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LESSONS LEARNED—THE INSPECTOR GENERAL'S REPORT ON THE 9/11 DETAINEES

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WEDNESDAY, JUNE 25, 2003

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Specter, Chambliss, Leahy, Feinstein, Feingold and Schumer.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. Good morning. I want to welcome everyone to this hearing, especially our distinguished witnesses.

As we continue to strive as a Nation to combat the grave terrorist threat we face, it is more important than ever that we exercise vigilant but responsible oversight with respect to our law enforcement agencies. We need to do all in our power to ensure that these agencies are able to investigate, detect and prevent terrorist attacks on our country without threatening or undermining our country's cherished freedoms, and I am committed to this process. In fact, this is one of several oversight hearings I intend to hold in the coming weeks. As I have announced, FBI Director Mueller will appear before us on July 23rd, and I am working to arrange a hearing with Asa Hutchinson, Under Secretary for Border and Transportation Security at DHS. Later this year I will hold a general oversight hearing with the Attorney General himself.

The subject of today's oversight hearing is the Department of Justice Office of Inspector General's Report on the September 11th detainees. It is apparent from the IG's report that in response to the September 11th attacks, well-meaning law enforcement officials, working around the clock under great stress and amid very difficult conditions, made some mistakes. There are valuable lessons to be learned from the report.

My intention here today is to conduct a forward-looking hearing. We need to examine mistakes that were made with respect to the 9/11 detainees with an eye toward ensuring that the problems do not arise in the future should we ever face a similar catastrophic emergency. To this end we will hear from the component parts of the Department of Justice, the Bureau of Prisons and the Federal Bureau of Investigation. I had hoped to have a witness here from the Border and Transportation Security Division of the Department

of Homeland Security, but was prevented from doing so because of scheduling conflicts. So we will do that later. However, as I mentioned, we expect to hear from Under Secretary Hutchinson in the next several weeks. I am hopeful that the witnesses here today will offer us, based on their firsthand experiences during the 9/11 investigation, the knowledgeable perspectives that we need to begin our critical assessment of the IG's report and recommendations.

I want to express my deep appreciation to Inspector General Fine and his staff, who have worked so hard to prepare the comprehensive report that is before us. The report contains a number of critical findings and recommendations which we must examine carefully to ensure that we will be better prepared if we as a Nation face another devastating attack on our soil.

As we consider these criticisms with 20/20 hindsight nearly 2 years after the 9/11 attacks, it is important to recognize the monumental challenges our country, the Government, and in particular the Justice Department faced n the immediate aftermath of the September 11 attacks.

In the days following the attacks our country did not know whether or not we faced additional even more devastating attacks. It was not clear how imminent any such attack might be, how extensive the Al-Qaeda network in the United States was, or whether those individuals who had contact with the 9/11 hijackers were co-conspirators or unwitting accomplices. The Government's response was one that I believe was correct: aggressive oversight and investigation and enforcement efforts against all persons who surfaced in the thousands and thousands of leads generated from the 9/11 investigation.

It is also important to acknowledge that the 762 detainees who are the subject of the IG's report, were illegal aliens who had no right to be in this country. They were individuals who had violated our Nation's immigration laws, and they were individuals who well-intentioned law enforcement agents believed at the time may have had ties to or knowledge of terrorism or terrorists.

But let me be clear: neither the fact that the Department was operating under unprecedented trying conditions, nor the fact that 9/11 detainees were in our country illegally, justifies entirely the way in which some of the detainees were treated.

The IG report highlights a number of significant problems, many of which related to the Department's "hold until cleared" policy. I believe that the Department's decision to detain illegal aliens who were suspected of having ties to or knowledge of terrorism or terrorists, until they were investigated thoroughly, was fully justified by the emergency at hand. The stakes were simply too high to proceed any other way. There are, however, countless examples of illegal aliens being released on bond to the streets of the United States or returned to their country of origin only to commit future serious crimes against innocent Americans.

So while I do not take issue with or second guess the policy, I do question the manner in which it was implemented. As the IG report makes clear in implementing the "hold until cleared" policy, officials failed to take adequate steps to distinguish promptly between aliens who were legitimate subjects of the 9/11 investigation and those who were encountered coincidentally as a result of the

9/11-generated leads. And because the clearance process was plagued by administrative logjams and paperwork overload, a number of detainees who turned out to have no links to terrorism were held longer than they should have been.

Perhaps the clearest message in the IG report is that the component parts of the Department of Justice and Main Justice did not effectively and efficiently communicate and share information with one another. Logjams were not identified in a timely fashion. Other pressing concerns and legal issues were not promptly raised to the highest levels within Main Justice.

The IG report also illustrates that the problems caused by the classification of detainees and the inefficient clearance process were magnified by the conditions in which some of the detainees were actually confined. Aliens classified as high-interest detainees, who were housed at the Metropolitan Detention Center, the MDC, in Brooklyn, were subjected to highly restrictive confinement policies for long periods of time.

But without a doubt, the most disturbing aspect of the IG report relates to the allegations of abuse and mistreatment of several detainees who were housed in the MDC. Let me state this unequivocally: abuse of inmates, no matter what the actual or potential charges, is wrong. It cannot be tolerated. And should any of the allegations in the IG's report be sufficiently corroborated, the responsible parties should be prosecuted to the fullest extent under the law.

Inspector General Fine, I am pleased to hear that you are continuing to investigate these matters, and I personally implore you to do so vigorously.

Although our Nation remains a target of terrorists we now have the ability and the resources some 20 months after 9/11 to assess our performance and to institute needed reforms. The time has come.

As noted in the IG report, the Departments of Justice and Homeland Security need to develop a crisis management plan that clearly identifies their respective duties should another national emergency occur.

Now, specific standards should be adopted that will improve the ability of our law and of our law enforcement officials, and of course, of our immigration and intelligence agencies to classify subjects of terrorism investigations appropriately, and to process and complete clearance investigations expeditiously; and most certainly, corrective action should be taken to ensure that all detainees are treated with appropriate respect and restraint.

I was pleased to learn several weeks ago that the Justice Department has instituted, or is in the process of instituting such reforms. I strongly urge you to continue these efforts. With commitment and dedication, I am confident that the Department of Justice and its component parts, as well as the Department of Homeland Security, can eliminated the likelihood that the problems highlighted in the IG report will occur in the future.

So we are happy to welcome the witnesses that we have here today to testify to us, and we will hold additional hearings in this area, and we look forward to hearing all of our witnesses who are experts here today.

[The prepared statement of Chairman Hatch appears as a submission for the record.]

Senator Leahy, we will turn to you.

Senator LEAHY. Thank you, Mr. Chairman..

Chairman HATCH. Then we will turn to the witness.

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

Senator LEAHY. On June 2nd the Office of Inspector General released, I might say, Mr. Fine, a long and anxiously awaited report. This report criticized the conduct of the Department of Justice toward those aliens who were arrested in connection with the investigation into the September 11 attacks. I want to thank Glenn Fine and his superb staff at the Office of Inspector General for doing their job. They noted where we have gone wrong, but more than that, they also noted where we can improve. I know they could not conduct a truly comprehensive national review of every case or every setting, but what they did review is important.

I think it is unfortunate we do not have the Attorney General or other senior witnesses from Main Justice and the FBI, or even outside experts who could shed light on the Department's performance at this hearing. Their absence calls into question the hearing's value. I understand that these people will be testifying on a whole host of things later on. It would be good to have them here to testify on this one thing, and it is particulary disappointing that the Attorney General is not here for this hearing. Last Monday the Legal Times published a column by Stuart Taylor, Jr. It was entitled, "Why Won't He Apologize?" In it, Mr. Taylor, who criticized civil libertarians and defended many of the Department's policies, then added, Mr. Ashcroft "does owe apologies to several hundred people for holding them far longer than necessary. He also owes apologies to at least 84 people for the unduly harsh conditions at the Metropolitan Detention Center. And he owes apologies to all (or almost all) 762 detainees for his implication...that they deserved to be treated like terrorists."

The Attorney General has declined similar requests for an apology even from somebody who has been strongly supportive of a lot of his actions, so I assume he would not agree that an apology is necessary. I wish he was here today to explain why he has not followed that call for an apology.

I know he is a busy man. There are other busy people in the Cabinet. Secretary of Defense Rumsfeld and Secretary of State Powell are also busy. A June 9 article in Roll Call reported that while Secretary Rumsfeld has testified before the committees that authorize the Defense Department 10 times since 2002, and appears nearly weekly for briefings for members, and Secretary Powell has appeared before the State Department's authorizing committees 8 times during that span, the Attorney General has appeared before the House and Senate Judiciary Committees only 3 times. In fact, in his most recent appearance, he did not even appear by himself, but with FBI Director Mueller and Homeland Security Secretary Ridge, and we were told that the time for each witness had to be limited.

We also requested that Deputy Attorney General Larry Thompson, whose office is mentioned in the OIG report, and FBI Director Mueller testify at this hearing. I regret they were not invited. I understand that Mr. Thompson is at a Ninth Circuit meeting in Hawaii, but I also feel that it would help if these people were here directly, on just this issue, not on the whole host of other issues that they have not been available to testify to.

I do welcome the witnesses who are here today, and I say to Inspector General Fine, you and your office handled a difficult assignment. I think your report carefully balances the pressures that the Department of Justice faced along with its obligations as the Nation's preeminent law enforcement agency. It took courage to produce a report that offers substantive criticisms of the Department's response to the September 11 attacks, and General Fine, I admire you for doing this.

As the report clearly states and as all of us readily acknowledge, the Justice Department and the Government as a whole were under tremendous stress in the wake of the September 11 attacks. The report, however, also makes clear that the Department committed a series of errors that could have been prevented or minimized. I understand that DOJ and the Department of Homeland Security, which now has primary responsibility for immigration, have agreed to implement a number of the OIG's recommendations. That is good news. This hearing should be part of a larger oversight mission for the Committee, as we monitor how and whether those changes take place, and whether they solve the problems raised in the OIG report. In addition, I would renew my call for a hearing with FBI Director Mueller on FISA issues.

I would also like, Mr. Chairman, to have the Committee consider the Leahy-Grassley-Specter Domestic Surveillance Oversight Act. This is bipartisan a piece of legislation as we might imagine.

I have a longer statement regarding the OIG report, and, Mr. Chairman, I ask consent that the statement be made part of the record.

Chairman HATCH. Without objection we will place it in the record.

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

Senator LEAHY. Let me close by saying the OIG has performed a valuable service in producing this report. I was dismayed by the defensiveness of the Justice Department's initial reaction to the report, which suggested that Department officials somehow read the report as a vindication. These findings are not a vindication. They are a portrait of mistakes and policy misjudgments made in a difficult time. I am pleased that both DOJ and DHS have since recognized the wisdom of the Inspector's conclusions and recommendations. We all know how difficult a time it was, but remember, we are constantly telling the rest of the world about the standards they should hold themselves to, and the example they should follow from the United States. We should do more than just exhort. We should prove that we follow that example ourselves.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

Mr. Fine, we are happy to have you with us. We will take your statement at this time.

STATEMENT OF HON. GLENN A. FINE, INSPECTOR GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. FINE. Mr. Chairman, Senator Leahy, and members of the Committee on the Judiciary, thank you for inviting me to testify about our report, which examines the treatment of aliens held on immigration charges in connection with the investigation of the September 11 terrorist attacks.

Our review was initiated pursuant to our responsibilities under the Inspector General Act as well as the PATRIOT Act, which specifically directs us to review claims of civil rights and civil liberties violations by Department of Justice employees and to inform Congress about the results of our review.

In my testimony today I will briefly summarize the findings and recommendations from our full 198-page report. Before doing that, I would first like to discuss the context of our review.

In response to the September 11 terrorist attacks, the Department of Justice and the FBI initiated a massive investigation called PENTTBOM to identify terrorists who committed the attacks, or knew about or aided their efforts, and to prevent any follow-up attacks. The FBI devoted enormous resources to this task, and the amount of information that it received was staggering. As the report points out, the FBI and the Department were faced with unprecedented challenges in the investigation, including the chaos caused by the attacks. The FBI in New York, for example, was forced to evacuate its offices and set up command posts in a parking garage and other sites. Department employees worked tirelessly and with extraordinary dedication over an extended period of time to meet these challenges and the ongoing threat of terrorism. Our findings should not diminish in any way the contributions Department employees made and continue to make to ensure the safety of this country.

With respect to our review, we determined that 762 aliens were detained on immigration charges in connection with the terrorism investigation in the first 11 months after the attacks. These aliens had violated immigration law either by entering the country illegally, overstaying their visas, or committing some other immigration violation.

Our review focuses on the detainees held at the Passaic County Jail in New Jersey, a county facility under contract to the INS, and at the Metropolitan Detention Center in Brooklyn, the MDC, which is a Federal facility operated by the Bureau of Prisons. We chose these two facilities because they held the majority of September 11 detainees, 84 in the MDC and 400 in Passaic. The two facilities were also the focus of many complaints about detainee mistreatment.

Let me now turn to the findings of our report. Although we recognize the difficulties and challenges that confronted the Department in responding to the terrorist attacks, we did find significant problems in the way the Department handled the September 11 detainees. Many detainees did not receive timely notice of the charges against them. Many did not get their charging documents for

weeks and some for more than a month after being arrested. These delays affected the detainees in several ways, from their ability to understand why they were being held, to their ability to obtain legal counsel and request a bond hearing.

In its investigation the FBI pursued thousands of leads, ranging from information obtained from a search of the hijackers' cars, to anonymous tips called in by people who were suspicious of Arab and Muslim neighbors who kept odd schedules. Outside the New York City area the FBI attempted to screen out, or vet, cases in which illegal aliens were encountered only coincidentally to a lead and showed no indication of any connection to terrorism.

However, this vetting process was not used in New York. Rather, the FBI in New York made little attempt to distinguish between aliens actually suspected of having a connection to the September 11th attacks or terrorism, and those aliens, who while guilty of violating Federal immigration law, had no connection to terrorism, but simply were encountered coincidentally to a PENTTBOM lead. For example, if an agent searching for a particular person on a PENTTBOM lead arrived at a location and found other individuals who were in violation of their immigration status, these individuals were arrested and considered to be September 11th detainees.

The Department instituted a "hold until cleared" policy for these detainees. Although not communicated in writing, the policy was clearly understood and applied throughout the Department. The policy was based on the belief that the clearance process would proceed quickly and would take only a few days or a few weeks to clear aliens arrested on PENTTBOM leads. That belief was inaccurate. The FBI cleared less than 3 percent of the 762 detainees within 3 weeks of their arrest. The average length of time from arrest of a detainee to clearance by the FBI was 80 days.

As we note in the report, in contrast to this untimely clearance process, the FBI did a much better job handling clearances for a "Watch List" that was sent to airlines. The FBI created guidelines for who should be placed on the Watch List, and it worked diligently to remove people from the list who had no connection to terrorism. The FBI's efficient handling of this Watch List contrasts markedly with its handling of the clearance process for September 11 detainees.

With regard to the detainees' conditions of confinement, our review raised serious concerns about the treatment of the detainees housed at the MDC. The MDC held September 11 detainees under extremely restrictive conditions, including lockdown for 23 hours a day. The MDC also designated the detainees as witness security inmates in an effort to restrict access to information about them. This designation hindered efforts by detainees' attorneys, families, and even law enforcement officials, to determine where the detainees were being held. As a result of this designation, MDC staff frequently and mistakenly told people who inquired about specific September 11 detainees that they were not held at the facility, when in fact they were there.

The MDC's policies on telephone access for detainees prevented some from obtaining legal counsel in a timely manner. The MDC permitted detainees only one legal call per week. In addition, legal

calls that resulted in a busy signal or calls answered by voice mail counted as the one legal call for that week.

Other conditions of confinement for MDC detainees were unduly harsh, such as subjecting them to having two light illuminated in their cells 24 hours a day.

With regard to allegations of abuse, we concluded that the evidence indicates a pattern of physical and verbal abuse by some correctional officers at the MDC against some September 11 detainees. This abuse consisted of actions such as slamming some detainees into walls, dragging them by their arms, stepping on the chain between their ankle cuffs, twisting their arms, wrists and fingers, and making slurs or threats such as, "You will feel pain" and "you're going to die here." Although these allegations have been declined for criminal prosecution, the OIG is continuing to pursue administrative investigations of them.

In contrast to the MDC, our review found that the September 11 detainees at Passaic had much different and significantly less harsh conditions of confinement. Passaic detainees were housed in the general population and treated like regular INS detainees. Although we received some allegations of physical and verbal abuse, we did not find the evidence indicated a pattern of such abuse at Passaic.

We believe that chaotic circumstances and uncertainty regarding the detainees' role in the attacks explained many of the problems we found in our review, but they do not explain or justify all of them. We therefore offered 21 recommendations to address the issues in our review.

Among our recommendations are:

The Department and the FBI should develop clearer and more objective criteria to guide their detainee classification decisions.

Immigration officials should enter into an agreement with the Department and the FBI to formalize policies, responsibilities and procedures for managing a national emergency that involves immigration detainees.

Immigration authorities should document when charging determinations are made. Further, they should define what constitutes extraordinary circumstances and the reasonable period of time when circumstances prevent the charging determination from being made within 48 hours.

Other recommendations concern issues such as requiring a more particularized assessment before placing detainees in such restrictive conditions of confinement, and better oversight over their conditions of confinement.

We have asked for written responses to our recommendations within 30 days. We are pleased that the Department and its components are reviewing our recommendations carefully and are considering implementing many of them.

Finally, I believe it is important to point out that the Department fully cooperated with our review. In addition, the fact that it permitted our full report to be released publicly is a credit to the Department. It is also a strength of the system established by the Inspector General Act, which allows internal evaluations of sensitive Government actions by an independent entity. Although various people have interpreted our report differently, in the report we

attempted to describe in detail the treatment of the September 11 detainees, to lay out the facts underlying the policies that were implemented, and to provide the basis for the recommendations we made. I believe the report can have a positive impact by detailing these facts and making recommendations for improvement.

That concludes my prepared statement and I would be pleased to answer any questions.

[The prepared statement of Mr. Fine appears as a submission for the record.]

Chairman HATCH. Thank you very much for your statement.

One of the primary criticisms in your report is that the—we will have 7-minute rounds, and I will interrupt at the end of 7 minutes in each case, so that we can all have an opportunity.

But one of the primary criticisms in your report is that the FBI did not give the detainee clearance process sufficient priority following 9/11. You indicate that the FBI failed to provide adequate field office and headquarter staff to clear, coordinate and monitor the clearance process, and I understand that the FBI had approximately 7,000 employees working on the September 11th investigation, many of whom had been transferred from their other duties. And as you report, the Bureau received and pursued hundreds of thousands of 9/11 investigative leads following the 9/11 incident, and I understand nearly 80,000 in the first week alone.

Now, since 9/11 we in Congress have given the FBI additional funding and personnel to fight the war on terrorism, but do you believe at the time of the attacks that the FBI had adequate resources to clear the detainees promptly and thoroughly, and that they could promptly and thoroughly pursue the critical leads that were generated as a result of the PENTTBOM investigation? And if so, do you believe that there were other tasks to which the FBI gave too much priority during the weeks following 9/11?

Mr. FINE. Senator Hatch, I do believe that the FBI had resources, had they made it a priority. I do note that they devoted enormous resources to the task, but the FBI is a large organization. It has approximately 28,000 employees, about 11,000 agents, and I believe that there was nothing that should have had a higher priority than the terrorism investigation at the time. I believe that had they allocated, as a management priority, additional resources to the task, it could have been done.

I also note that there were joint terrorism task forces and other Federal law enforcement agencies and agents with clearances who could have been used to help in the clearance process, had the FBI chose to do so.

I also note that there are several problems with detaining an alien and then moving on to the next lead without adequately investigating whether that alien had a connection to terrorism. One, it let the detainees languish without a clearance investigation being conducted. But second, if these aliens were of interest to the terrorism investigation and potentially had information, they should have been investigated as an investigative priority. It made sense to do that for the FBI, rather than to move on to the next one without adequately investigating this one.

I also note part of the problem was that they had requested checks, for example CIA clearance checks, and got the checks back,

but took months to even look at the checks. So I do believe that there were resources that could have been devoted to it and not to take them off necessarily other high priority matters, but some of the other matters that the FBI traditionally handles, and could have been devoted to this task had the FBI done so.

Chairman HATCH. The second part of that question is do you think we need to give them more resources?

Mr. FINE. Well, on an overall level, I think the FBI has enormously difficult and diverse responsibilities, and more resources could help them with their very, very important mission.

Chairman HATCH. As you mentioned in your testimony, your report focuses on those aliens who were detained by the INS for violations of immigration law, not those detained pursuant to material witness warrants, criminal complaints or those classified as enemy combatants. This is an important point to make: all of the 762 detainees you examined were foreign nationals who had violated U.S. immigration laws. Now, in a report issued earlier this year, you found that the illegal immigrants who are not detained, frequently flee and evade deportation. Now, I believe you determined that approximately 87 percent fail to honor deportation orders and slip back into our society. Now, given this astonishing statistic, I assume you do not take issue with the Department's decision to first verify that September 11 detainees did not have ties to terrorists before releasing them or deporting them. Am I right on that or am I wrong on that?

Mr. FINE. No, you are right. I do think it makes sense to look and see whether the detainee had any suspected ties to terrorism, and if they did, to investigate that. I think part of the problem was, particularly in the New York City area, they did not make that determination, and anybody who was picked up, even coincidental to a PENTTBOM lead, and had no indication of a connection to terrorism, was considered a September 11 detainee. And then they were not adequately investigated in a timely fashion.

Chairman HATCH. That was the problem. Your report also criticizes the way in which the FBI classified September 11 detainees and recommends that it develop a basic protocol to guide its classification decision in future terrorism investigations that involve mass arrests of illegal aliens. Have you given any thought to the specific criteria that should be included in such a protocol?

Mr. FINE. Well, I do not know whether we have this specific checklist that should be done, but I do note that the FBI has done that in other contexts, and it makes sense to do it so that people are treated uniformly so that it is not one situation in one area and another situation in another. For example, as I pointed out, in the Watch List that they created, they did create screening characteristics and characteristics that should be used to determine whether someone should be put on the Watch List as well. I think that makes sense, to create objective and uniform criteria for use by FBI employees so that one does not act in one way and another acts in another way.

