nation we are, and continue to be, excluded in the planning, development, and construction of the border fence.

Recently, the DHS Secretary has asserted authority under Section 102 of the REAL ID Act (enacted as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Public Law 109-13) which allows DHS to waive all applicable federal, state, and local laws in the construction of the fencing. This means that environmental, public health, labor and other normally-applicable laws have been completely ignored, and affected communities such as the Nation are completely closed off from the planning process. The Act also requires the U.S. Border Patrol to build the fencing, roads, and other types of barriers without having to consider or even disclose the potential harmful impacts on wildlife, water resources, or human health and safety. Therefore, the Nation's lands, sacred sites, and sensitive cultural and archeological areas are subject to blatant violation of National Environmental Policy Act ("NEPA") standards, and the Nation is unable to protect our valued lands from further devastation and destruction.

With these waivers, DHS is able to continue to construct the fence without environmental, endangered species, archeological, or other protections found in such laws and will result in the disturbance or destruction of numerous tribal archeological and sacred sites, human remains, wildlife, water, and natural resources. As to the Act's environmental and cultural effects, the fencing is to be built within ecologically and culturally sensitive areas such as national parks, forests, monuments, wildlife refuges, wilderness areas, and other environmentally-fragile areas. Already, in Arizona alone, the U.S. Border Patrol estimated that 39 species protected or proposed for federal protection are already being affected by its operations. The fencing required under the Act will further erode the protection of these and other species of wildlife, as well as abundant water, forest, and other natural resources in the proposed construction areas. The Nation strongly opposes any such potential damage to the physical and human environment.

In addition the Nation and other tribal concerns, many non-Indian border communities oppose the implementation of the Secure Fence Act, the resulting takings of private lands and the construction of the fence itself. The Nation strongly urges the Committee to request the Secretary to halt the use of these damaging waivers and work with the Nation and other landowners along the border in the construction of the border fence.

In summary, the Nation vigorously opposes the Secure Fence Act because it would:

- Further the historical divide that has existed between the Nation's people and homeland since the establishment of the modern-day international border;
- Damage the physical environment and cultural and natural resources in the areas where the Act's proposed double-layered security wall are to be constructed; and
- Undermine current cooperative efforts between the Nation and the U.S. Border Patrol to address security issues along the Nation's border.

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April 4, 2008

The Nation seeks the immediate repeal or amendment of the Secure Fence Act to ensure that it will not be implemented on the Nation's lands and will not affect the Nation's historic and culturally sensitive resources and sites. The Nation therefore supports H.R. 2593, The Borderlands Conservation and Security Act of 2007, introduced Congressman Raul Grijalva which would require the DHS Secretary to consult with tribal officials in jointly developing a border protection strategy for tribal lands along the United States-Mexico border. Specifically, the legislation repeals the Secure Fence Act's mandatory two-layer fence construction provision; repeals the DHS Secretary's authority to waive federal, state, and tribal laws; requires the DHS Secretary to work with tribes to train USCBP agents on tribal lands and jointly develop a border strategy for tribal lands along the U.S. international borders; and mandate meaningful and timely consultation and coordination with tribes and law enforcement agencies in jointly developing a border strategy for tribal lands along the U.S. international northern and southern borders.

H.R. 2593 was referred to three House Committees and is currently awaiting action by the House Natural Resources, Agriculture, and Homeland Security Committees. Currently, the bill has 29 cosponsors. The Nation respectfully requests that the Committee support companion of H.R. 2593 in the Senate to repeal the DHS Secretary's authority to waive all federal, state, and tribal laws, and urge coordination with sovereign Indian Nations, local communities, and private landowners in the further construction of the fence.

The Nation opposes the border wall but supports less harmful border protection measures, such as the integrated radar and camera system and vehicle barriers, subject to significant restrictions, and this is supported by the Nation's Legislative Council Resolution No. 06-255. In addition, the Nation strongly supports that federal law enforcement personnel constructing vehicle barriers "must perform resource clearance and fully comply with the NEPA, and that the CBP and its contractors are monitored by tribal archeological, biological, and cultural resources staff..

In addition, the DHS does not realize that the heavily armored vehicles that use the Nation's roads on a daily basis cause significant damages and repairs, which the Nation is responsible for repairing and maintaining. Again, the Nation must use tribal revenue to repair roads used for federal obligations, such as homeland security. The Nation urges the Committee to address this issue by requesting DHS provide monetary assistance to maintaining the roads DHS uses on the Nation's lands for border security.

VII. CONCLUSION

In closing, on behalf of the Tohono O'odham Nation, I appreciate the opportunity to present this statement to the Committee and respectfully request the Committee's favorable consideration of the Nation's requests. If you have any questions, please do not hesitate to contact me at (520) 383-2028, or your staff can contact our legal counsel in Washington D.C., Shenan Atcitty at (202) 457-7128. Thank you.