Chairman HATCH. With the exception of evidence suggesting that certain correctional officers in the Brooklyn Metropolitan Detention Center verbally and physically abused some of the detainees, which we all find deeply troubling, am I correct that you did not find any

evidence that officials in the Department of Justice or any of its components intentionally violated the legal rights of any of the 9/11 detainees.

Mr. FINE. No, we did not state or we did not find that anyone intentionally violated the law or the legal rights of detainees. We did find—and we point out—that there was some concern and some dispute within the Department about the legality of holding detainees for more than 90 days beyond the removal period. The Office of Legal Counsel subsequently opined that that was permissible. I note that that is still an ongoing legal issue in the courts. We also did note that the detainees who had reached the 90-day period were entitled to a custody review to determine whether their continued detention was warranted, and the INS did not conduct such custody reviews. We also note the abuse that you have referred to, but we did not find that there was intentional misconduct or an intentional violation of civil rights.

Chairman HATCH. I would like you to give us any other further help you can give us up here as to what we might be able to do to assist the FBI to do a better job the next time around if we happen to have another incident like this or any other similar type incident. So we would love to have your best advice on these matters.

Mr. FINE. I think one issue is the resource issues, and I do think the FBI could use additional resources given the many tasks they face. I believe that this hearing is a good thing, that it helps to look at the examples of what happened and try and make recommendations and provide impetus for improvement. So I think that the Congressional oversight and Congressional concern that is being conducted is a positive thing and can help improve the situation should it happen again.

Chairman HATCH. Well, thank you. We sure appreciate your testimony and your willingness to be here today.

We will turn to Senator Leahy. My time is up.

Senator LEAHY. Thank you, Mr. Chairman. I would submit for the record an article by David Cole that is in the Washington Post, and I would urge people to look especially at his reference to the Palmer raids and what happened after those. I also submit for the record the artcle by Stuart Taylor that I mentioned earlier.

Chairman HATCH. Without objection, they will go into the record.

Senator LEAHY. I note, General Fine, your reference of 11,000 FBI agents. I think the best way to help them is to resist the temptation here in the Congress to federalize more and more crimes. We should not federalize crimes that could very easily be handled by the local sheriffs departments and State police and local police. By allowing States to handle them, which they can do just as well if not better, we could reduce the demands on FBI resources so that the FBI can do the things that they are uniquely equipped to do, and in fact are the best in the world at doing. But that is probably for another hearing, although I wish at some point we could go through the State laws that we have federalized—and I have probably been guilty of voting for some myself, and find some way to look at which ones we could take out of the list in order to let the FBI do their real work.

Your report is dated April 2003. It was not transmitted to Congress until June 2nd. One, would you tell us why it took 2 months

to get here, whether the text of the report changed in any way during that period, and if so, what those changes were? Secondly, when did you originally complete your report and submit it for comment to Department officials; how long did that comment period last, and how does that compare to the average comment period for one of your reports?

Mr. FINE. We originally completed a draft of the report in March, and consistent with the way we treat these reports, we provided it to the Department and its components for assessment and comment, and to let us know if there is anything that is factually inaccurate in that report. We received some comments, made some minor adjustments for accuracy, and we finished our report, as you pointed out, on April 29th. We then submitted it to the Department for its review and for its determination of whether they believe there was anything too sensitive in that report to be released publicly. There were a number of components that were involved with this review—the FBI, the BOP, others in the Department—and at the end of the review period, they did ask us to take out a very few phrases and words that we blacked out in the report because they specifically identified individuals or countries, and the FBI considered them law enforcement sensitive.

The report was not changed between April 29th and the time it was released. And as I stated in my statement, I believe it is to the credit of the Department that they allowed the full report and they did not invoke the Inspector General Act to block the release of the report from the time we submitted it to them on April 29th.

Senator LEAHY. I understand the need to block out particular names, and all of us on here are used to handling classified materials where names are blacked out in the public record and only viewable in a classified section, but I am assuming by your answer that none of your conclusions were changed.

Mr. FINE. None of our conclusions were changed.

Senator LEAHY. This comment period, how did that compare with the comment period you normally have in such reports?

Mr. FINE. It was slightly longer, the comment period, but I think the issues here were very sensitive. We do give our reports—and sometimes they take longer than others depending on the length of the report or the issues involved. I note that we have completed a draft of the Hanssen report, for example, and it is undergoing a comment period by the FBI as well. That is taking slightly longer than normal because of the length of the report and the issues involved.

Senator LEAHY. Am I correct in understanding your testimony to be that they did not make changes in your report, they may have blacked out some names, but did not make changes, or seek changes in your report?

Mr. FINE. They did not make any changes in the report. They had some concerns about issues and impact on ongoing litigation. We did not change the report from April 29th to the time it was released. And we were the ones who actually blacked it out eventually. It was our report and we put in the black out marks that you see in the report.

Senator LEAHY. Your report makes a number of recommendations, and according to an article in the New York Times, June

13th, Department officials plan to implement 12 out of your 21 recommendations and consider an additional 9 for implementation. Do you evaluate their compliance in that regard?

Mr. FINE. Well, we have not received the official response from them as to which they are going to implement and which they are not. We have asked them for a response in writing. We have asked for that response—I think July 11th is when we have asked for the response. And when we get that response, yes, we will evaluate the response and whether we think it is a sufficient response to the recommendations we have made.

Senator LEAHY. One thing that concerns me and a lot of people in this country is the situation of the so-called Evansville 8. These are a group of Egyptian men living in Evansville, Indiana. I have been in touch with the Attorney General about this. They were among the individuals held as material witnesses in maximum security jails. They were never charged with a crime following the September 11 attacks. The FBI in fact eventually publicly acknowledged that each of the men had been wrongly accused and had suffered severe repercussions. The small community the Evansville 8 came from shunned them, despite our understanding that the constitution means innocent until proven guilty. In this case, even when declared innocent, many of the community considered them guilty. A lot of members of Congress have voiced a concern that the Material Witness Statute, as currently drafted, invites such abuse. But efforts to clarify or reform that statute have met with disinterest in the administration. Efforts to oversee the basic use of the statute have been stonewalled. At least one Federal judge has ruled the Department is improperly using the statute. Another has ruled the Department is erroneously keeping secret basic information about the scope of the statute.

I copied you on a letter I wrote to the Attorney General to keep you informed of the situation, in light of the fact that your recent report on 9/11 detainees did not include a review of those who were detained under the Material Witness Statute. Do you plan to investigate the treatment of this specific class of detainees, that is, the material witness detainees?

Mr. FINE. We have not opened that kind of a review on material witnesses or on the actions of the Department in conducting the criminal investigations. I note that many of them are ongoing and to some extent we do not want to interfere with the ongoing criminal investigations.

I also note that many of these are subject to oversight by courts and we try not to interfere with the courts' processes. So in light of that we have not opened a review of material witnesses.

Senator LEAHY. What about something like the Evansville 8, because that is not an ongoing court matter? It is not over for the 8. I mean their lives, particulary their economic prospects, have been ruined. Their standing in the community has been ruined. Their families are being shunned. Mistakes were obviously made. Is that going to be the subject of an investigation?

Mr. FINE. Well, we will certainly consider that in light of your comments and concern, but as of now, we have not opened such an investigation.

Senator LEAHY. Mr. Chairman, I will submit my other questions for the record.

Chairman HATCH. Thank you, Senator.

We will turn to Senator Chambliss at this point.

Senator CHAMBLISS. Thank you, Mr. Chairman.

Mr. Fine, certainly your obligation here was to do the oversight necessary to determine how the FBI and INS and other agencies acted in a very difficult time in the history of our country, and it was not a very enviable position that you were placed in. But, by the same token, it was not a very good position for our law enforcement officials to be in also, with us being attacked for the first time on domestic soil.

With respect to the information you gathered on the treatment of the prisoners, I am bothered by that, as I think everybody should be and is. Where did you get that information? Where did it come from?

Mr. FINE. We got it from a number of sources, some of them from the detainees themselves; some of them from the attorneys; some of them from the Bureau of Prisons, who had received complaints; some of them from public documents. So we received them from a number of different sources.

Senator CHAMBLISS. How about from the prisons guards and the prison personnel? Did any of the information come from them?

Mr. FINE. The initial allegations did not, but we have spoken to the prison guards and the prison personnel.

Senator CHAMBLISS. Do they agree that that took place?

Mr. FINE. The officers who were the subjects of the inquiry denied it, as we point out in the report. There are at least some that have confirmed it, but the subjects have denied it.

Senator CHAMBLISS. I notice that the complaints of prisoner treatment were primarily at the Brooklyn MDC Center. Did you make any investigation as to whether or not the folks who were accused of this type of activity had any friends, relatives, family members who were killed on September 11?

Mr. FINE. I believe that some of them did, and they let us know that.

Senator CHAMBLISS. So it was still a pretty emotional feeling on the part of those folks with respect to anybody who might have been involved.

Did you take into consideration the fact that there is a great likelihood that because of the actions of the FBI both here with respect to these detainees and also with other work that they were doing, the FBI has been pretty successful in having no further attacks take place within the United States?

Mr. FINE. Yes, we have taken note of that. Everyone, I think, has taken note of that. That is certainly a fact.

Senator CHAMBLISS. I notice you state in your report that you do not criticize the "hold until cleared" policy for the FBI to help determine any links between a detainee and terrorism activities. If you support thorough FBI clearances of the September 11 detainees, how can you criticize the Department for not distinguishing which detainees were related to terrorism before the clearances were complete?

Mr. FINE. I think the problem that we found was that in other parts of the country they made a determination: Is there any indication, is there any allegation, is there any evidence to indicate that this person is connected to terrorism, knew anything about, or was simply someone who was out of status who was confronted pursuant, coincidentally, to a PENTTBOM lead?

In New York, that did not occur, and if they arrived at a place and they were looking for somebody and found others who happened to be there, they detained them. But they also considered them of interest to their investigation, and they did not make any determination or discrimination as to this person we suspect of having connections to terrorism.

They then considered them a September 11th detainee, and they did not attempt to expeditiously clear them or find out if they had any evidence to indicate that they did have information connected to the attack. They moved on to the next lead without adequately investigating that, and that actually concerned us, as I mentioned, for two reasons: one, because the clearance process was unduly slow; and, two, if they were of interest and if they really believe that there was some indication that they had information connected to the terrorism attack, it made sense to investigate that.

Senator CHAMBLISS. Was the clearance process conducted solely by the FBI?

Mr. FINE. I think it mostly was by the FBI, although I do believe that there was some Joint Terrorism Task Force members who also participated. But it was mostly an FBI activity.

Senator CHAMBLISS. In my role as Chairman of the House Intelligence Subcommittee on Terrorism and Homeland Security, we did a thorough investigation of the intelligence community and the deficiencies that allowed September 11 to happen. And one strong criticism we had of the FBI, as well as other agencies, is the fact that there was not a full and open sharing of information.

Now, if the problem with respect to clearances was being handled by the FBI, my guess is most of the information that they had with respect to each individual was information gathered by the FBI or information that they reviewed that had previously been gathered.

Did you find that there was any sharing of information with the FBI by other Federal agencies with respect to any individual detainee? And did that have anything to do with the length of time before these folks were cleared?

Mr. FINE. We did find that there were attempts to obtain information from other agencies, particularly the CIA, where they asked to get CIA checks. And initially we were told by the FBI that that was part of the delay, that it took the CIA a while to get the checks back.

But when we investigated, we found out that that was not the problem, that the CIA was fairly timely in getting the checks back. But it was the FBI who took an extremely long period of time in many cases to even review the checks, that the checks had come in and were not looked at and not reviewed.

So I do think that there were problems in the sharing of information to some extent, but I believe it was a question of the FBI not looking at it carefully and expeditiously enough.

Senator CHAMBLISS. What about the INS? What was their role in sharing information with the FBI with respect to clearances?

Mr. FINE. I do not believe they had much of a role with respect to clearances. When the FBI confronted an alien who was out of status, the INS would be called in to make the arrest and decide where the person would go, but based solely upon information from the FBI. And the INS was seeking information from the FBI. It was seeking information to be used in bond hearings. It was seeking information for other purposes and had difficulty getting any information from the FBI. Not in all cases, but in many cases.

Senator CHAMBLISS. Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

Senator Feingold, you were next.

Senator FEINGOLD. There is no question that the investigation of the September 11th attacks presented one of the greatest challenges to Federal law enforcement in American history. And I think we can all agree that in countless ways, the men and women of the Department of Justice performed admirably in the weeks and months after the horrific attacks on our Nation. And for that, I and the American people will be forever grateful.

That gratitude is not diminished by concern over abuses of power that occurred. But it should also not diminish our determination to understand what occurred and demand that the Department address those abuses and assure that they never occur again.

I would like to commend and thank the Inspector General for his fair and candid review of the Department's conduct in the aftermath of September 11th. He has performed an invaluable service. The Inspector General's report is a powerful reminder to Congress and the American people of the importance of independent internal watchdogs in Federal agencies.

Mr. Chairman, a year and a half ago, when this Committee held oversight hearings on the Department's post-September 11th conduct, including a hearing I chaired, this Committee asked questions about many of the issues raised by the Inspector General's report. I must say that I certainly did not imagine that I would 1 day be sitting here and hearing from one of the Department's own officials criticizing the Department's conduct.

I cannot emphasize enough the significance of the Inspector General's report, and I again commend him for his work.

Before I get to my questions, Mr. Chairman, I also want to say, in agreement with the ranking member, that I find it very troubling that neither the Attorney General nor the Deputy Attorney General are here to testify today. I know that Senator Leahy requested that one of them appear. The absence of a high-level official from Main Justice frustrates legitimate and meaningful oversight of the Department. This is unfortunate. Imagine, the Attorney General or the Deputy Attorney General are not here to respond to an Inspector General's report about serious abuses within the Justice Department.

There are inconsistencies between the abuses identified by the Inspector General and the Department's explanation of its conduct, including statements by the Attorney General and other high-level officials to this Committee in 2001 and by the Attorney General at a House Judiciary Committee hearing earlier this month. It obvi-

ously would have been useful to have the Attorney General or the Deputy Attorney General before this Committee that we could seek clarification of these issues from the Department's leaders.

Mr. Chairman, in view of the Attorney General's absence today, I have sent him a letter asking him to respond to the questions I would have asked him had he appeared before us today. Mr. Chairman, I ask unanimous consent that this letter be made part of the record, and I ask the Attorney General to respond to these questions promptly.

Chairman HATCH. Without objection.

Senator FEINGOLD. Thank you, Mr. Chairman. With that, I will turn to my first question.

Mr. Fine, in response to your report, the Department stated in a press release "that the law was scrupulously followed." Now, just so we are clear, that is still an unresolved question, at least as far as your office is concerned, because your review did not include an analysis of the legality of the Department's conduct. Isn't that correct?

Mr. FINE. We did not take a position on certain aspects of the Department's conduct. We did not state, we did not find that things were illegal, but there are certain issues that are involved with the courts and that we did not take a position on.

Senator FEINGOLD. Your report did not conclude that the Department's conduct was legal, correct?

Mr. FINE. We did not state that in our report.

Senator FEINGOLD. According to the Department's press release and the Attorney General's testimony before the House Judiciary Committee earlier this month, the Department cites an Office of Legal Counsel opinion purportedly providing a legal basis for its continued detention of individuals who had been issued a final order of removal. Yet that OLC opinion was issued just this year in February. It had not been issued at the time the Department was making these detention decisions during the fall of 2001 and 2002.

On the issue of access to counsel, your report found that senior Department officials actively sought to undermine detainees' communications with counsel and consular or diplomatic officers as well as their families. And, of course, your report presents disturbing allegations of verbal and physical abuse of some detainees.

Given the abuses you chronicled in the report, do you agree with the Department's assertion that "the law was scrupulously followed"? If not, how would you describe the Department's conduct?

Mr. FINE. Well, I think the whole report has to be reviewed, and we laid out in significant detail the issues and some of the concerns that people had. I know even within the Department there were some issues and concerns about some of the policies and the legality of the policies. We also pointed out, as you just mentioned, the Office of Legal Counsel opinion, which did come well after the conduct at issue, and that was one of the criticisms that we had, that it should have been considered, the legality of it, in a more careful and timely way at the time that it was occurring.

We also note that there is ongoing litigation and court suits about this. So I do think it is important to review the entire report,

and we tried to lay out the facts and let people make their own judgments about that.

Senator FEINGOLD. Thank you.

Mr. Fine, as a follow-up to a question from Senator Hatch about whether DOJ officials intentionally physically or verbally abused detainees, did you find that DOJ officials or its component employees were aware or had knowledge that some detainees were experiencing verbal or physical abuse?

Mr. FINE. We did not find that. I think there is one instance in the report where we mention that there was an allegation of abuse that was brought to the Department, and the Department asked to look at it—to look into that.

What we state in the report is that the physical and verbal abuse, we did not have evidence that it was condoned or encouraged by anyone higher up than the correctional officers who engaged in it.

Senator FEINGOLD. With regard to a question Senator Leahy asked, just to be sure, could you tell the Committee how Department officials reacted to the report once it was completed and forwarded to them? Was there any internal debate about its findings, conclusions, or recommendations or the decision to make it public? And were you or your staff asked or encouraged to modify any sections of the report before it was finalized? I understood your testimony to be that nothing was changed, but I am asking about whether there were these kinds of conversations and concerns.

Mr. FINE. When the report was provided to them initially for a factual accuracy review, there were some comments made about the accuracy of certain things, and there were some adjustments made. As to the conclusions, I am sure there were some concerns about the conclusions, but it was our report and we wrote the report, and we stuck with the report, and we stick with the report.

Senator FEINGOLD. Were you asked or encouraged to modify any sections of the report before it was finalized?

Mr. FINE. There were some concerns about the sensitivity of it and whether it would have an impact on ongoing litigation. And so there were concerns about the release of some of those sections. We included them in there. They are in there, and we did not drop those issues that could have an impact on ongoing litigation. We thought it was important to keep—

Chairman HATCH. Senator, your time is up.

Let me just state for the record, I understand the desire to have the Attorney General appear before the Committee. You know, as I have said earlier, I will hold a general oversight hearing concerning the Department of Justice at which the Attorney General will have to appear as a witness. But it is important to note that oversight does not require the Attorney General at every hearing. Today's hearing is a good example. We have knowledgeable witnesses who can provide excellent firsthand information for us, which is what we are really after. And I urge my colleagues to take advantage of this opportunity to ask these excellent witnesses—

Senator FEINGOLD. Mr. Chairman?

Chairman HATCH. —any questions they feel like about the Inspector General's report and to find ways to improve the Department of Justice and the Department of Homeland Security.

Senator FEINGOLD. Mr. Chairman, if I could just make one brief comment?

Chairman HATCH. Sure—well, let me just finish my comment first.

In my view, I think time spent complaining about who the witnesses are today is wasted time. Let's get on with the hearing, and then we will have follow-up hearings. I have mentioned I am going to have the FBI Director in on July 23rd, and we are certainly going to have the Attorney General. But we have excellent witnesses here today who will help us to understand this IG report, and they are firsthand witnesses.

Yes, Senator?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISONSIN

Senator FEINGOLD. Mr. Chairman, I appreciate your courtesy. Ten seconds on this. I certainly understand that the Attorney General should not appear at all the hearings, but the symbolic importance of an Inspector General's report about abuses within the Justice Department I think requires the top person to be here—

Chairman HATCH. Well, he will be here.

Senator FEINGOLD. —to respond. But in a context—

Chairman HATCH. So will the FBI Director.

Senator FEINGOLD. Mr. Chairman, if I may finish, in a context where that is the focus of the entire hearing, not one of these around-the-world hearings where we all bring up 8,000 different issues, as we must, in a general oversight hearing. This is unique, this is important, and this should be the exclusive focus of a hearing where the Attorney General should respond.

I thank you, Mr. Chairman.

Chairman HATCH. Well, I would like the exclusive focus to be on the facts and what we can do about them, and we have good witnesses here who are experts in this area who we want to listen to.

Senator Specter? We have a vote on, so we are going to finish with Senator Specter, and maybe if we have time, we will go to you, Senator Feinstein.

Senator SPECTER. On these illegal immigrants who have been detained because they are out of status, I think it is important to enforce our immigration laws. But the real thrust here has been a security concern, and a factor which concerns me is whether there is some reason beyond their being out of status to be detained on security grounds.

Has there been any showing that they are security risks or any threat? And I don't think it requires a whole lot, but I think there ought to be some reason to believe they are security risks to have them detained. Was there any such showing to any even minimal extent by the Government?

Mr. FINE. I think it varied on the cases. I think there were some cases where there was evidence linking them to the terrorism or the terrorist attacks. I think the FBI will point out those cases. But the vast majority of them, I am not sure there was that indication. And what concerned us was that there was not that attempt to discriminate between the ones where there was evidence or an indication that they were a security threat, that they had knowledge of

terrorism, that they were connected to terrorism, and the ones who were simply encountered and were out of status.

Senator SPECTER. Well, if the Justice Department is making an approach to move against immigrants out of status, that is fine if they are all treated uniformly. But I think the point ought to be made abundantly clear that if they are really talking about security matters, there ought to be some showing.

This runs through a fair number of activities, and you have the case of Jose Padilla who has been in custody for more than a year. Counsel was appointed by the court, and Padilla has not been permitted to talk to counsel. He has been classified as an enemy combatant. The counsel was appointed by the court. This is not Padilla retaining somebody where you might have a mob defendant and mob connections where the attorney would be a conduit to other people.

Does your department, the Inspector General, get involved at all with a case like Padilla on raising a question as to whether there is a justifiable basis for denying access to counsel, court-appointed counsel?

Mr. FINE. No, we have not and we do not. I believe that is a Presidential decision to make the determination that someone is an enemy combatant and that they are held by the Department of Defense. And so we as the Department of Justice Inspector General's Office do not get involved in those enemy combatant cases.

Senator SPECTER. Well, there is a pretty fine line as to where the Department of Justice ends and the Department of Defense begins. And on some of these cases, they are criminal defendants in the criminal justice system, Department of Justice, and then when the problems arise, they are transferred to the Department of Defense.

You have the case of Yaser Hamdi where the District Court for the Eastern District of Virginia questioned the Government's affidavit as to whether there was a justification for designating Hamdi as an enemy combatant. The court said it fell far short, and that case is now on appeal.

Does your role as Inspector General have anything to do with that?

Mr. FINE. No, it really does not. We do not get involved with the court processes or the litigation decision, and we have not opened a review of that particular aspect. I do note it is subject to the court and the oversight of the court.

Senator SPECTER. Well, Mr. Fine, the Department of Justice is the entity which is fighting to preserve the President's enemy combatant regime, that is, including the denial of access to counsel. Doesn't that implicate the Inspector General where the Department of Justice is taking that position?

Mr. FINE. Well, we do have oversight over the Department of Justice. I will note that litigation decisions by Department attorneys are actually not subject to the Inspector General's authority. They are subject to the authority of the Office of Professional Responsibility of the Department of Justice, who has authority to investigate issues involving misconduct related to litigation, providing legal advice, and that kind of strategy.

So while we do have oversight in a broad sense over the Department of Justice, those kinds of particular issues have not been ones

where we have gone behind them and second-guessed the Department's policy issues or litigation decisions.

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

Senator SPECTER. Well, where the Inspector General is really intimately involved in the civil liberties issues, it seems to me that that is a dotted line.

A concern I have, Mr. Fine, is this: We passed the PATRIOT Act and gave the Attorney General vastly increased powers. And the Attorney General wants to come back and have another PATRIOT Act. And when you have a series of cases—and I compliment you on your report, and I agree with you said this oversight hearing is very salutary.

One of the great problems is that this Committee is so busy, just incredibly busy. We were on the asbestos markup for hours, and we are going to do it again tomorrow. We have so many hearings. We do not have the time to do an adequate job of oversight. And when these cases get into the court, there are very, very long delays. It would seem to me that the courts ought to be expediting these issues where people are in detention to make judgments because they bounce back and forth.

But it also seems to me, Mr. Fine, that you ought to take a close look where the Department of Justice is acting, and the internal decision to make it to the Office of Professional Responsibility I would suggest does not bind you, that you have broad powers as Inspector General. And the Congress has been very active in giving those broad powers.

When I chaired the Intelligence Committee in the 104th Congress, we had a big fight about creating an Inspector General in the CIA. And we did that because we expect you to be aggressive and tough. You are a governmental employee. But I would urge you to move into those gray areas and to cross those dotted lines. And I say that really to help the Department of Justice and to help America.

If there is not public confidence in what is going on, and as 9/11 recedes, there is lesser public concern, and I think it is unfortunate because I think we really are at risk. And I think we have to have strong security measures. But when these detainees are treated as they are and you have a group of cases where people have been in detention, cannot consult with court-appointed counsel on the statement that it may get back to the enemy, where there is not a statement which satisfies the court as to enemy combatant status, I think the Department of Justice would be well served by having an aggressive Inspector General so there is public confidence. Because when Attorney General Ashcroft—and he used to sit in this chair, and he was pretty tough on witnesses, a lot tougher than—well, not as tough as Senator Hatch, but tougher than I am. But you will be serving him very well if you try to ease the public concern so that when he comes back for the next PATRIOT Act we do not have a wave of public opposition and we can feel confident in what the Department of Justice is doing. And we are looking to you, Mr. Inspector General.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

We are going to go vote. We are going to let you go, Mr. Fine. We appreciate your testimony. You have been a good public servant. You have really done a very good job here, and, frankly, we have appreciated what you have had to say.

Well, I have been informed that Senator Schumer wants to ask you some questions, but we have three votes, so you are going to get stuck here for upwards of an hour. Senator Kennedy also.

So we will be back as soon as we can. We will recess until we can get these votes over with and I can get back.

[Recess 11:13 a.m. to 12:12 p.m.]

Chairman HATCH. We are going to turn to Senator Schumer now for 7 minutes, and if he goes over, I am going to cut him off, as I have done with everybody so far. So just be forewarned, Senator Schumer. If you would like, you can come sit by me.

STATMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman.

First, I want to thank you, Mr. Inspector General, for your fine report, and I guess I would like to make a few general comments here.

To me, the key in all of these things is balance, and I have always had objections to people on both sides. People on the far left say, "Never change anything. You cannot adapt to the new circumstances." People on the far right say, "Hey, we can sort of throw out the whole thing." And in a new changing world, balance is careful—balance is hard to achieve because you are recalibrating, you have a new fact base, et cetera.

And so I guess what I would say here is the best way to deal with these things, all of these changes, these sort of post-9/11 changes, when you are dealing with the age-old problems of how to balance security and liberty, is that there ought to be discussion, there ought to be justification. Well, that is first. In other words, if you are going to take away any liberty, there has to be a justification for it. That is number one.

Number two is discussion. There should be open and broad discussion. I think many of the things that the Attorney General has done are very defensible, but he does them sort of by fiat. He does not first say, "Here is the problem, here is what we are trying to do, I welcome comment," and lots of people just sort of go off and get overly worried because he is not doing as much as they had feared.

And, third—and this is, I think, what is key here—there should be some rules and there should be some independent check that those rules are being carried out. We should not do this on an ad hoc basis. And I think with the detainees we can learn all of that.

When it first happened, it is hard to fault DOJ that they believed it would take only a few days to clear detainees who were not tied to terrorism. And let's remember that these detainees were not American citizens. They have some rights. There are some who believe anyone should have all the panoply of the Constitution, whether they are a citizen or not. I do not agree with that. That has never been the philosophy of this country, and there should be

some rights and there should be rules. But it does not mean that you get the same rights as being an American citizen.

But, in any case, that is how it looked at the beginning, and it seemed to just go on and on and on, and people clearly were abused. The average length of time from arrest to clearance was 80 days, and for some it took more than 3 months. To hold people incommunicado, to not charge them with anything, to not allow communications for a short period of time is justified. We even do that with citizens, you know, for 48 hours or 72 hours. To do it for too long a time is wrong, and no one came in and re-examined and said, "Hey, this is taking us more than 2 weeks What do we do? What should be our rules? What should be our standards?"

I hope in the future that the Justice Department will adapt them. There is a requirement that DOJ—there is a dispute whether it is legal that you cannot be held more than 90 days to be deported. I do not know if you think that is a legal—let me just ask you that. I have a few more things I want to say, but the one thing I want to ask you is: Do you think that is a legal requirement, or has that just sort of been a standard that can be raised or not?

Mr. FINE. Well, there is that regulation, and it is an issue. But the question is whether beyond 90 days you can still detain an alien if you are still investigating the alien for terrorism.

The Office of Legal Counsel of the Department of Justice opined, based on its review of the regulations and the Constitution, that it is permissible. Others believe that it is not, and it is the subject of ongoing litigation. We did not take a position on that, but we pointed out that as an issue, and an issue that should have been addressed, as you point out, at an early stage. I think that it is absolutely critical that these legal issues ought to be carefully considered at an early stage of the—

Senator SCHUMER. And you would certainly say that given the experience—and, again, I am not one who wants to whip the Justice Department or anything. 9/11 occurred and, you know, those on the left who say this is just like the internment of the Japanese, that is way overboard. Mistakes were made, but, on the other hand, the two are not even comparable.

But don't you believe that the Justice Department should try now to come up with some rules for future situations in case, you know, and say here is the amount of time you can be held without being informed of what the charge is, here is the amount of time you can be held incommunicado? And then there might be an escape valve for very unusual situations, but in those cases, I would recommend you go to some independent source outside of Justice, an Article III judge. This works with wiretaps eminently well rather than do—tell me what you think about that kind—in other words, if I had to learn from this instead of just browbeating the Justice Department, which I don't think is fair in this case even though mistakes were made, and I have great sympathy for some who were held too long. Every person here did violate the law, as it turns out. That is right, isn't it? Because they are illegal aliens.

Mr. FINE. All but one.

Senator SCHUMER. All but one. But it wouldn't be to browbeat the Justice Department but, rather, to say what are the new rules so this does not happen again, and yet we can protect our security.

Would that be a fair summation of where we ought to go from here in your judgment?

Mr. FINE. I do think it is fair to use this situation or use this report as an opportunity to learn lessons, as the title of the hearing is, to see where there were problems and try and avoid them in the future. That was our purpose in laying out the facts, and that was our purpose in offering 21 recommendations for improvement should a similar situation, larger scale or smaller scale, arise in the future. So I do think that is a benefit of this kind of report.

Senator SCHUMER. Good. There were some more serious allegations of abuse which trouble me, you know, slamming into walls, dragging by the arms, stepping on the chain connecting ankles, slurs and threats. How widespread was that?

Mr. FINE. I would say that it is not the entire institution. It is not everyone in the MDC, and we did not find that there was an organized policy to condone or encourage that.

We did find that there were, you know, some—evidence indicated that some, a handful of correctional officers did engage in this abuse.

Senator SCHUMER. A handful means less than ten?

Mr. FINE. I don't know the exact—I wouldn't want to say the exact number because it is ongoing, but, yes, I would say there is not a widespread pattern of abuse by most correctional officers at the MDC. I think that would be unfair to say.

Senator SCHUMER. Right. And there was, of course—only 60 percent, as I understand it, at MDC were notified within 72 hours. The average time between arrest and notice of charge was 15 days.

Mr. FINE. At the MDC that was the average time.

Senator SCHUMER. And that should be corrected, too.

Mr. FINE. I think that is something that should be corrected. The INS had an unstated rule that they wanted to notify people within 72 hours. I think that ought to be made a requirement.

Senator SCHUMER. Yes. But just again, because some of the news reports made it seem, I think—you know, when I read this stuff, I said, hey, some mistakes were made but they weren't so far out of line that this is a huge blot on our National honor that will be there like the Japanese interment was.

Overall, can you give us some characterization of how good a job under these trying circumstances the Justice Department did with these detainees? I know that is hard to do, but it is important because, again, I think you get people on each side who overblow this.

Mr. FINE. I think your comments are fair, Senator Schumer, in that some have taken this on one side to say—to exaggerate what was said in the report, and others have taken it and said, well, there were no problems whatsoever. I think that it is in the middle and that we tried to lay out in very careful detail what the facts were, what the problems we thought were, so that people could make their judgments. But I do think balance is appropriate, so I wholly agree with you.

Senator SCHUMER. So, in other words, on a one to ten, with ten being egregious abuse and one being everyone fine, this is in the four, five, six range, maybe, three, four, five kind of thing? I am not asking you to give it a number. I am just trying to—

Mr. FINE. I am not sure I could give it a number, but I do think your comments are correct, that you have to keep a balance of the situation that confronted the Department, the chaos, the uncertainties, but also look at it to see what the problems were.

Senator SCHUMER. Right. And you—

Chairman HATCH. Senator, your time is up.

Senator SCHUMER. Just one point I would make, Orrin?

Chairman HATCH. Make one last point.

Senator SCHUMER. One more, because you will have sympathy with it. I am sure if you did nothing and then, God forbid, one of these people committed a terrorist act, all the articles would be the other way: What the heck? Why didn't you do it? You didn't move quickly enough.

These are very easy things to guess in hindsight, and I think the Justice Department didn't do a great job, but under the circumstances, as long as they move to correct it in the future, the changes, you know, doesn't deserve the kind of opprobrium that I have heard from some quarters about this. That would be my view.

Thank you, Mr. Chairman.

Chairman HATCH. That is my view as well. I really believe—

Senator SCHUMER. I told you you would like my last comment.

Chairman HATCH. Listen, I like most everything about you except some of the questions from time to time.

[Laughter.]

Senator SCHUMER. Which you will not characterize.

Chairman HATCH. I will not. I think I have done enough characterization. No, I care a great deal for you. I just wish you would be as reasonable on other matters.

[Laughter.]

Chairman HATCH. Mr. Fine, you have been very helpful to us here today. I get a big kick out of some of these people who think you have got to have a big show here to get to the bottom of oversight matters. I think you have provided us with the correct approach here. You have not whitewashed anything. You have talked very strongly about the defects and the deficiencies in our Justice Department and our FBI, our prison system, among other things, and I personally respect you very much. I think your report is a work of great honor and will help all of us to do a better job in this Government, regardless of ideology. And that is the way it should be. And I think the folks who supervise you ought to be proud of what you are doing, and I personally am.

Senator Kennedy is going to submit questions for you. He has been called to some other things. Otherwise, we would have continued to wait. But we are going to let you go now, and I am sorry you had to wait for that extra hour, but it was important that Senator Schumer have his opportunity to talk to you.

Mr. FINE. Thank you very much, Senator Hatch.

Chairman HATCH. Thank you so much. We appreciate it.

Now, our second panel of witnesses from the Justice Department is well suited to assist the Committee in conducting its oversight responsibilities. These witnesses from the Department and its component parts are those who can fully address the specific concerns and recommendations in the IG's report as well as the efforts that have been taken to address the problems highlighted in the report.

Mr. Lappin is the Director of the Bureau of Prisons. He is the BOP official ultimately responsible for the conduct and management of the Federal prison system and can address any specific concerns Committee members have regarding alleged treatment of the 9/11 detainees.

Mr. Rolince I am very familiar with. He has testified many times in front of the Senate Select Committee on Intelligence. He is one of the true leaders in this country. He performed a crucial role at the FBI in the days following the September 11th attacks. At the time he served as Chief of the International Terrorism Operations Section in the Counterterrorism Division. He was actively involved in the overall PENTTBOM investigation, including the investigation of detainees described in the report.

Last, but not least, is Mr. Nahmias. He is Counsel to the Assistant Attorney General for the Criminal Division. You cannot have better people than these three. His primary responsibility is the supervision and coordination of the Department's terrorism investigations around the world, particularly those associated with the Al-Qaeda organization.

So I want to thank you all for being here today. This is a very important hearing, and we look forward to your testimony. We will start with you, Mr. Lappin.

STATEMENT OF HARLEY G. LAPPIN, DIRECTOR, FEDERAL BUREAU OF PRISONS, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. LAPPIN. Mr. Chairman and members of the Committee, I appreciate the opportunity to appear before you today to discuss the various issues raised by the Department of Justice Office of Inspector General's report on the September 11 detainees. The OIG plays a crucial role in providing objective oversight and promoting efficiency and effectiveness within the Department of Justice. We appreciate the opportunity that the Inspector General provides to help us continue to improve.

On September 11, 2001, this country experienced events that we have never faced in the history of our Nation. In the months following these tragic events and continuing today, the Department of Justice's central mission has been protecting Americans from further acts of terrorism. The Bureau of Prisons helped in that effort and continues to play a significant role in the war on terrorism.

We continue to work closely with the Federal Bureau of Investigation and other components on the largest criminal investigation in the Nation's history to bring to justice the individuals responsible for the tragedy of September 11 and to prevent future acts of terrorism.

Within days of the terrorist attacks on September 11, the Bureau of Prisons was tasked with detaining aliens deemed by law enforcement to be of great significance to its terrorism investigations. In the months following September 11, we had 185 detainees incarcerated at several Bureau of Prisons facilities. The Metropolitan Detention Center in Brooklyn was one such facility and housed a substantial number of the detainees. Given its proximity to the World Trade Center, the institution suffered some substantial disruptions

to its operations. Nevertheless, the institution staff were able to keep the institution operating in a safe and secure manner.

Beginning on September 14, 2001, the Bureau of Prisons received detainees who were suspected of having ties to the terrorist organizations. However, limited law enforcement data was available on these individuals; law enforcement agencies lacked the standard data normally used by the Bureau to assess detainees. Thus, to ensure the safety of our staff and the public, we housed the detainees under the same conditions we employ for other persons believed to be capable of committing acts of violence, directly or indirectly. It was our concern about the indirect actions—specifically the threat that they could pose to the United States by communicating key information or directions that could lead to further acts of terrorism on U.S. soil—that contributed substantially to the greatly restricted communication with friends, family, and even counsel.

Tragically, on November 1, 2000, at our detention facility located in Manhattan, two detainees associated with Al-Qaeda brutally assaulted a correctional officer. The assault left the officer comatose for a number of days. He remains permanently impaired and will require assisted care for the remainder of his life. This event caused us to go back and carefully review many of our policies and procedures for housing offenders, particularly those suspected of violent tendencies. In fact, some of the decisions we made regarding the housing of September 11 detainees were intended to protect against just this type of event, particularly given the assailant's ties to Al-Qaeda.

The OIG report regarding the September 11 detainees contains allegations by some detainees that they were abused by one or more Bureau employees. We take all allegations of staff misconduct and mistreatment very seriously and investigate every allegation thoroughly. We do not tolerate any type of abuse of inmates. When allegations of serious abuse are accompanied by credible evidence, staff members are often removed from contact with inmates or placed on administrative leave. We refer serious cases of staff misconduct for criminal prosecution when warranted.

With respect to the detainees, the Bureau referred any and all allegations of abuse that we became aware of to the OIG. To our knowledge, all allegations by the post-September 11 detainees housed at Brooklyn have either been investigated and found to be without substantiation or are currently being investigated. If these allegations of misconduct are substantiated, I want to emphasize that the Bureau will take appropriate and decisive action. However, in the 21 months since the Bureau began detaining individuals related to the September 11 investigation, the Bureau has not been provided with any information from the OIG that any charges are going to be brought against any employees or that any administrative misconduct has been substantiated.

In closing, I am proud of the work of the Bureau of Prisons and its staff as they accepted the challenges of this truly unique situation. The Bureau continues to effectively meet the mission to protect society by confining offenders in facilities that are safe, humane, cost-efficient, and appropriately secure. We take this role and our expanding role in the fight against terrorism very seriously.

Mr. Chairman, this concludes my prepared remarks. I would be pleased to answer any questions you or other members of the Committee may have. Thank you.

[The prepared statement of Mr. Lappin appears as a submission for the record.]

Chairman HATCH. Thank you, Mr. Lappin.

We will turn to Mr. Rolince at this point.

STATEMENT OF MICHAEL E. ROLINCE, ACTING ASSISTANT DIRECTOR IN CHARGE, WASHINGTON FIELD OFFICE, FEDERAL BUREAU OF INVESTIGATION, WASHINGTON, D.C.

Mr. ROLINCE. Mr. Chairman and members of the Committee, on behalf of the Federal Bureau of Investigation, I would like to thank you for the opportunity to discuss the Inspector General's report on the September 11th detainees. I would also like to recognize the Inspector General and his staff for their efforts in putting the report together.

The FBI is aware that delays in the clearance process led to some extended, but legal, detentions. I believe delays in our clearance process and inconsistencies in the classification of detainees, while unintentional, should be recognized, as should the fact that each of the 762 illegal aliens was lawfully detained. The Office of the Inspector General pointed out possible areas of improvement, and we are in the process of closely examining their findings and, in concert with the Department of Justice, implementing recommendations that we believe will improve the process in the future. We will certainly work with the OIG as we continue our ongoing efforts to improve the FBI's counterterrorism program.

That being said, I think it is important to understand the context in which these detentions occurred.

In the days, weeks, and months after the terrorist attacks of September 11, 2001, the FBI by necessity worked under the assumption based on consistent intelligence reporting that a second wave of attacks could be coming. We did not know where, when, or by whom, but we knew that the lives of countless Americans could depend on our ability to prevent that second wave of terror. The pressure placed on both law enforcement and the intelligence community was tremendous, and we certainly had more questions than answers.

If air travel resumed, would one or more planes slam into a building full of people? Could the attack come in another form, such as chemical or biological? We had to proceed with an excess of caution because the consequences of releasing someone who really was a terrorist could have cost thousands of lives. And given the choice between finishing checks on those already in custody or locating and neutralizing the seemingly endless threats that were still being reported and investigated, we made a conscious decision to prioritize and neutralize potential threats first.

In addition, given the primary goal of protecting the security of the American public, the FBI believed it would have been irresponsible to simply release individuals who not only were in the country illegally but also were potential threats or who may have crucial information related to the attacks, particularly given that the Federal Government had the legal authority to detain them based

upon their illegal presence in the United States. In fact, the OIG report recognizes and agrees with the priority of prevention over investigation in the days following 9/11.

In order to put the 9/11 response in proper perspective, it is important to understand the responsibilities of the International Terrorism Operations Section within the FBI's Counterterrorism Program in the years that preceded these unprecedented attacks. As Director Mueller noted recently, prior to 9/11 we had only 535 special agents assigned to international terrorism matters worldwide and only 82 agent and support staff serving at FBI headquarters. In spite of that finite staff, our response to the threats posed and the resultant successes should not go unrecognized. As you now know, Osama bin Laden and Al-Qaeda were subjects of sealed indictments obtained prior to the attacks on our embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya, on August 7, 1998. Following those attacks, the FBI deployed over 1,000 agents and later secured the indictments of 23 individuals responsible for the deaths of 244 persons to include 12 Americans and the wounding of over 5,000 mostly Kenyan and Tanzanian citizens. The FBI in concert with the United States Attorney's Office in the Southern District of New York gained convictions of four subjects, and we await the extradition of three others currently in custody in the United Kingdom.

Additionally, the FBI's International Terrorism Operations Section, known as ITOS, was responsible for coordinating the forensic deployment to Kosovo, the massive investigation and offshore recovery efforts following the October 1999 crash of Egypt Air Flight 990, the response to Al-Qaeda's December 1999 millennium conspiracy to attack us in the United States, Jordan, and Yemen, and the October 12, 2000, attack on the USS Cole in which 17 brave U.S. sailors lost their lives.

While those investigations consumed significant resources, we remained committed to and actively involved in dozens of extraterritorial cases to include the June 1985 Hizballah hijacking of TWA Flight 847 which ended in the brutal murder of U.S. Navy diver Robert Stetham. The United States holds three of the top 22 international terrorist fugitives responsible for that crime.

I would be remiss if I did not point out that today we meet on the seventh anniversary of the June 25, 1996, attacks by Saudi Hizballah at Khobar Towers which resulted in the deaths of 19 courageous airmen. Thanks largely to the tireless efforts of former FBI Director Louis Freeh, 5 years after the attack, a painstaking and at times frustrating investigation reached a milestone. Thirteen individuals were indicted in the Eastern District of Virginia, four of whom remain on the Top 22 International Terrorist fugitives list.

Additionally, ITOS coordinated the FBI's response to the kidnappings and murders of Americans by the Abu Sayyaf in the Philippines and by the FARC in Colombia. In fact, on April 30, 2002, Attorney General Ashcroft announced the indictment of six FARC members charged with killing three Americans in 1999. ITOS also coordinated the FBI's response to the killing of U.S. citizens over a 20-year period by the terrorist organization 17 November in Greece. The first killing attributed to 17 November was the

December 23, 1975, assassination of CIA station chief Richard Welch. Today, 19 defendants are currently on trial in Greece for the murder of 23 people including four Americans.

Simply stated, Senators, the men and women in ITOS were fully engaged in the war on terrorism and applied every resource available.

In the aftermath of the 9/11 attacks, the FBI's response was immediate. In a matter of hours, we had deployed to each of the crash sites, ordered dozens of seasoned management personnel back to Washington, and fully staffed a 24/7 operation at our Command Center with up to 500 persons representing 30 agencies. At the height of the 9/11 investigation, known as PENTTBOM, the FBI assigned 7,000 agents to assist full-time. The majority were reassigned from other national security and criminal investigative work. The lack of prior counterterrorism training and experience, although not recognized by the OIG, needs to be factored into this discussion.

Before the month was out, we were faced with another unique attack—anthrax. Not knowing whether we faced a domestic threat, an international threat, or a follow-on attack by Al-Qaeda, we again responded with significant resources as we dealt with an unknown killer or killers, first of Florida, then in New York, and finally here on Capitol Hill. Additionally, we turned our attention to the kidnapping of journalist Daniel Pearl and the crash of an American Airlines flight in Queens November 12, 2001. In order to ensure the security of the Winter Olympics in Salt Lake City and drawing lessons from the prior attack in Atlanta, we deployed over 1,100 agent and support personnel in addition to those assigned to the Salt Lake City office.

Meanwhile, PENTTBOM became the largest and most complex investigation in the history of the FBI. In spite of operating under severe handicaps, the New York office—relocated to a garage on 26th Street, and lacking a proficient infrastructure—began a 24/7 operation utilizing 300 investigators from 37 agencies. The 1–800 toll-free line set up in our Atlanta office received 180,000 phone calls from a shocked public eager to assist; 225,000 e-mails were received on the FBI's Internet site. Evidence response teams from throughout the country were dispatched to New York, Washington, and Pittsburgh.

Nationwide we covered over 500,000 investigative leads and conducted 167,000 interviews. We collected over 7,500 pieces of evidence which were submitted for analysis. Working in conjunction with New York City agencies and authorities, we helped process over 1.8 million tons of debris for victim identification and investigative lead purposes, and we took over 45,000 crime scene photographs.

As this massive investigation unfolded, the concern of follow-on attacks was critical to our thinking and to our development of an investigative strategy. As investigators came upon individuals who were in this country illegally, it was absolutely essential to determine to the extent possible any connection to the attacks and the threat posed by them, if any. To do otherwise would have been irresponsible, if not negligent.

As for the clearing process itself, the OIG report states that some investigations were straightforward. That is true, but even so-called straightforward investigations take time. Many of the investigations were far from straightforward. For each detainee we had to conduct a preliminary investigation. This is more than a name check or a Lexis-Nexis search. It often requires getting court-approved checks for phone records and computer records. It may involve translation services, multiple interviews, surveillance, and other time-consuming work.

This policy was sound. We did not know who these people were. Some had numerous identity documents, and others had failed polygraphs on questions such as, "Did you know any of the hijackers?" or "Were you involved in the September 11th attacks?"

It is also important to clarify another point which I believe has been significantly confused in the media, and that is the issue of some individuals being "cleared" of terrorism ties. The fact that an illegal alien was prosecuted for non-terrorism crimes or deported rather than prosecuted does not mean that the alien had no knowledge of or connection to terrorism. For example, one immigration detainee who pled guilty to conspiracy to commit identification fraud and aiding and abetting the unlawful production of identification documents traveled overnight with two of the hijackers. The name and address of another immigration detainee, who pled guilty to identification fraud, was used by Al-Qaeda cell members in Hamburg, Germany, to attempt to obtain U.S. visas.

In many cases, the Department of Justice, in conjunction with the FBI, determined that the best course of action to protect national security was to remove potentially dangerous individuals from the country and ensure that they could not return. Charges may have been withheld in such situations if, for example, they could have compromised ongoing investigations or sensitive intelligence matters.

Many leads took us overseas and, therefore, took time to resolve. It would have been a disservice to the American public we work so hard to protect for the FBI not to check with the law enforcement and intelligence organizations of the countries of origin for name checks and traces in certain instances. Then, as now, we had no control over the length of time our counterparts overseas took to accomplish these tasks. Please do not lose sight of the fact that these investigations were taking place simultaneous with the investigation of the 19 hijackers, the processing of the crash sites, and the resolution of the second wave threats.

The OIG report concluded, "The Justice Department faced enormous challenges as a result of the September 11 terrorist attacks, and its employees worked with dedication to meet these challenges." I am pleased that the IG recognizes the dedication displayed by so many in the FBI, other Department of Justice agencies, and our local, State, and Federal partners on the JTTFs throughout this country.

At the same time, we recognize that we can always improve, and we have done so. Over the past 20 months, Director Mueller has refocused the FBI's priorities, and the Bureau has made great strides in adapting to its mission of preventing terrorist attacks. The changes we have implemented and others that are ongoing will

ensure that should we ever face a similar crisis, we will handle that crisis with even greater efficiency and speed.

As I mentioned earlier, the vast majority of special agents engaged in the PENTTBOM investigation in the early months were not experts in counterterrorism. Today, we have a much larger pool of agents dedicated to and trained in counterterrorism. We have greatly increased the number of strategic analysts, vastly improved their training through the new College of Analytical Studies, and provided them with advanced new software tools to enhance their strategic intelligence capabilities. We have hired nearly 300 additional foreign language translators. New "Fly Away Squads" are now on standby to lend specialized counterterrorism knowledge and expertise, language capabilities, and analytical support around the country and the world as needed. This particular capability was utilized in Buffalo, Detroit, and Portland to assist local FBI offices and recently in Morocco to assist our counterparts in their investigations.

We have new flexibility to mobilize additional personnel as needed. The newly created Office of Intelligence will enable the FBI to assess gaps, devise strategies, and implement plans for intelligence collection. It will help us quickly make the connections necessary to prevent terrorist attacks and to determine a subject or suspect's connections to terrorism with greater efficiency than ever before.

Today, we have better coordination and information sharing with our partner agencies than ever before, and yet we recognize the need for continued improvement. The number of regional Joint Terrorism Task Forces has been increased from 35 in 2001 to 66 today. The new National JTTF acts as a national liaison entity and transmits information on threats and leads from the 30 participating agencies at headquarters to the local JTTFs. We have CIA terrorism experts detailed to the FBI and our terrorism experts detailed to CIA. We are working with our former INS colleagues, now in the new Department of Homeland Security. The Bureau of Immigration and Customs Enforcement has and continues to play a critical role on our JTTFs.

The FBI acknowledges that our success is measured not only by how effectively we disrupt acts of terrorism, but also by how well we protect the constitutional rights and cherished liberties of American citizens in the process. We will continue to work to find new ways to meet both of these crucial missions.

Thank you, Senator, for affording me the opportunity to participate in today's discussion on this important topic, and I look forward to answering any questions that you may have.

[The prepared statement of Mr. Rolince appears as a submission for the record.]

Chairman HATCH. Thank you so much.

Mr. Nahmias, we will turn to you.

STATEMENT OF DAVID NAHMIAS, COUNSEL TO THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. NAHMIAS. Mr. Chairman, members of the Committee, on behalf of the Department of Justice, I want to thank you and the Committee for inviting me and my colleagues to appear before you

today to participate in this hearing. I have submitted a full written statement which I would ask to be included in the record.

Chairman HATCH. Without objection, we will put it in the record.

Mr. NAHMIAS. As the Attorney General recently testified before the House Judiciary Committee, the Inspector General plays a valuable role in the Department of Justice in critiquing our performance and recommending ways in which we can improve. To put the most recent IG report into context, however, I would urge you to remember that we experienced a crisis of unprecedented proportions during the months that followed September 11, 2001.

Beginning moments after the attacks, we took immediate steps to find out who had planned and executed the attacks, who had conspired with those terrorists, and who might be planning future acts of terrorism against our Nation. Senior members of the Department formulated a general investigative strategy in response to the September 11th attacks. The strategy was as follows:

First, to follow each of the many thousands and thousands of leads generated from the September 11th investigation;

Second, to identify individuals linked by those leads with the hijackers or other terrorists; to investigate those persons fully; and to charge persons if there was evidence that they had violated the law; and

Third, to make appropriate legal arguments in court to detain those charged persons until such time as we concluded that they were not part of the September 11th terrorist conspiracy or any other terrorist activity.

This strategy was built on the recognition that it can be extremely difficult to detect terrorists and terrorist plots and that every lead must, therefore, be pursued as far as possible, because even a single missed lead could be the connection to another catastrophic attack.

The Inspector General's report focuses on 762 aliens who were detained, pursuant to this strategy, during the course of the September 11th investigation; 762 aliens out of more than 167,000 witnesses interviewed by the FBI. All of the 762 detained aliens were in the United States illegally and were lawfully detained while their ties to terrorism were investigated. They were all charged with violations of the Federal immigration laws.

Examples of those detained include an illegal alien who was a roommate of one of the 19 hijackers and who also knew a second hijacker; and an illegal alien who admitted to the FBI that he had trained in terrorist camps in Afghanistan and who was linked to known members of a terrorist organization.

It should be understood that under the immigration laws, an illegal alien in removal proceedings is not entitled to bail or bond as a matter of right. It is a matter of discretion.

However, as the Attorney General stated during his recent testimony, the Department of Justice has no interest in detaining people any longer than is necessary to properly investigate them.

The Attorney General has reaffirmed the judgment that this investigative strategy was and is sound. We came across these people as a result of following leads about the 9/11 attacks. We knew that these people were here illegally, but we did not immediately know the details of their activities. If we had released or granted bond

to an illegal alien who went on to commit further additional attacks against the United States, we would have failed in our responsibility to keep this country safe.

Indeed, in the past the Inspector General has issued reports critical of the Department's failure to protect citizens from violence perpetrated by previously detained illegal aliens who were then released, removed, or allowed to depart, such as the Texas railway serial killer, Rafael Resendez Ramirez, and one of the 1997 Brooklyn Bombers.

In fact, just this last February, the Inspector General issued a detailed report that found that 87 percent of aliens who are not detained flee and elude their deportation orders. The risk after our experiences on September 11, 2001, was too great to take such chances.

I would like to respond briefly to the criticism that we have not brought terrorism-related immigration charges against these aliens. These detainees were all immigration law violators and, thus, removable on that ground alone. Unlike in the criminal system, the sanction for immigration violations—removal from the United States—does not increase if additional or more serious violations are alleged. Indeed, in the past, aliens who have been charged or detained based on national security concerns have then asserted claims for asylum based on the fact that they have been labeled as terrorists by the U.S. Government. The goal is to accomplish the right result—in this case, removal—in a manner that best protects the national security and uses our limited resources most wisely.

Likewise, as Mr. Rolince indicated, just because we do not charge someone criminally with a terrorism offense does not necessarily mean that the person has no terrorist ties. As in the immigration context, the decision not to charge in any criminal case may be made because, for example, while there is significant evidence of terrorist connections, the evidence is insufficient to prove terrorist activity beyond a reasonable doubt. Or it may be that we do not want to reveal sensitive intelligence sources or because other critical intelligence is classified or for other reasons.

It is also important to distinguish between our policy of detaining illegal aliens suspected of terrorist ties and the conditions of their confinement. As Mr. Lappin's testimony makes clear, we do not in any way condone the abuse of anyone who is held in Federal custody. The Inspector General's report discusses allegations that some specific detainees were abused and other problems with the conditions of confinement at one facility where 84 of the 762 illegal aliens were detained. As the Attorney General stated on June 5, "We do not stand for abuse, and we will investigate those cases...We don't tolerate violence in holding individuals, and that is not and will never be a policy of our Department."

The Department of Justice welcomes constructive criticism. We are still in the process of reviewing the recommendations of the Inspector General in detail. I would like to note that before the report was issued, the Department had already made adjustments that are consistent with several of the IG's recommendations.

In closing, I would like to emphasize four important points.

First, all of these 762 detainees were illegally in the United States and their detentions were legally and constitutional valid.

Second, it is clear that the vast majority of non-detained illegal aliens flee, even those who are not suspected of having terrorist ties.

Third, our central mission was and is to prevent another terrorist attack.

And, finally, the Department of Justice is always looking for ways to improve.

Mr. Chairman, I also wanted to comment in response to several questions about the process by which this report was generated and the comments that the Department provided. I think it is important, because it did not come out during Mr. Fine's testimony, to note that from the beginning of this process, the Deputy Attorney General's office requested of the Inspector General that if he found any problems that required immediate attention before his report was completed, that he communicate those to the Department's leadership so that we could understand what issues were out there and take action on anything that needed immediate attention.

The Inspector General in July of 2002, nearly a year ago, provided two comments regarding BOP processes. We reviewed those immediately and took action upon them. During the period from that time until the draft report was actually issued, we received no other information from the Inspector General regarding things that in his judgment required immediate attention. So I think it is important to point out that we treat the Inspector General process as a way of learning about potential problems in the Department, and we actually asked that while this process was ongoing, if anything that needed immediate attention was noted, that it be communicated to us.

With that, Mr. Chairman, I appreciate the opportunity to be here and hope to be able to answer any questions you or members have.

[The prepared statement of Mr. Nahmias appears as a submission for the record.]

Chairman HATCH. Well, thank you. All three of you have been helpful here, but we have some questions for you, if you do not mind.

We will put Senator Kennedy's statement in the record and another document that he has submitted as well. And maybe I can ask a couple of questions here and then turn to Senator Feingold.

Special Agent Rolince, one of the main points the IG makes in his report is that these so-called clearance checks could have proceeded on a timelier basis. And while I doubt anyone would dispute that had the clearances occurred more rapidly and many detainees would have been deported sooner, it is very easy for us in retrospect to sit here with 20/20 hindsight and make observations like that. And I do not think the American people can or should lose sight of the enormous and unprecedented challenges that you outlined in your statement and that the Bureau faced in the weeks and months after 9/11, which is also one of the points mentioned by the IG.

I know that, for example, your New York field office had to be relocated to a garage and at the same time was tasked with doing

much of the leg work in the initial investigations of the 9/11 hijackers. And one of the things I also think we need to understand is just what went into the Bureau decision to either clear or not clear a given detainee. It seems to me that once someone was cleared, they were gone. They were not there to be interviewed. They were not there to face any potential charge, and for all intents and purposes, they were irretrievable. I do not think there is any question about that.

And so it is not surprising to me in the least that the Bureau would want to err on the side of caution before issuing any form of clearance. So I guess a starting point for me is: Can you explain just what went into the decision on whether to issue a clearance? And I think we need to know what kind of information had to be gathered and from where. Was this information available within the Bureau, or did it have to be gathered from outside agencies and other sources? And, secondly, what type of things did the Bureau look for in deciding whether to issue a clearance?

Mr. ROLINCE. Thank you, Senator. I think you hit on a couple of very important points, and I think we would all agree it is difficult to sit in this room, much more difficult than it was to sit in the Operations Center or to sit in the garage in New York or in Shanksville, Pennsylvania, or over at the Pentagon and really get a sense of the urgency, on the one hand, and the seeming sense of despair on another, and couple that with the fact that we were convinced a second wave of attacks was coming.

The New York office, the largest in the Bureau, also suffered the most catastrophic attack. It is the office wherein the first attack on the World Trade Center took place and the conspiracy to bring down the United Nations, the Lincoln and Holland tunnels and commit other terrorist acts occurred. They made a conscious decision that everyone that was arrested by Immigration—and all 762 of these arrests were Immigration and Naturalization Service arrests—would be given a full investigation and a background conducted, checking every relevant database within the FBI, the CIA, the State Department, Customs, Immigration. Any bank that was out there that may contain information on these people was checked.

If within one of these investigations information surfaced to the group that did prioritize this in New York and that was put together specifically to do nothing but the detainee issues, if the authority issuing the clearance letter—in this case, Ken Maxwell, then the Assistant Special Agent in Charge—decided there was something about the investigation that had been done that required further scrutiny by people steeped in counterterrorism, that it would then move over to the Joint Terrorism Task Force. And this touches on Mr. Fine's point about resources, while the FBI also has all these Joint Terrorism Task Forces, they could have used, and we would have used, and we should have used, and we did use.

The Joint Terrorism Task Force in New York consists of 30-some-odd agencies, over 400 NYPD detectives attached to it. So in a case wherein we thought there was something more that needed to be investigated or scrutinized, that was moved from the detainee squad over into the JTTF, and that took time.

Chairman HATCH. Okay. Let me go to you, Director Lappin. The Inspector General's report contains serious allegations of physical and verbal abuse of some of the 9/11 detainees. Now, during his investigation, the IG interviewed detainees who complained of such abuses as well as correctional officers who had contact with these detainees.

Not surprisingly, there are disputes about what actually happened and what actually occurred. Some of the detainees have alleged that they were abused by officers without provocation. In at least one instance, an officer has claimed that a detainee reacted violently when being moved. According to the IG, after 9/11 the Bureau of Prisons installed surveillance cameras to monitor the detainees' activities. However, the Bureau of Prisons did not retain these videotapes for very long, and it goes without saying that videotaped records would have been helpful in evaluating such claims of abuse or misconduct.

Now, what are the Bureau's future plans with respect to surveillance cameras inside the BOP facilities?

Mr. LAPPIN. Thank you, Mr. Chairman. Let me first state again for the record that mistreatment of inmates by staff in any correctional setting is totally unacceptable. We take all allegations of mistreatment seriously and do our very best to investigate all those allegations thoroughly.

Considering the fact that we at times receive allegations of mistreatment, realizing the emotion of the situation related to the detainees, the staff took it upon themselves at MDC Brooklyn to install cameras. It was intended to record interactions between staff and inmates. Our policy only requires recording of staff-inmate interactions during an emergency situation, if one is available, and during a forced cell move or a calculated use of force in a particular case to remove an inmate. So what we did was actually above and beyond what policy requires us to do.

However, we did record interactions between staff and inmates. As you can imagine, that ongoing recording resulted in many tapes, and certainly cost and maintenance of those tapes became an issue.

Our policy on this issue was to retain tapes of those situations that had been brought up in reference to allegations. So if a detainee made an allegation, we would not destroy those tapes. Or if there was a use-of-force incident, we would not destroy those tapes.

Chairman HATCH. Do you have the tapes now?

Mr. LAPPIN. Yes, we have the tapes on some situations where inmates were forcibly removed from their cells, and in some cases, at least one, where allegations were made, we have retained those tapes.

We set a 30-day time frame because it is our policy that an inmate has 20 days to file a complaint or a grievance with the warden on treatment or any other issues. We extended that to 30 days just in case someone brought it to our attention. But after a 30-day period, if there were no allegations, at that point we saw no need to continue to retain those tapes that did not have related allegations or uses of force attached to them.

Chairman HATCH. Okay. My time is up, but I am going to submit questions, and we will keep the record open until 5 o'clock today for any members of the Committee to submit any questions or

statements that they care to submit. I will put Senator Grassley's statement in the record as well.

We will turn to Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Let me just say to all of you, thank you, and I want you to know that I sincerely admire what you are charged with doing, the incredible difficulty of what you had to do after 9/11, and your continuing responsibilities to prevent terrorist attacks on the American people. I do not think there is any other more important job in this country, and that is sincere.

We do have to ask you questions about this report because it is troubling, and I want to first ask Mr. Nahmias, if I understand your testimony correctly, neither you nor the Department refute any of the findings, conclusions, or recommendations in the OIG report. Is that correct?

Mr. NAHMIAS. Senator, I think with regard to the findings and the recommendations, we have learned a lot from the report, and we may quibble over minor details, but there is nothing at all significant about the report that we refute. We have found it to be very educational for us, and with regard to the recommendations, we agree in principle to all the recommendations, and we are preparing detailed responses as the IG has requested in the next couple weeks.

Senator FEINGOLD. I appreciate that answer.

Mr. Rolince, I understand that you filed affidavits in the bond proceedings of September 11th detainees who were held on immigration violations. How many of the 762 INS cases, with regard to how many of those did you submit an affidavit?

Mr. ROLINCE. Senator, I do not have an exact count. I could certainly get that for you. And I moved away from the process in January of 2002 when I moved over to the Washington field office. So my number would not be the total number that I think you are probably looking for. I could give you a rough approximation of maybe 20 to 30.

Senator FEINGOLD. Okay. I am told that in your affidavit you articulated a theory for the investigation called the mosaic theory, which, as I understand it, is the idea that there are different pieces of an investigative puzzle and a particular person plays a particular role in the big picture, a crime or, in this case, terrorist activity. Is that right?

Mr. ROLINCE. Yes, sir.

Senator FEINGOLD. In how many of those INS cases in which you submitted an affidavit did you have evidence of criminal activity concerning the specific individual whom the Department was seeking to hold without bond?

Mr. ROLINCE. Again, I could not give you an exact number. I can certainly find that for you. But there were instances when we became aware of suspicious activity on the part of different individuals. Two people down in Texas that were taken off a train, for instance, comes to mind. They had box cutters and shoe polish and an inordinate amount of money. And it just looked suspicious on the front end. We did not get a lot of cooperation, but ultimately they would plead guilty to charges relative to that money. And I believe there were some sort of bank fraud charges.

So there were a finite, a very finite number of cases wherein information of criminal activity came to our attention, and in order to be able to fully vet that information, we would put one of those letters before the court.

Senator FEINGOLD. But as I understand your answer, there were quite a few of these affidavits where there was not evidence of criminal activity. Is that correct?

Mr. ROLINCE. That is correct. The vast majority of those letters went forward simply because we were not convinced that we had all the answers to the questions or all the record checks were back, and we clearly erred on the side of caution.

Senator FEINGOLD. So the Government submitted affidavits in INS cases in support of the Government's desire to deny bond, and in many of these cases, you did not have specific evidence of criminal activity or terrorist activity with regard to the individual with respect to whom you are seeking to detain?

Mr. ROLINCE. That is correct. And I think it is also worth pointing out, sir, that on occasion those letters were brought to me and I read them, and I refused to sign them, for lack of a better word, because I just did not feel that we had justified and uncovered enough information to ask a judge to extend that.

Senator FEINGOLD. But in many cases, they were signed?

Mr. ROLINCE. Yes, sir.

Senator FEINGOLD. Okay. Did you know that in almost every one of these cases the individual did share the same religion or ethnicity as the September 11th hijackers?

Mr. ROLINCE. Thank you very much for that question, Senator. No, I did not know that. I should not know that. There is no reason that we should ask that. It did not play any role whatsoever in the 9/11 investigation, and I would submit that it should never play any role whatsoever in any FBI investigation, with relatively few exceptions. Maybe in the hate crime area, you might want to know that. But I categorically—

Senator FEINGOLD. Would it be fair to say that—you know, to take two other very large immigrant communities in the United States, Mexican nationals or Chinese nationals, were there members from these groups picked up and detained on immigration violations without bond in connection with the September 11th investigation?

Mr. ROLINCE. There were members of other nationalities who, upon our making a determination on the Immigration and Naturalization Service making a determination that they were out of status, they were, in fact, arrested. For instance, there were two individuals of Russian ethnicity who I am aware of were observed by a motorist filming within either the Lincoln or the Holland Tunnel. The police pulled them up coming out at the end and they were arrested.

Senator FEINGOLD. Would it be fair of me to suggest that the number of people who were in those categories would be a handful of the 762, at best?

Mr. ROLINCE. Of?

Senator FEINGOLD. Not being of the same ethnic or religious background as the September 11th hijackers.

Mr. ROLINCE. I believe the majority of the 762—and we can check this—were Pakistanis. So it would be accurate to say that there were not great numbers of other ethnicities, yes.

Senator FEINGOLD. In fact, it would be far more than a majority? Wouldn't it be fair to say it would be far more than a majority that were of the same religious background?

Mr. ROLINCE. I would not know what religious background they were. We should not ask that question. I do not think we gathered that information. Somebody might know it, but I hope the FBI does not.

Senator FEINGOLD. Well, isn't it the case that they were nationals of Arab or predominantly Islamic countries in almost every case?

Mr. ROLINCE. I think that is fair to say, sir, yes.

Senator FEINGOLD. Fair enough.

Mr. Nahmias, I think everyone can agree that it might be proper to arrest and detain individuals who would pose a flight risk or a danger to the community, and that is what the law provides. The problem, though, is that the department appears to have not had the facts to support a determination in every case that someone was a flight risk or a danger to the community. Instead, it appears that ethnicity or religious background may have been used as proxies for real evidence of criminal activity.

Can you tell us here today that for each of the 762 individuals arrested on immigration violations and held without bond the Department had a factual basis to believe, not based on ethnic or religious stereotyping but real facts, that an individual was tied to terrorism and posed a danger to the community or a flight risk?

Mr. NAHMIAS. Yes, Senator Feingold. I begin that by saying, to reiterate what Mr. Rolince was saying. With regard to ethnicity or religious background, these were people who were come across in the course of pursuing 9/11 leads. And if that led to—it did not matter which ethnic or religious background the person had. If they were here and they were illegally here, as a part of the 9/11 investigation they would be arrested on immigration law violations.

We then sought to clear them. In going into court and seeking detention, it is also important to point out that under the immigration laws, illegal aliens do not have a right to release. And we were very concerned because we know—and the Inspector General has more recently told us in a very formal way—that if we release someone, there is an 87-percent chance that we will not see that person for their scheduled deportation.

So in going into court and laying out the facts that supported a detention decision, sometimes they were very specific, and sometimes, particularly in the early part of an investigation, the facts that were presented to a judge, an immigration judge, were largely the fact that this person had been arrested in the course of pursuing a 9/11 lead, and we were trying to determine where he fit in the investigation. All of those facts were submitted to immigration judges, who then, I believe with very few exceptions, held the person without bond.

It is also critical, I think, to recognize that it is extraordinarily difficult in many cases to identify who terrorists are. To give a couple of examples of that, we learned very quickly after September

11th that among the 19 hijackers, there were 17 of them whom the kind of quick checks, background checks, name checks, CIA traces, and checks for other clear illegal activity, would have gotten us nowhere. Seventeen of them had come in under the radar and remained under the radar. And so we knew from that example that it was going to be very difficult to figure out who might be here as a sleeper agent.

To give you another recent example that has just come out in the last couple days, the person who was designated as an enemy combatant by the President on Monday was originally come across by the FBI in the course of pursuing a routine 9/11 lead—very little of a lead to start with. He was interrogated, interviewed voluntarily in September of 2001, and nothing came of that. There was no other real development of the case at that point. And because he was here legally at that point on a student visa, he was not arrested, because we do not arrest people who are here legally. And he was allowed to remain in the community. There was some ongoing investigation, and it was only over the course of the next couple months that we developed through further investigation clear evidence that he had contact with an Al-Qaeda terrorist operative connected to 9/11.

And so in December, he was approached again, interviewed, and when he denied that contact and we were not able to clear things at that point, he was actually made a material witness. And that has been made public since that time.

Now, by that point, he was also in violation of his student visa, and INS put a detainer on him. And had he not been made a material witness, he would have been held under this policy until the investigation was completed.

Then after the material witness period, he was charged with criminal offenses that did not involve terrorism. They involved credit card fraud and making false statements. And the investigation continued, now with him at least detained, for more than a year. And it was only a couple of months ago that we received information from high-level Al-Qaeda operatives that he, in fact, had been sent to the United States just before September 11th as an Al-Qaeda sleeper to help operatives coming into the United States after September 11th to plan additional attacks against the United States.

I think it is important to look at that type of example of how an investigation develops, because the reality is that, had he been here illegally when he was first encountered in September, he would have been arrested under this policy, and he would have been safely in custody between September and December when we got enough information to at least make him a material witness and then to charge him criminally. And even at that point, we had not figured out that he was, in fact, clearly a terrorist.

I would have been much happier and we would have been much safer had he been off the street from September to December under this policy than the way things played out, where he was here legally and we allowed him to stay out.

So I think it is critical to understand in presenting this information that we were operating in a world where it is almost impossible to figure out who these people are unless we get some breaks.

Senator FEINGOLD. Well, I appreciate that answer—

Chairman HATCH. Senator, can you wrap it up?

Senator FEINGOLD. Will there be opportunity for a second round?

Chairman HATCH. I want to—

Senator FEINGOLD. I tell you what. If you will just let me ask one more question, after this I will—

Chairman HATCH. Sure. That would be fine.

Senator FEINGOLD. I want to just follow up on this question and one other question.

Chairman HATCH. That would be fine. And Senator Leahy has asked me to keep the record open for one week, and we will do that, for any further questions.

Senator FEINGOLD. I allowed the witness to give an extensive answer, First A, because I believe it is terribly important for members of the Committee to understand what you are trying to accomplish here and how important it is; second, I wanted to understand this example you were using. This was an example not of somebody who was detained on the basis of an immigration violation. This is somebody who, as I understand, was a material witness.

As I understand the IG's report, it does not relate to those who were detained on the basis of material witness. This is not—isn't that correct? I understand from the IG's report that that is not one of the categories that was addressed by the IG's report. Isn't that correct?

Mr. NAHMIAS. That is correct.

Senator FEINGOLD. So I wanted to hear your example because I think it is important, but it does not relate to the question directly of these 762 individuals. I take your point, which is that had this person been detained because he had an immigration violation, then you could have more easily pursued him. And I think that is a fair point. I do not think it undercuts the major thrust of my question, which was: Did we really have information of criminal or terrorist activity with regard to most of these 762 individuals? And I think it is fairly obvious we did not. But I appreciate your answer.

Let me just ask one other type of question. The IG reports that senior Justice Department officials in the Deputy Attorney General's office told the Director of the Bureau of Prisons to "not be in a hurry" to provide the September 11th detainees with access to communications, including legal and social calls or visits. In the meantime, your boss, Assistant Attorney General for the Criminal Division, Mr. Chertoff, reassured Congress and the American people in his testimony before this Committee on November 28, 2001, that the right to counsel would be protected.

At the time of Mr. Chertoff's testimony, were you aware of the fact that other senior officials had instructed the Bureau of Prisons to do the exact opposite, to frustrate detainees' attempts to contact counsel?

Mr. NAHMIAS. Senator Feingold, having read the report, I do not agree that that is, in fact, what the Inspector General found. The Inspector General found that people at various levels of the Department had indicated that policies and legal issues might often be addressed aggressively in terms of not taking a conservative position

on how long someone might be detained, whether to seek detention, and so forth.

Actually, in the section of the Inspector General's report that you are referring to—I think it is page 113—just a few lines after that quote about supposedly saying do not be in a hurry, the Inspector General makes clear that the person to whom that was supposedly said, the then-Director of the Bureau of Prisons, understood that to mean within the limits of applicable policy and law. And that is really the point.

I also believe that that statement was made in the context actually not of these 762 people, but in the context of discussions of what to do with regard to already imprisoned terrorists who were under special administrative measures in the ADMAX facility in Florence, Colorado. So it is somewhat out of context as presented in the Inspector General's report.

Senator FEINGOLD. But you were aware that instruction had been given to not be in a hurry, even though you add the caveat within normal procedures. But you were aware that that type of instruction had been given.

Mr. NAHMIAS. I was not aware that that specific instruction was given. I think it is critical to say it was always with that caveat, that at any time, to my knowledge, that anyone has discussed taking any kind of aggressive position on policy issues or on how to treat any of these detainees, it was always done with the caveat that it remain within the law. And a good example of that is when the confusion about whether or not detainees could be held more than 90 days after a removal decision was made clear, the immediate reaction by the Deputy's office was: If that is the law, we have to change the policy. And that is just one very clear example expressed in the report where, when a clear legal issue came up, the reaction was, in an abundance of caution, to avoid crossing any legal line.

Senator FEINGOLD. Again, just to clarify. I heard your answer. At the time of Mr. Chertoff's testimony, were you aware of the fact that other senior officials had given these instructions? However you want to characterize them, were you aware of that?

Mr. NAHMIAS. Personally, I was not aware of that, but I am confident that the instructions that were given were to remain within the law.

Senator FEINGOLD. I heard that part. I just want to know what you were aware of.

Do you know whether at the time of his testimony Mr. Chertoff was aware that other senior officials had instructed the Bureau of Prisons to frustrate communications by detainees with counsel?

Mr. NAHMIAS. I do not believe that that instruction was given or that the Inspector General makes that finding.

Senator FEINGOLD. Well, I would disagree with that, but you do not know of any specific knowledge about these instructions.

Mr. NAHMIAS. No. I think that there was—and Mr. Lappin might be able to address this more clearly. There was a brief period of blackout generally, but I do not think anyone ever gave the instruction to frustrate people's ability to communicate with counsel.

Senator FEINGOLD. Let's hear Mr. Lappin's answer.

Mr. LAPPIN. Yes, sir. The Bureau of Prisons initially determined the conditions of confinement for the detainees. In fact, on September 11 itself, before we received any detainees, we had a number of terrorists in our existing populations, at which time we pulled those inmates out of general populations, moved them into the segregation units of those facilities, and placed them in a restricted environment, primarily because we did not know at that time if they had had any communication outside of the institution with the target group of individuals being investigated, and we wanted to preclude any further communication with those individuals if it, in fact, had occurred in the past and might result in further terrorist attacks.

Based on that, as we received detainees on September the 14th, based on the information we received from the investigating and detaining authorities that these individuals were of high interest to the PENTTBOM World Trade Center investigation, we employed those same restrictive conditions.

I am aware that discussions did occur after that decision was made with individuals in the Department who affirmed our approach to the conditions of confinement we had determined for those individuals.

So the Bureau of Prisons initially made that determination, not only based on the threat to the public but, as I mentioned in my opening statement, also based on the fact that these individuals, Al-Qaeda individuals, had exhibited aggressive acts against our employees in the past, and certainly as well as for the protection of these individuals themselves.

Realize that here you are in New York, the facility in Brooklyn houses 2,500 inmates, many of whom were from that area. Many of those inmates could have and may have had families, friends, and relatives in the buildings. It would have been unwise of us to allow those inmates to go out into a general population where another inmate may have taken aggressive action towards them because of their association with the investigation.

Senator FEINGOLD. I appreciate your elaborating on that. I will just say to conclude, Mr. Chairman, that I do read the IG's report as clearly suggesting a problem in some circumstances with the right to counsel, that this is a failure here in this situation, and although there may be individual situations that make sense in that regard, that we have got to take very seriously the IG's conclusion and not let this happen again with regard to those who did not certainly deserve that kind of treatment.

But, again, I thank the witnesses and I thank the Chairman.

Chairman HATCH. Thank you, Senator Feingold. Those are good questions.

Mr. Nahmias, you are in agreement that where there is a need for right to counsel that counsel will be provided?

Mr. NAHMIAS. Yes, Mr. Chairman, and—

Chairman HATCH. In other words, you are saying that the direction has always been and you believe it has always been carried out that you would live within the law, even though you could be criticized for living within a broad interpretation of the law.

Mr. NAHMIAS. I think it is important—there were problems with the ability of people to have access to their counsel. Some of those

are inherent in the Bureau of Prisons setting. Some of them are inherent in the type of custodial situation within the Bureau of Prisons these people were in. There were some problems with that. Those are the types of things that we have learned from the Inspector General's report, we learned them along the way, and we would try to correct them in the future. But there was never a policy of the Department, and I can't believe there will ever be a policy of the Department, that anyone who is detained by the Department should not have the ability to communicate with counsel in their defense.

Chairman HATCH. I think this is important because there have been a lot of articles written pro and con on this issue. Let me just say that you folks have very difficult jobs to do, and I can just hear the screaming and wailing and shouting if we had had another terrorist attack because you let some of these people go prematurely. I think Senator Schumer is absolutely right when he indicated that you would never live it down. And even at that, we know that there are known terrorist organizations and terrorists in this country that we are monitoring that we are pretty sure may try to do something like this in the future. And that does not stop other methods of terrorism.

It is easy to criticize, but you folks have been handed basically an impossible job in many ways. But I think you are doing the very best job you can to take care of it, and where there are defects, where there are questionable acts, where there are questionable approaches, we up here want you to end those and make sure that our laws are followed. And if we cannot rely on the law enforcement agencies, who can we rely on?

So this hearing has been very helpful, and I think having experts here has been extremely helpful for me personally. And I appreciate all that you do and all that you have done, and I understand some of the criticisms. And I think it was good to get the Inspector General's report out, and we can all grow from that and learn from that and hopefully do things even better in the future.

But, with that, we will recess until further notice.

[Whereupon, at 1:24 p.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

U. S. Department of Justice

Office of the Inspector General

September 15, 2003

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senator Leahy:

This responds to your July 11, 2003, letter which included questions from several Senators relating to my appearance at the Judiciary Committee's June 25, 2003, oversight hearing entitled, "Lessons Learned – The Inspector General's Report on the 9/11 Detainees." I will respond to the questions in the order of the attachments.

Questions from Senator Kennedy:

1. *During your interviews with INS and Justice Department officials, did any of them raise concerns that by continuing this policy they were being asked to violate the law? When did the senior DOJ officials first become aware of the problem?*

   How could the Department not know that this was a problem? What evidence did you find that the Department was in fact aware? Why was the Department so hesitant to change its policy? Why did the Department finally decide to end the "no bond" policy?

Several Immigration and Naturalization Service (INS) officials told investigators from the Office of the Inspector General (OIG) that they were concerned about the legality of opposing bond for all aliens arrested in connection with the September 11 investigation, particularly those for whom they had no evidence of ties to terrorism. They also were concerned about the

duration of detention for those aliens who had been issued final orders of removal and were ready to be deported from the United States.

The INS officials stated that they raised their concerns with officials in the Office of the Deputy Attorney General (ODAG) responsible for overseeing and coordinating INS issues. There is significant dispute, however, about whether and when the INS officials first informed the ODAG staff of their concerns, and whether those concerns were promptly addressed. INS and Civil Division attorneys asserted that they raised their concerns about the "no bond" policy and the limits of the government's detention authority at various meetings in the fall of 2001, and that ODAG officials attended those meetings. By contrast, the ODAG officials asserted that they believed that revisions made to the "no bond" policy in October 2001 had addressed the INS's concerns about any problems with that policy. With respect to the INS's concerns about the limits on its authority to detain aliens with final orders of removal and voluntary departure orders, ODAG officials asserted that they were not told by the INS that the cases presented a potential legal problem until late January 2002.

As we discuss in the report, we concluded that while the October revisions to the "no bond" policy may not have reflected the oral understanding reached between ODAG officials and INS, the "revised" policy continued to place the INS in the untenable position of continuing to argue for denial of bond for the September 11 detainees without supporting evidence. We also concluded that the weight of the evidence indicates that continued concerns were raised about final order and voluntary departure cases at the meetings in the fall of 2001 and that the ODAG officials were, in fact, informed of these concerns.

For example, an attorney with the Office of Immigration Litigation (part of the Justice Department's Civil Division) told the OIG that at an October 26, 2001, meeting held to discuss the detainees, he described the limits on the INS's legal authority to detain final order cases as a "problem." He said he described the slow pace of the clearance process as creating a "litigation risk." Notes taken by an FBI attorney who attended the same meeting reflect that the INS representative at the meeting described the legal issues created by the Department of Justice requirement that all September 11 detainees be held until cleared of connections to terrorism and the "split of opinion" on the INS's authority to continue the detainees' detention. A Senior Counsel in the ODAG was present at the meeting. We also found that this issue was raised during the fall of 2001 by the Moussaoui case, by a number of *habeas corpus* petitions filed on behalf of the detainees, and by questions posed in the media and by Congress to Department officials. We concluded that there was sufficient discussion and information about this issue that the ODAG officials should have considered earlier the limits on the government's authority to hold

detainees with final removal orders, both within the 90-day period and after the 90-day period.

However, we also concluded that on such an important matter the INS had a responsibility to press the issue more clearly – and in writing – if it believed that the "hold until cleared" policy presented a legal issue for the Department. INS officials did not provide such a written document until January 2002, almost five months after the issue first arose.

In January 2002, after the FBI had drafted a letter responding to the INS's concerns and after the FBI and the Criminal Division had agreed not to oppose a change to the "hold until cleared" policy, the Department revised its position to allow aliens who had received final orders of removal or voluntary departure orders to be removed, even if the clearance process was not completed. The ODAG officials stated that they were not hesitant to change the policy, once it had been brought to their attention that the policy might be illegal, and that they did so quickly.

2. *Can you comment on the effectiveness of a law enforcement policy to pursue broad arrests, even when it was evident that those apprehended were visa violators and not terrorists? What was the need to conduct such sweeping arrests? Did the FBI not have sufficient intelligence to distinguish between suspected terrorists and visa violators? Was this policy a wise use of staff and resources in the weeks after the terrorist attacks? Do you think that this policy may have had a chilling effect on members of the Arab and Muslim community who could have provided leads beneficial to the terrorist investigation? What recommendations would you make to improve future terrorism-related investigations?*

The Department reacted swiftly to the attacks on the World Trade Center and Pentagon by launching a massive investigation in this country and abroad. In the ensuing weeks, Joint Terrorism Task Force (JTTF) agents and other law enforcement officers across the country arrested hundreds of illegal aliens they encountered while pursuing September 11 leads, whether or not the aliens were the subjects of the leads. Our review did not assess the effectiveness of these law enforcement actions. However, we saw some instances when aliens were detained who appeared to be extremely attenuated from the focus of the September 11 investigation. We recognize that the weeks and months immediately after the attacks were chaotic, particularly in New York City, and that separating detainees who had connections to terrorism from those who were merely in violation of their immigration status was a difficult task. But in New York City, unlike in other parts of the country, the FBI did not make an attempt to distinguish between aliens it actually suspected of having connections to or knowledge of terrorism from those who were encountered coincidental to the PENTTBOM investigation.

While we do not criticize the decision to require FBI clearance of aliens who the FBI suspected of having a connection to the September 11 attacks or terrorism in general, we criticize the indiscriminate and haphazard manner in which the labels of "high interest," "of interest," or "of undetermined interest" were applied to many aliens who had no connection to terrorism. We recognize the difficulty of making a definitive and expeditious determination in many cases absent specific intelligence about an individual alien, and we realize that in the weeks and months after September 11 law enforcement authorities erred on the side of caution. However, we concluded that the manner in which the FBI applied these designations to arrested aliens was, in many cases, tenuous.

Moreover, the FBI failed to provide adequate field office staff to expeditiously conduct detainee clearance investigations and failed to provide adequate FBI Headquarters staff to effectively coordinate and monitor the detainee clearance process. This contributed to the slow pace of the FBI's clearance process, which meant the FBI's initial determination of its "interest" in a detainee had enormous consequences for the detained aliens.

We believe that the failure to distinguish between aliens with potential connections to terrorism and those arrested tangential to the PENTTBOM investigation was unsound for several reasons. First, rather than concentrating its resources on those aliens who it actually suspected of being connected to terrorism, the FBI in New York City required full investigations of all aliens encountered pursuant to a PENTTBOM lead, thus diverting resources from the aliens who warranted full investigations. In addition, instead of investigating expeditiously aliens who the FBI actually suspected of having a connection to terrorism, the FBI in New York City often moved on to a new lead without even investigating, in a reasonably timely fashion, those aliens it labeled "of interest" to the PENTTBOM investigation. We believe that if the detainees really were of interest to the terrorism investigation and potentially had information about terrorism, as a prudent investigative step the FBI should have investigated the detained individuals quickly to gain potential information to assist in its investigation.

Assessing the impact of these policies on the Arab and Muslim communities was beyond the scope of our review.

Finally, as we recommend in Chapter 9 of our report, we believe the Department and the FBI should develop clearer and more objective criteria to guide its classification decisions in future cases involving mass arrests of illegal aliens in connection with terrorism investigations. For example, the FBI could develop generic screening protocols (possibly in a checklist format) to help agents make more consistent and uniform assessments of an illegal alien's potential connections to terrorism. These protocols might require some level of evidence linking the alien to the crime or issues in question, and might include

an FBI database search or a search of other intelligence and law enforcement databases.

We also recommend that the FBI consider adopting a tiered approach to detainee background investigations that acknowledges the differing levels of inquiry that may be appropriate to clear different detainees of connections to terrorism. For example, a more streamlined inquiry might be appropriate when the FBI has no information that a detainee has ties to terrorism, while a more comprehensive background investigation would be appropriate in other cases.

3. *Based on your extensive interviews, who are the senior officials most responsible for designing and enforcing the post-September 11 detention policies?*

The general policies of no bond and "hold until cleared" for detainees labeled of interest to the September 11 investigation were established by high-level officials within the Department, up to and including the Attorney General. The Attorney General told the OIG that he instructed that if, during the course of the September 11 investigation, aliens were encountered who had violated immigration law, they should be charged with appropriate violations, particularly if the alien had a relationship to the September 11 attacks. The Deputy Attorney General told the OIG that he remembers the "decision to hold without bond" being discussed, and that he was in favor of requiring the clearance process "within the bounds of the law." Department officials told the OIG that they initially believed the clearance process generally would take only a few days for the majority of the aliens arrested on PENTTBOM leads. At most, they expected the process would take a few weeks to clear aliens who had no additional indications of a connection to terrorism. This turned out to be inaccurate.

With regard to who was responsible for implementing and overseeing the policy, within one week of the attacks a group was established by Deputy Assistant Attorney General Alice Fisher to coordinate efforts among various components within the Department of Justice that had an investigative interest in or responsibility for the September 11 detainees. In addition to the FBI, the "working group" included staff from the INS; the Department's Office of Immigration Litigation; the Terrorism and Violent Crime Section of the Department's Criminal Division, which reported directly to Fisher; and the Office of the Deputy Attorney General. Stuart Levey, the Associate Deputy Attorney General responsible for oversight of immigration issues, or one of his counsels attended the daily working group meetings, and they were responsible for the implementation of the Department's policies as they related to the INS.

4. *What are the most significant consequences your report found with respect to denial of access to counsel?*

We found substantial problems in the detainees' ability to obtain counsel in a timely manner, particularly at the Metropolitan Detention Center (MDC) in Brooklyn, New York, a Bureau of Prisons (BOP) facility. Most September 11 detainees did not have legal representation prior to their detention at the MDC, and we found that they had difficulty obtaining counsel for a variety of reasons.

First, a "communications blackout" imposed by the BOP, which appears to have lasted for several weeks, affected the ability of the detainees held in the MDC to obtain and communicate with counsel. Second, the designation of September 11 detainees as WITSEC inmates (which stands for "witness security") also prevented them from being able to communicate with attorneys because the location of those labeled WITSEC is extremely closely held. Application of this WITSEC classification to the September 11 detainees resulted in MDC officials continuing to withhold information about the detainees' location, even after the communications blackout was lifted. We found that MDC staff frequently – and mistakenly – told people who inquired about a specific detainee that the detainee was not held at the facility when, in fact, the opposite was true.

Third, the MDC imposed a policy that permitted September 11 detainees only one legal call per week. In addition, the pro bono attorney lists provided to September 11 detainees by the INS contained inaccurate and outdated information. As a result, detainees often used their sole legal call during a week to try to contact one of the legal representatives on the pro bono list, only to find that the attorneys either had changed their telephone number or did not handle the particular type of immigration situation faced by the detainees. In addition, detainees complained that legal calls that resulted in a busy signal or calls answered by voicemail counted as their one legal call for that week. We believe that counting calls that reached a voicemail, resulted in a busy signal, or went to the wrong number was unduly restrictive and inappropriate.

Fourth, the manner in which the MDC inquired whether the detainees wanted to place a legal call was unclear and inappropriate. In many instances, the unit counselor inquired whether September 11 detainees in the MDC special housing unit wanted their weekly legal call by asking, "are you okay?" For some period, several detainees told the OIG that they did not realize that an affirmative response to this rather casual question meant they opted to forgo their legal call for that week. We believe the BOP should have asked the detainees directly "do you want a legal telephone call this week?" rather than relying on the detainees to decipher that a shorthand statement "are you okay?" to mean "do you want to place a legal telephone call?"

The consequences to these detainees' inability to gain access to counsel were significant: it hindered their ability to understand why they were being held and it also hindered their ability to request a bond hearing.

5. *I noticed that there are sections of the report that have been redacted. These redactions do not just include names. They also include statistical information such as the ages of the persons detained. Why has this information been redacted? Was there any pressure on you by the Department of Justice to make these redactions? Were these redactions made to address security concerns, or were they made because of pending litigation?*

At the request of the FBI and the Department, the OIG agreed to redact (black out) a few pieces of information from the report. In the view of the FBI and the Department, that information was "law enforcement sensitive" and could compromise the on-going terrorism investigations by providing useful information to potential terrorists. For example, in the view of the FBI and the Department, information on page 21 from the charts of the ages of the 762 detainees was redacted because it would, in their view, provide information about the focus of their terrorism investigation.

The Department and the OIG discussed these concerns and reached agreement on a limited number of redactions that did not affect the integrity of the report. The OIG agreed to make these limited redactions to address the security concerns raised by the FBI and the Department.

6. *Is there a division of opinion within the Justice Department or other conflict that prevents all of the defendants from being represented by the government?*

The OIG has not been involved in any way in the lawsuits brought against the Department by September 11 detainees, and we have no information about the opinions of the Justice Department regarding representation of any of the defendants in those lawsuits.

Questions from Senator Leahy:

1. *In your interviews with detainees, or in any other discussions did you find evidence that the detention of undocumented immigrants with no connection to the September 11, 2001, attacks had a chilling effect on other immigrants? Do you believe these detentions might have deterred other immigrants from coming forward with information that could help authorities prevent a new terrorist attack?*

The OIG did not assess the potential chilling effect the September 11 detentions may have had on other immigrants who otherwise may have come forward with information relating to terrorism.

2. *Your investigation evaluated the Department's efforts to determine whether an arrested undocumented alien was "of interest" and subject to*

continued detainment. Throughout your report, the severe consequences of this determination are demonstrated. The report concluded that the Department's actions were unacceptably "indiscriminate and haphazard," even taking into consideration the difficulties and challenges facing the agency following the September 11 attacks. Why do you believe that the Department should have done a better job? To what do you attribute its failure to do so?

In conducting our review, we were mindful of the circumstances confronting the Department and the country as a result of the September 11 attacks, including the massive disruptions they caused. However, for several reasons we believe the Department should have distinguished between those immigrants who truly were of interest to the terrorism investigation and those who were not. First, it made investigative sense. If the FBI suspected aliens of having a connection to terrorism and labeled them to be "of interest" to the terrorism investigation, it should have investigated them quickly to determine if they actually had information that could be useful to the investigation. Second, making more careful assessments of the aliens' possible connection to terrorism, which appears to have been done outside of New York City, would have allowed the FBI to focus its investigative efforts on those aliens who it actually had reason to suspect were connected to terrorism or had information about terrorist activities. Third, we believe it to be unfair to treat aliens so inconsistently, depending solely on where in the country they happened to be detained.

We attribute the inconsistency of treatment to a variety of causes, including the chaos and upheaval in New York City as a result of the attacks, the lack of sufficient resources applied to the clearance process by the FBI in New York City, the concern in New York City about making the wrong decision about an individual alien, and the fear of releasing a terrorist who might conduct another attack.

3. *In your testimony to the Judiciary Committee on June 25, 2003, you indicated that, in contrast to the PENTTBOM investigation, there are other contexts in which the FBI has developed protocols to ensure consistency, e.g. its watch list screening protocol. (A) Do you have additional examples of other contexts in which the FBI has created a process or reviewing protocol to ensure consistency in its treatment of persons under review? (B) Do you believe that such established protocols should be mandatory in other contexts, e.g. in the Department's evaluation of suspects or detainees for enemy combatant status?*

We understand that the Department developed protocols for use in connection with the voluntary interview project in the aftermath of September 11. Additional examples of a type of protocol are contained in the Attorney General Guidelines that were recently modified regarding the

circumstances under which general crimes and criminal intelligence investigations may be begun, and the permissible scope, duration, subject matters, and objectives of these investigations. We believe that mandatory protocols could be helpful in other contexts, particularly when there are mass actions affecting many individuals and uniformity of treatment is an important consideration.

Questions from Senator Durbin:

1. *You explained in your report that your review was focused on INS detainees at the Metropolitan Detention Center and the Passaic County Jail. Are you currently reviewing or do you have any plans to review the treatment of detainees at other facilities? If so, what facilities are you reviewing and when do you expect to complete these reviews?*

We continue to investigate cases involving individual complaints by detainees held at other BOP facilities. We intend to handle these allegations as separate cases, and we do not have plans to conduct any additional facility-wide reviews. We made this decision because we did not receive a significant number of complaints from any other facilities, similar to the number of complaints about conditions at the MDC and Passaic.

2. *You explained that the scope of your review was limited to the treatment of detainees and did not include assessing the Department's counterterrorism and immigration enforcement tactics. How did you decide on the scope of this review?*

Defining and limiting the scope of our review was one of the more difficult organizational aspects of this project. But unless we identified a discrete number of issues to examine, the review could have continued for a significantly longer period of time. In defining our scope, we examined Section 1001 of the USA PATRIOT ACT, Pub. L. No. 107-56 (2001), which directed the OIG to "receive and review" claims of civil rights or civil liberties violations by Department of Justice employees. In addition, as mentioned in response to the preceding question, the OIG received a significant number of specific complaints about conditions of confinement and treatment of detainees at the MDC and Passaic.

3. *I encourage you to review the effectiveness of the Justice Department's counterterrorism efforts and their impact on Arab and Muslim Americans, immigrants and visitors. Are you currently conducting any additional reviews or do you plan any additional reviews? If so, what are you reviewing and when do you plan to complete your review?*

The OIG is committed to conducting aggressive oversight of the Department's counterterrorism efforts. For example, in September 2002 the

OIG issued a comprehensive review of the FBI's Counterterrorism Program that examined threat assessment, strategic planning, and resource management issues. In addition, the OIG is presently examining the Department's counterterrorism task forces, including the Joint Terrorism Task Forces (JTTFs) and the Anti-Terrorism Task Forces (ATTFs). The OIG also is examining the Critical Incident Response Plans developed by the United States Attorneys' Offices to respond to terrorist acts and other domestic emergencies. In another ongoing review, the OIG is examining the revised domestic guidelines issued by the Attorney General in May 2003 that govern general crimes and criminal intelligence investigations.

Finally, as discussed in our June 2003 report, the OIG concluded that the evidence indicated a pattern of physical and verbal abuse by some correctional officers against some September 11 detainees housed at the Metropolitan Detention Center in Brooklyn, New York. Since we issued that report, the OIG has continued its investigation and we are now in the process of concluding our review. In the near future, we plan to submit a detailed report to the BOP that contains our findings and recommendations with regard to the conduct of individual BOP correctional officers, as well as systemic issues that this follow-up investigation has identified. We also intend to release publicly the general findings of this report.

4. *In the report, you indicate that your investigation has developed "significant evidence" that physical abuse of detainees occurred. It has been some time since these alleged incidents took place.*

a. When will your investigation of these allegations conclude? Does your office have guidelines for the length of such investigations? Once you conclude your investigation, will you notify complainants of the disposition of their complaints? If not, why not?

We are aggressively and expeditiously pursuing these complaints and anticipate that many of them will be completed in the near future. The length of these investigations depends on the complexity of each case and a variety of other factors, including the availability of witnesses and other evidence. When our investigations are concluded, the OIG will report to the BOP and the complainants, consistent with the requirements of the Privacy Act. In addition, we plan to issue a public report describing our general findings.

b. *In a recent consent decree, the Justice Department requires a local law enforcement agency (the Detroit Police Department) to complete investigations of alleged misconduct within 60 days of receiving a complaint and to notify the complainant of the disposition of their complaint. Would you consider applying the same standard to your office's investigations? If not, why not?*

The OIG attempts to complete its investigations within six months. In many cases, however, this goal is not possible to accomplish. For example, many cases have potential criminal aspects to them, at least initially, and it is impossible to complete these investigations in a short time given the involvement of prosecutors and court officials. In addition, while we agree that timeliness is important in any investigation, thoroughness is also a primary objective. We believe a rigid 60-day time limit would not allow for a thorough investigation and evaluation. Having said that, we continue to strive to complete our investigations as timely as possible.

5. *You indicated that you have asked the Justice Department and relevant DOJ components to respond to the report's recommendations and that the Department of Homeland Security (DHS) Inspector General has asked the DHS to respond to the report's recommendations. Please provide copies of these responses.*

On September 9, 2003, the OIG released the responses from the Department of Justice and the Department of Homeland Security, along with our written analysis of the responses. This document was provided to each member of the House and Senate Judiciary Committees and is available on the OIG's website.

Thank you for the opportunity to provide input on these important issues.

Sincerely,

Glenn A. Fine
Inspector General

cc: Senator Edward M. Kennedy
Member, Committee on the Judiciary

Senator Richard Durbin
Member, Committee on the Judiciary

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COMMITTEE ON THE JUDICIARY
COMMITTEE ON FOREIGN RELATIONS
COMMITTEE ON THE BUDGET
SPECIAL COMMITTEE ON AGING
DEMOCRATIC POLICY COMMITTEE

June 24, 2003

The Honorable
John D. Ashcroft
Attorney General of the United States
U.S. Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20510

Dear Mr. Attorney General:

As you know, the Senate Judiciary Committee is scheduled to hold an oversight hearing tomorrow on the report by the U.S. Department of Justice Office of the Inspector General (IG) on the treatment of individuals held on immigration violations in connection with the investigation of the September 11 attacks. The Senate and the American people are entitled to meaningful oversight of the Justice Department, which is made all the more urgent given the critical review of the Department's conduct by the IG. I regret that neither you nor another high level Department official will testify at this important hearing.

I therefore request that you respond to the following questions, which I would have asked you, had you appeared before the Committee:

(1) As early as October 31, 2001, I and some of my Senate and House colleagues raised concerns with you about the September 11 detainees, including their conditions of detention and access to counsel. In your November 16, 2001, response to my October 31 letter, you assured me that aliens who are arrested are informed of their right to be represented by counsel, provided with a list of organizations that provide free legal services, and informed that they may communicate with consular or diplomatic officers of the country of their nationality in the United States. In a series of Senate Judiciary Committee hearings with senior Justice Department officials during the fall 2001, my colleagues and I again raised concerns – this time about issues such as detainees' access to counsel and family, detainees' conditions of confinement, and the selective roundup of mostly Arab and Muslim male immigrants.

We received assurances from Michael Chertoff, Assistant Attorney General for the Criminal Division, at a hearing on November 28, 2001, and Viet Dinh, Assistant

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Attorney General for the Office of Legal Policy, at a hearing on December 4, 2001, that detainees have access to counsel. Mr. Chertoff testified, "nobody is held incommunicado. We don't hold people in secret, you know, cut off from lawyers, cut off from the public, cut off from their family and friends. They have the right to communicate with the outside world. We don't stop them from doing that." In a hearing on December 6, 2001, you told me that detainees are allowed access to counsel, saying:

> I do not intend to hold individuals without access to counsel. And we will take steps to make sure that we don't. I don't believe that we are. And I will make available to individuals an understanding of pro bono counsel or free counsel in the event that they are not classified as individuals entitled to an attorney at government expense. . . .Each of these individuals obviously has had the right to contact a lawyer – you have cited some who have said that their contact hasn't been with free enough access, and I will look carefully into that.

The IG now confirms that access to counsel was denied to many detainees, sometimes for prolonged periods. Communications blackouts, lasting from several days to several weeks, were imposed on some detainees. Even when there was no blackout, many detainees were only allowed one phone call to a lawyer per week. Sometimes calling a wrong number, or reaching a voicemail system, counted as the one call. Guards would ask, "are you okay," and if a detainee said "yes," they were not offered their call, even though the guard did not specifically ask the detainee if the detainee wanted to place a call. Lists of pro bono attorneys were not consistently provided and were often inaccurate.

More disturbingly, according to the IG report, senior Justice Department officials – David Laufman, the chief of staff to the Deputy Attorney General, and Christopher Wray, the Principal Associate Deputy Attorney General – actively sought to limit detainees' access to counsel. They told the Director of the Bureau of Prisons (BOP) to "not be in a hurry" to provide the September 11 detainees with access to communications, including legal and social calls or visits. (IG Report at 113.) In other words, while you and other Department officials publicly assured Congress and the American people that the right to counsel would be protected, it appears that senior Justice Department officials, in fact, actively sought to undermine it.

(a) Please indicate whether the directive by Mr. Wray and Mr. Laufman was authorized by their superiors, and if so, who authorized the directive? If the directive was not authorized by their superiors, please indicate whether the Department has reprimanded them or taken any other disciplinary action against them.

(b) In response to the IG report criticizing the Department's conduct, the Department has said that "the law was scrupulously followed." (Department press release, June 2, 2003.) Please explain how you believe the law was scrupulously followed here, or, in other words, how you believe the detainees' due process rights, including the right to representation by counsel, was not infringed by the Department's conduct.

(c) Please describe what steps, if any, were taken by you to facilitate detainees' right to counsel after you promised me and the Committee to "look carefully into that" on December 6, 2001.

(2) Pursuant to federal regulations, the Immigration and Naturalization Service (INS), which prior to March 1, 2003, was part of the Justice Department, was required to decide whether to file immigration charges against an alien within 48 hours of the alien's arrest, except in the event of an emergency or other extraordinary circumstances, in which case the charging determination may be made within an additional reasonable period of time. While the regulations do not specify a deadline for the INS to serve notice of the charges on the alien, the INS did have a goal of serving notice within 72 hours after arrest. You testified before the House Judiciary Committee on June 5, 2003, that "Some people were not charged immediately with immigrant [sic] violations; that's something we would like to improve the record on. But no person that I am aware of, none, was ever held for more than 30 days without a charge in that respect." The IG, however, found that at least 25% of the detainees were issued a Notice to Appear (NTA) more than 72 hours after arrest, and some not until months later. Twenty-four detainees were served with an NTA more than 31 days after their arrest. The IG could not determine the exact day a charging decision was made because the IG was told that the Department did not maintain such records.

(a) Why does the Department not keep records regarding charging decisions containing basic information, such as the date of the decision?

(b) If no records were maintained, what is the basis for your statement that no one was ever held for more than 30 days without a charge?

(c) Please provide documentation or other evidence that no one was held for more than 30 days without a charge.

(d) Please provide documentation or other evidence that the 24 individuals served with an NTA more than 31 days after arrest were in fact charged in less than 30 days.

(e) Please identify those instances in which the "emergency or extraordinary circumstances" exception was invoked, and please provide documentation of the "emergency or extraordinary circumstances."

(3) The IG criticizes the Department for the "indiscriminate and haphazard manner" in which immigrants were labeled as possible terrorism suspects. (IG Report at 70.) It is my understanding that virtually none of the individuals detained on immigration violations after September 11 were ever charged with terrorism crimes.

It appears that the Department's "hold until cleared" and "no bond" policies effectively constituted a mandatory detention policy for anyone the Department arrested in connection with its September 11 investigation. Congress, however, was so concerned about the potential for abuse of mandatory detention policies that, in the USA PATRIOT Act expanding the Attorney General's detention authority, Congress included a requirement that the Attorney General certify that he has reasonable grounds to believe the person is a suspected terrorist or has engaged in other activity that endangers the national security of the United States. *See* Section 412 of the USA PATRIOT Act (Public Law 107-56). The Department apparently detained immigrants after September 11 pursuant to pre-existing authority, not under this provision of the Patriot Act. Nevertheless, this provision is an indication of the level of Congress's concern in granting broad detention powers to the Attorney General and the clear intent of Congress that the Attorney General should provide a factual basis for a determination that someone should be held without bond.

In your testimony before the House Judiciary Committee on June 5, 2003, you were asked by Representative Maxine Waters what connection existed between these detained individuals and the September 11 investigation. You said, "There are individuals who had strong links to the terrorists against whom we did not have a case that was sufficient to bring criminal charges, or about whom the bringing of the case might result in the revelation of material in court which would be against the national security interests of the United States." You then described the cases of three individuals who were deported because you determined that they had strong links to terrorism or that bringing charges would be in the national security interests of the U.S. For each of these three cases, please provide the facts of their cases, including, but not limited to, the date of arrest, the immigration charges made against them, whether they were deported, and the criminal charges, if any, filed against them.

(4) In testimony before the Senate Judiciary Committee on November 28, 2001, Assistant Attorney General Chertoff said that all detainees had violated immigration or criminal law or were being detained on material witness warrants. He went on to say, "nothing that we are doing differs from what we do in the ordinary case or what we did

before September 11." The IG's report, however, states that "the overwhelming majority of these aliens were arrested on immigration charges that, in a time and place other than New York City post-September 11, would have resulted in either no confinement at all or confinement in an INS or INS contract facility pending an immigration hearing." (IG Report at 111.) Please explain the inconsistency between Mr. Chertoff's assertion and the finding of the IG.

(5) Why were such a high percentage (33%, more than double the number of detainees of any other country) (IG Report at 21) of the detainees Pakistani nationals when it was learned that the majority of the hijackers in the September 11 attacks were from Saudi Arabia?

(6) When it became clear that the FBI clearance process was taking weeks and months, and that many of the detainees were guilty of immigration violations alone, why were the "hold until cleared" and "no bond" policies not reconsidered?

(7) Please explain the legal basis for the Department's "no bond" policy and please provide all documentation, legal memoranda, or other communications concerning the legal basis for this policy.

(8) Please explain the legal basis for the Department's "hold until cleared" policy and please provide all documentation, legal memoranda, or other communications concerning the legal basis for this policy.

(9) (a) Please explain the legal basis for the Department's decision to continue to hold individuals after issuance of a final order of removal. The Office of Legal Counsel opinion that has been cited by the Department in response to the IG report was not issued until February 2003, so please provide the legal basis for the Department's decision at the time those decisions were being made, beginning in the fall 2001. (b) Please provide all communications, memoranda, or documents concerning the legality of the continued detention of individuals who had been issued a final order of removal, including all memoranda or communications by the INS stating its views on the issue.

(10) Please explain why the Department failed to conduct adequate oversight of federal detention facilities and state contract facilities concerning the treatment of detainees in custody and their ability to file complaints about physical and verbal abuse.

(11) The IG found that the BOP's decision to allow staff to destroy or reuse videotape recordings of detainee movements hampered the usefulness of the videotape system to prove or disprove allegations of abuse raised by detainees. The lack of videotape evidence hampered the IG's investigation of detainee abuse allegations. What steps have

you taken to improve the BOP's document and videotape retention policies and procedures?

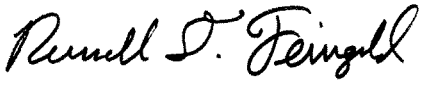
(12) Why was there no prompt reconsideration of the Witness Security, or WITSEC, classification when the communications blackout was lifted?

(13) What steps will you take to improve communication between the Bureau of Prisons and the Department about the policies and practices relating to the treatment of immigration detainees?

(14) Former INS Commissioner James Ziglar recently said, "The overwhelming means that the government has at its disposal today to invade and intimidate suggests to me that we must be even more vigilant in deterring government overreaching. . . . The insatiable appetite for more power by those who already have it is always justified by 'necessity.'" "Former INS Head Warns of Rights Abuses; Officials' Fear of Being Blamed for a New Attack Has Bad Side Effect, Ziglar Says," *The Washington Post*, June 15, 2003, p. A12. What reforms are you undertaking at main Justice, the FBI, and the Bureau of Prisons to ensure that the abuses highlighted in the IG report are not repeated? Please indicate in your response which IG recommendations you are adopting and which recommendations you have declined to adopt.

I look forward to your response.

Sincerely,



Russell D. Feingold
U.S. SENATOR

TESTIMONY OF GLENN A. FINE
Inspector General, U.S. Department of Justice

Before the Senate Committee on the Judiciary
June 25, 2003

Mr. Chairman, Senator Leahy, and Members of the Committee on the Judiciary:

Thank you for inviting me to testify about the Office of the Inspector General's (OIG) report that examines the treatment of aliens held on immigration charges in connection with the investigation of the September 11, 2001, terrorist attacks.

In my testimony today, I will summarize the major findings and recommendations from our 198-page report, which we released on June 2. However, to help place our findings in context, I will first describe the background and scope of our review.

I. BACKGROUND AND SCOPE OF OIG REVIEW

The OIG conducted this review under the authority of the Inspector General Act and the specific directives contained in The USA PATRIOT Act (Patriot Act). Section 1001 of the Patriot Act directs the OIG to receive and review claims of civil rights and civil liberties violations by Department of Justice (Department) employees and to inform Congress about the results of our reviews.

Pursuant to these responsibilities, the OIG initiated this review examining the treatment of detainees arrested on immigration charges in connection with the Department's September 11 terrorism investigation, known as PENTTBOM. The FBI initiated this massive investigation to identify the terrorists who committed the September 11 attacks and anyone who knew about or aided their efforts. In addition, the FBI worked with other federal, state, and local law enforcement agencies to prevent any follow-up attacks in this country and abroad.

Given the identities of the September 11 terrorists, the Department recognized from the earliest days that the investigation contained a significant immigration law component. One of the principal responses by law enforcement authorities after the attacks was to use federal immigration laws to detain aliens suspected of having possible ties to terrorism. Many of these individuals were questioned and subsequently released without being charged with a criminal or immigration offense. Many others were arrested and detained for violating federal immigration laws.

Our review determined that 762 aliens were detained on immigration charges in connection with the terrorism investigation in the first 11 months after the attacks. Of these 762 aliens, 24 were in the custody of the Immigration and Naturalization Service (INS) on immigration violations prior to the terrorist attacks. All 762 aliens were placed on what became known as an "INS Custody List" because of the FBI's assessment that they may have had a connection to the September 11 attacks or terrorism in general, or because the FBI was unable, at least initially, to determine whether they were connected to terrorism. In our review, these aliens are referred to as "September 11 detainees."

Our review examined various issues relating to these detainees, including:

- the classification of the September 11 detainees;
- the timeliness of charging September 11 detainees with immigration violations;
- issues affecting the length of the detainees' confinement, including the process undertaken by the FBI and others to clear individual detainees of a connection to the September 11 attacks or terrorism in general;
- bond decisions for the detainees;
- the timing of removal of the detainees; and
- the conditions of confinement for the September 11 detainees.

Our review focused on detainees held at the Passaic County Jail (Passaic) in Paterson, New Jersey (a county facility under contract to the INS) and at the Metropolitan Detention Center (MDC) in Brooklyn, New York, operated by the Federal Bureau of Prisons (BOP). We chose these two facilities because they held the majority of September 11 detainees and were the focus of many complaints about detainee mistreatment.

At the outset, it is important to understand not only what our review examined, but also what it did not examine. We did not review all aspects of the Department's terrorism investigations. For example, we did not review individuals arrested on criminal charges in connection with the terrorism investigation or those held on material witness warrants. We did not examine the treatment of aliens or United States citizens considered enemy combatants

and held in Guantanamo or in the United States. Further, we did not examine or assess the Department's decision to limit public release of information concerning arrests related to the ongoing terrorism investigation, the Department's decision to close immigration hearings to the public, or its use of voluntary interviews for certain categories of aliens. Several lawsuits related to these issues are currently pending. It was beyond the scope of our review to examine these issues, and we took no position on them.

In addition, it is important to understand the context of our findings. In response to the September 11 terrorist attacks on the United States, the FBI allocated massive resources to the PENTTBOM investigation, assigning more than 4,000 FBI special agents and 3,000 FBI support personnel to work on it within days of the attacks. The amount of information and leads about the attacks and potential terrorists that the FBI received in the weeks and months after the attacks was staggering. Moreover, as our report points out, the Department was faced with unprecedented challenges responding to the attacks, including the chaos caused by the attacks and the possibility of follow-up attacks. The FBI in New York, for example, was forced to evacuate its offices that were located near Ground Zero and had to set up command posts in a parking garage and other sites in the New York area. In addition, during the fall of 2001 and the spring of 2002, FBI field offices were conducting other important investigations, including the anthrax attacks, the Daniel Pearl kidnapping in Pakistan, and the crash of an airliner in Queens, New York. At the same time, the FBI was assisting with security for the Winter Olympics in Salt Lake City.

Moreover, it also is important to recognize that Department employees worked tirelessly and with enormous dedication over an extended period of time to meet the challenges posed by the September 11 attacks and the ongoing threat of terrorism. In conducting our review, we were mindful of this context and the circumstances confronting Department employees at the time. Our findings should not be used to diminish, in any way, the dedication and contributions Department employees made and continue to make to ensure the safety of the country.

Yet, while recognizing these difficulties and challenges that confronted and still confront the Department, we found significant problems in the way the Department handled the September 11 detainees. As the title of this hearing indicates ("Lessons Learned – The Inspector General's Report on the 9/11 Detainees"), we believe that lessons can be learned from a review of this issue. In that vein, we make 21 recommendations in our report to help improve the Department's handling of detainees in the future.

I will now discuss the major findings of our review, as well as our recommendations.

II. SUMMARY OF OIG FINDINGS

A. Classification of Detainees

In the aftermath of the September 11 attacks, the FBI pursued thousands of leads relating to its PENTTBOM investigation, in New York and elsewhere, ranging from information obtained from a search of the hijackers' cars to anonymous tips called in by people who were suspicious of Arab and Muslim neighbors who kept odd schedules.

If the FBI encountered an alien in connection with pursuing any of these leads, whether or not the alien was the subject of the lead, the FBI asked the INS to determine the alien's immigration status. If the alien was found to be in the country illegally – either by overstaying his visa or entering the country illegally – the alien was detained by the INS.

The FBI then was asked to make an assessment of whether the arrested alien was "of interest" to its terrorism investigation. If the FBI indicated that the alien was "of interest," "of high interest," or "of undetermined interest," the alien was placed on the INS Custody List and treated as a September 11 detainee.

These initial classifications by the FBI had significant ramifications for the detainees. First, the Department instituted a policy that any detainee on the INS Custody List had to be detained until cleared by the FBI. Although never communicated in writing, this "hold until cleared" policy was clearly understood and applied throughout the Department. As a result, the September 11 detainees were not allowed to be released on bond according to normal INS procedures and were not allowed to depart or be removed from the United States before FBI clearance, even if an Immigration Judge ordered their removal or the detainee voluntarily agreed to leave. Second, the initial classification decision by the FBI often determined where the detainees would be confined and their conditions of confinement.

Our review found that these classification decisions were not handled uniformly throughout the country. FBI and INS offices outside New York City attempted to screen out or "vet" cases in which illegal aliens were encountered only coincidentally to a PENTTBOM lead or showed no indication of any connection to terrorism. In these cases, the alien was not placed on the INS Custody List and was processed according to normal INS procedures.

However, this vetting process was not used in the New York City area. Rather, the FBI in New York did not attempt to distinguish between those aliens who it actually suspected of having a connection to the September 11 attacks or terrorism from those aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism but simply were encountered in connection with a PENTTBOM lead. As a result, anyone picked

up in connection with a PENTTBOM lead in the New York area was deemed "of interest" for purposes of the "hold until cleared" policy, regardless of the origin of the lead or any genuine indications of a possible connection to terrorism. For example, if an agent searching for a particular person on a PENTTBOM lead arrived at a location and found other individuals who were in violation of their immigration status, those individuals were detained and considered to be arrested in connection with the PENTTBOM investigation.

Our review does not criticize the Department's decision to investigate or require FBI clearance for aliens who the FBI actually suspected of having a connection to terrorism or the September 11 attacks. However, we do criticize the inconsistent manner in which these decisions were made. Even in the hectic aftermath of the September 11 attacks, we believe the FBI should have taken more care to attempt to distinguish between aliens who it actually suspected of having a connection to terrorism and aliens who, while guilty of violating immigration law, had no connection to terrorism but simply were encountered in connection with a PENTTBOM lead. In most parts of the country this was done; in New York, where the bulk of the September 11 detainees were arrested, it was not.

B. Notice of Charges

Our review found that many September 11 detainees did not receive notice of the charges against them in a timely manner. Normally, after an alien is arrested for violating federal immigration law, the INS notifies the alien of the charges and initiates a removal proceeding by serving a Notice to Appear (NTA) on the alien and the Immigration Court. The NTA must include the alien's specific acts or conduct that is in violation of the law.

Prior to the September 11 attacks, the INS was required by federal regulation to make this charging determination within 24 hours of arrest. The Department changed the regulation soon after the September 11 attacks to allow the INS 48 hours to make the determination. The revised regulation also included an exception to the 48-hour rule that provided that in the event of an emergency or other extraordinary circumstances, the charging decision could be made within an additional reasonable period of time. The regulation does not define "extraordinary circumstances" or "reasonable period of time." Moreover the regulation contains no requirement as to when the INS must <u>notify</u> the alien of the charges; the regulation only addresses when the INS must <u>make</u> its charging decision.

Our review determined that the INS did not record when the charging decisions were actually made, but it did record when the charges were served on the alien. According to the INS, before the September 11 attacks its goal

was to serve charges on aliens in writing within 48 hours of arrest. After September 11, the INS's goal was to serve charges on aliens within 72 hours.

We found that the INS served 60 percent of the September 11 detainees with NTAs within its goal of 72 hours. However, many detainees did not receive their charging documents for weeks, and some for more than a month, after being arrested. Detainees housed in the MDC received notice of their charges an average of 15 days after their arrest. Delays were caused by several factors, including the INS's decision to review and approve all charges at INS Headquarters and miscommunications between the INS New York and Newark Districts, each of which presumed that the other office had served the charging documents on aliens who were transferred from the INS in New York to the INS in Newark.

The delays in receiving notice of the charges affected the September 11 detainees in various ways. First, it postponed detainees' knowledge of the specific immigration charges they faced. Second, it affected the detainees' ability to obtain effective legal counsel given the lack of specific charges. Third, it delayed the detainees' opportunity to request bond re-determination hearings and seek release.

C. The Clearance Process

Our review found that the Department's "hold until cleared" policy was based on the belief – which turned out to be erroneous – that the FBI's clearance process would proceed quickly. For example, many Department officials told us that they believed that the FBI would take a few days or a few weeks to clear aliens arrested on PENTTBOM leads but who had no additional indications of a connection to terrorism.

That belief was inaccurate. The FBI cleared less than 3 percent of the 762 September 11 detainees within 3 weeks of their arrest. The average length of time from arrest of a September 11 detainee to clearance by FBI Headquarters was 80 days. More than a quarter of the 762 detainees' clearance investigations took longer than 3 months.

The delays in the clearance process were attributable to various factors. The FBI did not provide adequate field office staff to conduct the detainee clearance investigations in a timely manner and failed to provide adequate FBI Headquarters staff to coordinate and monitor the detainee clearance process. We also found that, in New York, once the FBI investigated a lead and the INS arrested an alien in connection with the lead, FBI agents generally moved on to the next lead rather than investigate or clear the person arrested. In addition, FBI Headquarters did not set any time limits for completing the clearance investigations. The FBI also requested CIA checks on the detainees, but the

FBI often took months to review the information it received from the CIA. We also found delays between when local FBI offices cleared the detainees and when FBI Headquarters processed the final clearances.

As we note in the report, in contrast to the untimely clearance process for September 11 detainees, the FBI did a much better job handling clearances from a "Watch List" it sent to airlines, rail stations, and common carriers to assist in the terrorism investigation. For example, the FBI created guidelines for who should be placed on the Watch List, and it worked diligently to remove as quickly as possible those people from the list who had no connection to terrorism. The FBI's efficient handling of this Watch List contrasts markedly with its handling of the clearance process for September 11 detainees.

As discussed below, the untimely clearance process for September 11 detainees had significant ramifications for the detainees, who were denied bond and were not permitted to leave the country until the clearance process was completed, even when they had received final orders of removal or voluntary departure orders.

D. Bond and Removal Issues

The Department instituted a "no bond" policy for all September 11 detainees as part of its decision to hold the detainees until the FBI could complete its clearance investigations. Several INS officials told the OIG that, at least initially, they expected the FBI to provide them with information to present at bond hearings to support the "no bond" position. Instead, INS officials told the OIG that often they received no information from the FBI about September 11 detainees and, consequently, had to request multiple continuances in the detainees' bond hearings.

Our review determined that the INS raised concerns about this situation, particularly when it became clear that the FBI's clearance process was much slower than anticipated and the INS had little information in many individual cases on which to base its continued opposition to bond. As a result, the INS was placed in the position of arguing for "no bond" even when it had no information from the FBI to support that argument, other than the fact that the detainee was arrested in connection with a PENTTBOM lead.

Moreover, the question arose whether the INS legally could hold September 11 detainees after they had received final orders of removal or voluntary departure orders from an Immigration Judge. In general, aliens found to have violated immigration law must be removed from the United States within 90 days of when the alien is ordered removed. Because of the "hold until cleared policy," detainees were held, even beyond the 90 days normally provided for removal, despite their willingness and ability to leave the

country. Senior INS attorneys expressed doubts about the legality of preventing the September 11 detainees from leaving the country, not only after the 90-day period had expired but even within the 90-day removal period, if the detainee was willing to leave the country and arrangements could be made to remove the detainee.

Considering the significant concerns that INS attorneys harbored about the legality of the Department's policy, we believe the INS had a responsibility to press the issue clearly – and in writing – if it believed that the policy presented a legal issue for the Department. It did not do so until January 2002, several months after the issue first arose.

In late January 2002, the FBI brought this issue to the Department's attention, and the Department abruptly changed its position as to whether the INS should continue to hold aliens after they had received final departure or removal orders until the FBI had completed the clearance process. After this time, the Department allowed the INS to remove aliens with final orders without FBI clearance.

A Department legal opinion – issued by the Office of Legal Counsel in February 2003, well after the time frame under examination in this review – ultimately concluded that it was permissible for the Department to take more than 90 days to remove an alien if the delay was related to affecting the nation's immigration laws and policies. The opinion concluded that investigating whether an alien had terrorist connections met this test. A pending lawsuit also is addressing this legal issue.

Our report concluded that the Department did not address this issue in a timely or considered way and abruptly changed its policy in January 2002, without the benefit of a legal analysis. Only later did the Department request a legal opinion. We believe the Department should have addressed squarely and earlier the issue of the Department's authority to hold detainees up to and beyond 90 days from when they received final orders of removal.

Finally, federal regulations require that aliens held for 90 days after final orders of removal are entitled to custody reviews to determine if their continued custody is warranted. We found that the INS rarely conducted such required reviews for the September 11 detainees.

E. Conditions of Confinement

The INS made the decision where to house September 11 detainees, relying primarily on the FBI's assessment of the detainees' possible links to terrorism. Aliens deemed by the FBI to be "of high interest" to its terrorism investigation generally were held in BOP high-security facilities, such as the

MDC in Brooklyn, New York. Generally, although not always, aliens deemed by the FBI to be "of interest" or "of undetermined interest" were detained in lower-security facilities, such as the Passaic County Jail in Paterson, New Jersey. FBI agents generally made this assessment of interest without guidance or standard criteria, based on the limited information available at the time of the aliens' arrests.

Where a September 11 detainee was confined had significant ramifications, because a detainee held at the MDC experienced much more restrictive conditions of confinement than those held at Passaic.

1. Metropolitan Detention Center

In examining the treatment of detainees at the MDC, we appreciated the fact that the influx of high-security detainees stretched the MDC's resources. Its employees often worked double shifts during a highly emotional period of time, close to the scene of the terrorist attacks. We also appreciate the uncertainty surrounding the detainees and the chaotic conditions in the immediate aftermath of the September 11 attacks.

However, our review raises serious concerns about the treatment of the September 11 detainees housed at the MDC. In the heightened state of alert after the terrorist attacks, the BOP imposed a total communications blackout for several weeks on the September 11 detainees held at the MDC. After the blackout period ended, the MDC combined a series of existing policies and procedures for inmates in other contexts and applied them to the September 11 detainees. For example, the MDC designated the detainees as "Witness Security" inmates in an effort to restrict access to information about them, including their identity, location, and status. Designating the detainees at the MDC in this manner frustrated efforts by detainees' attorneys, families, and even law enforcement officials to determine where the detainees were being held. As a result of this designation, we found that MDC staff frequently – and mistakenly – told people who inquired about a specific September 11 detainee that the detainee was not held at the facility when, in fact, the detainee was there.

Further, the MDC's restrictive and inconsistent policies on telephone access for detainees prevented some detainees from obtaining legal counsel in a timely manner. Most of the September 11 detainees did not have legal representation prior to their detention at the MDC. Consequently, the policy instituted by the MDC that permitted detainees only one legal call per week – while complying with broad BOP national standards – severely limited the detainees' ability to obtain and consult with legal counsel.

Further complicating the detainees' efforts to obtain counsel, the pro bono attorney lists provided September 11 detainees contained inaccurate and outdated information. As a result, detainees often used their sole legal call during a week to try to contact one of the legal representatives on the pro bono list, only to find that the attorneys either had changed their telephone numbers or did not handle the particular type of immigration situation faced by the detainees.

In addition, detainees complained that legal calls that resulted in a busy signal or calls answered by voicemail counted as their one legal call for that week. When questioned about this, MDC officials gave differing responses about whether or not reaching an answering machine counted as a completed legal call. We believe that counting calls that only reached a voicemail, resulted in a busy signal, or went to a wrong number was unduly restrictive and inappropriate.

Moreover, the manner in which the MDC inquired whether the detainees wanted to place a legal call was unclear. In many instances, the unit counselor inquired whether September 11 detainees wanted their weekly legal call by asking, "are you okay?" Several detainees told the OIG that for some time they did not realize that an affirmative response to this casual question meant they opted to forgo their legal call for that week. We believe the BOP should have asked the detainees directly "do you want a legal telephone call this week?" rather than relying on the detainees to decipher that a shorthand statement "are you okay?" meant "do you want to place a legal telephone call?" As a result of these policies, it took many detainees a long period of time to contact a lawyer.

The MDC created a new special housing unit (called the Administrative Maximum Special Housing Unit, or ADMAX SHU) to hold the September 11 detainees until the FBI cleared them. In this unit, the MDC applied existing BOP policies applicable to inmates in disciplinary segregation. As a result, the detainees were placed in restraints whenever they were moved, including handcuffs, leg irons, and heavy chains. Four MDC officers had to be present each time a detainee was escorted from the cell.

Because of these restrictive conditions, we believe it was important for the FBI to determine, in a reasonable time frame, whether these detainees were connected to terrorism or whether they could be cleared to be moved from the ADMAX SHU to the MDC's much less restrictive general population. Yet, detainees remained in the ADMAX SHU for long periods of time waiting for the FBI's clearance process. Even when the FBI cleared the detainees, they remained in the ADMAX SHU for days and sometimes weeks longer than necessary due to delays between the time the FBI cleared a detainee of a

connection to terrorism and the time the MDC received formal notification of the clearance.

The OIG found that certain other conditions of confinement for the September 11 detainees at the MDC were unduly harsh, such as subjecting the detainees to having two lights illuminated in their cells 24 hours a day for several months longer than necessary, even after electricians rewired the cellblock to allow the lights to be turned off individually.

With regard to allegations of abuse, we concluded that the evidence indicates a pattern of physical and verbal abuse by some correctional officers at the MDC against some September 11 detainees, particularly during the first months after the attacks and during intake and movement of prisoners. This generally consisted of slamming some detainees into walls; dragging them by their arms; stepping on the chain between their ankle cuffs; twisting their arms, hands, wrists, and fingers; and making slurs and threats such as "you will feel pain" and "you're going to die here."

Most correctional officers we interviewed denied the allegations of abuse, and federal prosecutors have declined the cases for criminal prosecution. However, the OIG is continuing to investigate these matters administratively. Our investigation has not uncovered any evidence that the physical or verbal abuse was engaged in or condoned by anyone other than the correctional officers who committed it.

We also found that MDC staff failed to inform MDC detainees in a timely manner about the process for filing formal complaints about their treatment.

In addition, we found that MDC staff appropriately took some affirmative steps to prevent potential staff abuse against September 11 detainees – and potentially protect MDC staff from unfounded allegations of abuse – by installing security cameras in each detainee's cell and by requiring staff to videotape all detainee movements outside their cells. However, the BOP changed its policy and permitted MDC staff to reuse or destroy these videotapes after 30 days (as opposed to keeping them "indefinitely" as required in the original policy), which hampered the usefulness of the videotape system to prove or disprove allegations of abuse raised by individual detainees.

The decision to change the videotape policy was made by a BOP Regional Director. We do not believe, and have found no evidence to suggest, that the decision to change the policy was designed to cover up abuse. We also understand the difficulty in storing the hundreds of videotapes the MDC accumulated after several months of taping the detainees. But the decision to recycle or destroy the videotapes after 30 days meant that the usefulness of the tapes was limited.

2. Passaic County Jail

In contrast to our findings at the MDC, our review found that the September 11 detainees confined at Passaic had much different, and significantly less harsh, experiences. According to INS data, Passaic housed 400 September 11 detainees from the date of the terrorist attacks through May 30, 2002. This was the largest number of September 11 detainees held at any single U.S. detention facility.

Passaic detainees housed in the general population were treated like "regular" INS detainees who also were held at the facility. Although we received some allegations of physical and verbal abuse, we did not find the evidence indicated a pattern of abuse at Passaic. However, we did find that the INS failed to conduct sufficient and regular visits to Passaic to ensure the September 11 detainees' conditions of confinement were appropriate.

III. RECOMMENDATIONS

We believe the chaotic situation and uncertainties surrounding the detainees' role in the September 11 attacks, and the potential of additional attacks, explain many of the problems we found in our review, but they do not explain or justify all of them. We therefore offered 21 recommendations to address the issues in our review. We have asked the Department, the FBI, and the BOP to respond to these recommendations in writing within 30 days. The Department of Homeland Security (DHS) OIG has made the same request on our behalf to the immigration officials involved in these issues but who have since transferred out of the Department of Justice into DHS. At this stage, it appears that the Department and its components are taking our recommendations seriously and are considering implementing many of them.

Examples of our recommendations include:

- The Department and the FBI should develop clearer and more objective criteria to guide their classification decisions in any future cases involving mass arrests of illegal aliens in connection with terrorism investigations. We note that the FBI, in connection with its Watch List, developed guidance to govern who should be placed on that list. With regard to detainees the FBI could, for example, develop generic screening protocols (possibly in a checklist format) to help agents make more consistent and uniform assessments of an illegal alien's potential connections to terrorism.

- Unless federal immigration authorities, now part of the DHS, work closely with the Department and the FBI to develop a more effective

process for sharing information and concerns, the problems inherent in having aliens detained under the authority of one agency while relying on an investigation conducted by another agency can result in delays, conflicts, and concerns about accountability. We recommend that immigration officials enter into an agreement with the Department and the FBI to formalize policies, responsibilities, and procedures for managing a national emergency that involves alien detainees.

- While we appreciate the enormous demands placed on the FBI in the aftermath of the terrorist attacks, the FBI did not adequately staff or assign sufficient priority to investigate or clear September 11 detainees of a connection to terrorism. We believe it critical for the FBI to devote sufficient resources in its field offices and at Headquarters to conduct timely investigations on immigration detainees. In addition, FBI Headquarters officials who coordinate the detainee clearance process and FBI field office supervisors whose agents conduct the investigations should impose some deadlines on agents to complete background investigations or, in the alternative, reassign these cases to other agents.

- Under federal regulation, the INS was required to decide whether to file immigration charges against an alien within 48 hours of his arrest. However, the regulation contained no requirement with respect to when the INS must notify the alien or Immigration Court about the charges. We recommend that the immigration authorities in the DHS document when the charging determination is made in order to determine compliance with the "48-hour rule." We also recommend that the DHS convert the goal of service of charges on aliens within 72 hours to a formal requirement. Further, we recommend that it be defined what constitutes "extraordinary circumstances" and the "reasonable period of time" when circumstances prevent the charging determination from being made within 48 hours.

- We recommend that the BOP establish a unique Special Management Category other than "Witness Security" for aliens arrested on immigration charges who may be of interest to a terrorism investigation. Such a classification should identify procedures that permit detainees' reasonable access to telephones more in keeping with the detainees' status as immigration detainees who may not have retained legal representation by the time they are confined, rather than as pre-trial inmates who most likely have counsel. In addition, BOP officials should train their staff on any new Special Management Category to avoid repeating situations such as when MDC staff mistakenly informed people inquiring about a specific September 11 detainee that the detainee was not held at the facility.

- We recommend that the BOP issue new procedures requiring that videotapes of detainees with alleged ties to terrorism be retained for longer periods of time.

- We recommend that the BOP ensure that all immigration detainees housed in a BOP facility receive timely notice of the facility's policies, including its procedures for filing complaints.

IV. CONCLUDING OBSERVATION

I believe it is important to recognize that, despite the sensitivity of many of the issues in our report, the Department fully cooperated with our review, including the Attorney General, the Deputy Attorney General, the FBI Director, and the many other Department officials and employees to whom we spoke. On June 2, we released our full report with only a few words or phrases that contain specific identifying information "redacted" (blacked out) because they were considered "Law Enforcement Sensitive" by the Department and the FBI.

The fact that the Department permitted the full report on these topics to be released publicly is a credit to the Department. It also is a strength of the system that was established in the Inspector General Act, which allows evaluations of important and sensitive government actions by an independent OIG.

Although people have interpreted our report differently, we have attempted to describe in detail the treatment of the September 11 detainees, to lay out the facts underlying the policies that were implemented, and to provide the basis for the recommendations we made. I believe this report can have a positive impact by describing what occurred and providing recommendations for improvement should the Department be faced with handling detainees in other situations, both large and small scale, that may arise in the future.

This concludes my prepared statement. I would be pleased to answer any questions.

For Record

STATEMENT OF SENATOR CHARLES GRASSLEY
UNITED STATES JUDICIARY COMMITTEE
"Oversight Hearing: Lessons Learned -
The Inspector General's Report on the 9/11 Detainees

June 25, 2003

Mr. Chairman, thank you for holding this important oversight hearing.

The terrorist attacks of September 11th and the resulting war on terrorism have forced us to rethink how our law enforcement, intelligence and border security agencies work. We are correctly shifting from a reactive posture to a proactive, preventive mode of enforcement.

The Justice Department Inspector General, Glenn Fine, has done us a service by examining the Justice Department's conduct regarding the detention of illegal aliens after the attacks. The detention of these aliens was and remains an important issue for the public and Congress, and it's worth examining. This is what we have a watchdog inspector general for – to investigate, evaluate and report on how our government works, and whether it is working well or poorly, or committing waste, fraud or abuse

No matter whether you support the administration's war on terrorism and its tactics, or whether you're a critic, this report is important and essential to Congressional oversight.

However, since this report was issued a few weeks ago, there has been a lot of spin and hype. Some critics have said this proves the administration has violated people's civil rights and trampled immigrant's liberties. Others have said this shows that the administration been perfect and has done nothing wrong. I don't think either of those are right.

Let's be clear about what the report says. All, or nearly all, of the immigrants in this report were arrested for breaking the law. The FBI wanted to make sure none of them were connected to terrorism, which was not only prudent, but critical to ensuring there was not another attack.

The report also did not find that any government official or agency broke the law. Rather, in the extraordinary stressful and confusing period after the attacks, they adjusted discretionary rules and regulations to accommodate the circumstances.

The report makes clear that things could have been done better, some officials should have addressed looming legal questions, and that agencies may have fallen short of their goals or not followed their usual procedures at times.

That's useful to know and consider. At the same time, criticism should be tempered by consideration of what was going on at the time - every attempt was being made to prevent another terrorist attack.

The report also found evidence of a pattern of abuse for a small group of the detainees. That is under investigation, and the Attorney General has rightly said abuse will not be allowed and it must be investigated.

There is a right balance to be found in what the Inspector General report looked at. That balance is not the cries and accusations from some groups that claim the report proves some conspiracy against civil rights. And the balance is not found in the public relations comments of some officials who disregard the report's facts and findings, or others who attack the messenger because they don't understand the concept of an Inspector General.

It looks like this report already has produced some changes. The Justice Department has reportedly indicated it will make changes along the lines of the Inspector General's recommendations. That is as it should be, and shows how the system works.

It's important for Congress to conduct oversight hearings like this on how the government carries out the war on terrorism, and what affects that has on people, including aliens who are detained. I appreciate the Inspector General for doing this report, and I want to commend the FBI and Bureau of Prison, Department of Justice officials for all the work they did in the aftermath of the attacks.

Thank you, Mr. Chairman, for holding this hearing to discuss these matters, and I look forward to working with you in other oversight areas.

News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

June 25, 2003

Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary

"OVERSIGHT HEARING: LESSONS LEARNED – THE INSPECTOR GENERAL'S REPORT ON THE 9/11 DETAINEES"

I want to welcome everyone to this hearing, especially our distinguished witnesses. As we continue to strive as a nation to combat the grave terrorist threat we face, it is more important than ever that we exercise vigilant, but responsible, oversight with respect to our law enforcement agencies. We need to do all in our power to ensure that these agencies are able to investigate, detect and prevent terrorist attacks on our country, without threatening or undermining our country's cherished freedoms, and I am committed to this process. In fact, this is one of several oversight hearings I intend to hold in the coming weeks. As I have announced, FBI Director Mueller will appear before us on July 23. I am working to arrange a hearing with Asa Huchinson, Under Secretary for Border and Transportation Security at DHS. And later this year, I will hold a general oversight hearing with the Attorney General.

The subject of today's oversight hearing is the Department of Justice Office of Inspector General's report on the September 11 detainees. It is apparent from the IG's report that, in response to the September 11 attacks, well-meaning law enforcement officials, working around the clock under great stress and amid very difficult conditions, made mistakes. There are valuable lessons to be learned from the report.

My intention here today is to conduct a forward-looking hearing. We need to examine the mistakes that were made with respect to the 9/11 detainees, with an eye toward ensuring that the problems do not arise in the future, should we ever face a similar catastrophic emergency. To this end, we will hear from the component parts of the Department of Justice – the Bureau of Prisons and the Federal Bureau of Investigation. I had hoped to have a witness here from the Border and Transportation Security division of the Department of Homeland Security, but was prevented because of scheduling conflicts. However, as I mentioned, we expect to hear from Under Secretary Hutchinson in the next several weeks. I am hopeful that the witnesses here today will offer us, based on their first-hand experiences during the 9/11 investigation, the knowledgeable perspectives we need to begin our critical assessment of the IG's report and recommendations.

I want to express my deep appreciation to Inspector General Fine and his staff who has worked so hard to prepare the comprehensive report that is before us. The report contains a

number of critical findings and recommendations which we must examine carefully to ensure that we will be better prepared, if we as a Nation face another devastating attack on our soil.

As we consider these criticisms - with 20/20 hindsight nearly two years after the 9/11 attacks - it is important to recognize the monumental challenges our country, the government, and in particular, the Justice Department faced in the immediate aftermath of the September 11 attacks.

In the days following the attacks, our country did not know whether or not we faced additional, even more devastating attacks. It was not clear how imminent any such attack might be, how extensive the Al Qaeda network in the United States was, or whether those individuals who had contact with the 9/11 hijackers were co-conspirators or unwitting accomplices. The government's response was one that I believe was correct: aggressive investigation and enforcement efforts against all persons who surfaced in the thousands and thousands of leads generated from the 9/11 investigation.

It is also important to acknowledge that the 762 detainees who are the subject of the IG's report were illegal aliens who had no right to be in this country. They were individuals who had violated our nation's immigration laws. And they were individuals who well-intentioned law enforcement agents believed at the time may have had ties to, or knowledge of, terrorism or terrorists.

But let me be clear: neither the fact that the Department was operating under unprecedented, trying conditions, nor the fact that the 9/11 detainees were in our country illegally, justifies entirely the way in which some of the detainees were treated.

The IG report highlights a number of significant problems, many of which related to the Department's *hold until cleared* policy. I believe that the Department's decision to detain illegal aliens who were suspected of having ties to, or knowledge of, terrorism or terrorists until they were investigated thoroughly, was fully justified by the emergency at hand. The stakes were simply too high to proceed any other way. There are countless examples of illegal aliens being released on bond to the streets of the U.S., or returned to their country of origin, only to commit future serious crimes against innocent Americans.

So while I do not take issue with, or second guess, the policy, I do question the manner in which it was implemented. As the IG report makes clear, in implementing the *hold until cleared* policy, officials failed to take adequate steps to distinguish promptly between aliens who were legitimate subjects of the 9/11 investigation and those who were encountered coincidentally as a result of 9/11-generated leads. And because the clearance process was plagued by administrative logjams and paperwork overload, a number of detainees who turned out to have no links to terrorism were held longer than they should have been.

Perhaps the clearest message in the IG report is that the component parts of the Department of Justice and Main Justice did not effectively and efficiently communicate and share information with one another: logjams were not identified in a timely fashion; other

pressing concerns and legal issues were not promptly raised to the highest levels within Main Justice.

The IG report also illustrates that the problems caused by the classification of detainees and the inefficient clearance process were magnified by the conditions in which some of the detainees were confined. Aliens classified as *high interest* detainees, who were housed at the Meteropolitan Detention Center (MDC) in Brooklyn, were subjected to highly restrictive confinement policies for long periods of time.

But without a doubt, the most disturbing aspect of the IG's report relates to the allegations of abuse and mistreatment of several detainees who were housed in the MDC. Let me state this unequivocally: Abuse of inmates – no matter what the actual or potential charges – is wrong. It cannot be tolerated. And should any of the allegations in the IG's report be sufficiently corroborated, the responsible parties should be prosecuted to the fullest extent under the law. Inspector General Fine, I am pleased to hear that you are continuing to investigate these matters, and I implore you to do so vigorously.

Although our nation remains a target of terrorists, we now have the ability and the resources – some 20 months after 9/11 – to assess our performance and to institute needed reforms. The time has come.

As noted in the IG report, the Departments of Justice and Homeland Security need to develop a crisis management plan that clearly identifies their respective duties should another national emergency occur; specific standards should be adopted that will improve the ability of our law enforcement, immigration and intelligence agencies to classify subjects of terrorism investigations appropriately and to process and complete clearance investigations expeditiously; and most certainly, corrective actions should be taken to ensure that all detainees are treated with appropriate respect and restraint.

I was pleased to learn several weeks ago that the Justice Department has instituted, or is in the process of instituting such reforms. I strongly urge you to continue these efforts. With commitment and dedication, I am confident that the Department of Justice and its component parts, as well as the Department of Homeland Security, can eliminate the likelihood that the problems highlighted in the IG report will occur in the future.

# # #

Department of Justice

STATEMENT

OF

HARLEY G. LAPPIN
DIRECTOR
FEDERAL BUREAU OF PRISONS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

THE OFFICE OF THE INSPECTOR GENERAL'S REPORT
ON THE SEPTEMBER 11 DETAINEES

PRESENTED ON

JUNE 25, 2003

STATEMENT OF HARLEY G. LAPPIN
DIRECTOR, FEDERAL BUREAU OF PRISONS
BEFORE THE
COMMITTEE ON THE JUDICIARY

June 25, 2003

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before you today to discuss the various serious issues raised by the Department of Justice Office of Inspector General. The Office of Inspector General (OIG) plays a crucial role in providing objective oversight and promoting efficiency and effectiveness within the Department of Justice. We appreciate the opportunity that the Inspector General provides to help us continue to improve.

On September 11, 2001, this country experienced events that we have never faced in the history of our Nation. We were attacked by terrorists on our own soil. In the months following these tragic events and continuing today, the Department of Justice's central mission has been protecting Americans from further acts of terrorism. The Bureau of Prisons helped in that effort and continues to play a significant role in the war on terrorism. We continue to work closely with the Federal Bureau of Investigations (FBI) and other components on the largest criminal investigation in the Nation's history to bring to justice the

individuals responsible for the tragedies of September 11 and prevent future acts of terrorism.

Within days of the terrorist attacks on September 11, the Bureau of Prisons was tasked with detaining aliens deemed by Federal law enforcement to be of great significance to its terrorism investigations. In the months following September, 11, we had 185 detainees incarcerated at several Bureau of Prisons facilities. The Metropolitan Detention Center (MDC) in Brooklyn was one such facility and it housed a substantial number of detainees. Given its proximity to the World Trade Center, the institution suffered some substantial disruptions to its operation. Nevertheless, the institution staff were able to keep the institution operating in a safe and secure manner.

Beginning on September 14, 2001, and for some time thereafter, the Bureau of Prisons received detainees who were deemed by the FBI to be of interest to the investigations into the tragedies of September 11. These individuals were suspected of having ties to terrorist organizations. However, limited law enforcement data was available on these individuals; law enforcement agencies lacked the standard data normally used to the Bureau to assess detainees. Thus, to ensure the safety of our staff and the public, we housed the detainees under the same conditions we

employ for other persons believed capable of committing acts of violence - directly or indirectly. It was our concern about the indirect actions - specifically the threat that they could pose to the United States by communicating key information or directions that could lead to further acts of terrorism on U.S. soil - that contributed substantially to the greatly restricted communication with friends, family, and even counsel. This and related concerns were reflected throughout the Department of Justice in policies and practices regarding limitations on communication with the detainees.

The OIG report regarding the September 11 detainees includes allegations made by some detainees that they were abused by one or more Bureau employees. The report notes that these allegations are currently under investigation. We take all allegations of staff misconduct and mistreatment very seriously and investigate every allegation thoroughly. We do not tolerate any type of abuse of inmates. When allegations of serious abuse are accompanied by credible evidence, the staff member is removed from contact with inmates or placed on administrative leave. We refer serious cases of staff misconduct for criminal prosecution when warranted.

With respect to the detainees, the Bureau referred any and all allegations of abuse that we became aware of to the OIG's New York office. To our knowledge, all allegations by the post-September 11 detainees housed at MDC Brooklyn either have been investigated and found to be without substantiation or are currently being investigated. Thus, while troubling, the OIG's conclusion that abuse took place has not led to any formal action. If these allegations of misconduct are substantiated, I want to emphasize that the Bureau will take appropriate and decisive action. However, in the 21 months since the Bureau began detaining individuals related to the September 11 investigation, the Bureau has not been provided with any information from the OIG that any criminal charges are going to be brought against any employees or that any administrative misconduct has been substantiated.

In closing, I am proud of the work of the Bureau of Prisons and of its staff as they accepted the challenges of this truly unique situation. The Bureau continues to effectively meet our mission to protect society by confining offenders in facilities that are safe, humane, cost-efficient, and appropriately secure. We take this role and our expanding role in the fight against terrorism very seriously.

Mr. Chairman, this concludes my prepared remarks. I would be pleased to answer any questions you or other Members of the Committee may have.

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Legal Times

June 16, 2003

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HEADLINE: Why Won't He Apologize?
John Ashcroft's too-tough stance on terror 'suspects' insults America's immigrants.

BODY:
By Stuart Taylor Jr.

Some of the 762 mostly Middle Eastern men detained on immigration charges after the Sept. 11 attacks "appear to have been arrested more by virtue of chance encounters or tenuous connections to a . . . lead rather than by any genuine indications of a possible connection with or possession of information about terrorist activity," concludes Justice Department Inspector General Glenn Fine in his 200-page report, released on June 2.

"For example, on September 15, 2001, New York City police stopped a group of three Middle Eastern men in Manhattan on a traffic violation. The men had the plans to a public school in their car. The next day, their employer confirmed that the men were working on construction at the school and that it was appropriate for them to have the plans. Nonetheless, they were arrested and detained as September 11 detainees."

Among other "significant problems" that Fine documents: "The FBI in New York City made little attempt to distinguish between aliens who were subjects of the FBI terrorism investigation . . . and those encountered coincidentally to a [terrorism-related] lead"; the Justice Department's "hold until cleared" policy for all such people resulted in an average detention of 80 days, mainly because the FBI clearance process "was understaffed and not given sufficient priority"; the government continued to detain "aliens with final orders of removal who wanted and were able to leave the country," but whom the FBI had not gotten around to clearing. The 84 detainees assigned to the federal Metropolitan Detention Center in Brooklyn, N.Y., were "locked down" for at least 23 hours a day with their cell lights on all night; shackled with handcuffs, leg irons, and heavy chains every time they were taken outside their cells; limited to so few phone calls that many were unable to retain lawyers or reach their families; and subjected to "a pattern of physical and verbal abuse by some correctional officers."

Where's the Apology?

What says Attorney General John Ashcroft to these men -- very few, if any, of whom turned out to have any connection to terrorist activities? Through Justice Department spokeswoman Barbara Comstock, he said this: "We make no apologies for finding every legal way possible to protect the American public from further terrorist attacks . . . . Those detained were illegal aliens."

This was reminiscent of Ashcroft's response when asked in late November 2001, by Newsweek

magazine, whether the government should apologize to nonterrorists who had been incarcerated for months, many under harsh conditions, for overstaying their visas. "No," Ashcroft responded. "The United States of America does not apologize to law violators."

On the other side of the political spectrum, Georgetown law professor **David Cole,** a leading civil libertarian, recently wrote in The **Washington Post:** "The inspector general's report illustrates what happens when the government adopts a 'preventive' law enforcement strategy, as Ashcroft has so proudly done since the terrorist attacks. The justice system is generally backward-looking. The presumption of innocence and due process require objective evidence that an individual has actually done something wrong before he can be stuck in a prison cell."

The inspector general's report, as well as the reactions of Ashcroft and Cole, suggests that neither our leaders nor their civil-libertarian critics have yet come to grips with the utterly novel problem presented by Sept. 11's demonstration that a handful of determined terrorists can murder thousands of Americans -- perhaps millions, once they get atomic weapons -- in a flash. It is a problem for which even our vocabulary is inadequate. When the most precise noun to describe people like those three unlucky Middle Eastern construction workers is "suspect," that word, with its "probably a criminal" connotation, is stretched too thin.

Stalked by the deadliest terrorists in history, we are armed with legal rules calibrated largely for dealing with drug dealers, bank robbers, burglars, and ordinary murderers, and we are stuck in habits of mind that have not yet fully processed how dangerous our world has become. "The old adage that it is better to free 100 guilty men than to imprison one innocent describes a calculus that our Constitution -- which is no suicide pact -- does not impose on government when the 100 who are freed belong to terrorist cells that slaughter innocent civilians and may well have access to chemical, biological, or nuclear weapons," in the words of Harvard Law School's Laurence Tribe.

Struggling with A New Reality

Civil libertarians such as Cole ignore this reality when they condemn Ashcroft for pushing the Justice Department and the FBI to focus on preventing future terrorist acts instead of looking backward. Ashcroft is quite right to do this. He is also right to understand that sometimes this calls for preventive detention of people who are very probably harmless, but who seem a lot more likely to be international terrorists than you, me, or your typical Middle Eastern immigrant.

Not only does al Qaeda's capacity to inflict catastrophic carnage dwarf any previous domestic security threat; its martyrdom-seeking "sleeper" agents are trained to avoid criminal activities that might arouse suspicion until they strike. The careful ones will not be arrested on criminal charges until after their mass murders, if at all.

But Ashcroft seems dangerously indifferent to a corollary reality: When you "preventively detain" people -- the vast majority of whom you know will probably prove harmless -- you are no more justified in treating them as criminals than if they were school children involuntarily quarantined because they might possibly be infected with SARS.

You should not presume them all guilty. You should not treat them -- or talk about them -- as criminals or "suspected terrorists," and thus lump a group, almost all of whom are not terrorists, together with admitted al Qaeda members such as Zacarias Moussaoui. You should not let the sluggish FBI bureaucracy leave men locked up for months after their harmlessness has become clear to the agents handling their cases.

And you should not stigmatize as "law violators," and thus somehow deserving of such treatment, people who have done nothing worse than overstaying their visas or the like. Yes, they violated immigration law. But such violations are not criminal offenses -- for good reason. No moral stigma should attach to those of the world's tired, its poor, its huddled masses yearning to breathe free who seek to share in the bounty of America.

Even those of us who support stricter enforcement of immigration laws -- out of fear that a flood of poor immigrants may dilute our prosperity -- should recognize that ours is fundamentally a selfish impulse. It gives us no standing to pass moral judgment on "illegal aliens." They come to America to make better lives for themselves and their families, by washing dishes at our restaurants, cleaning our homes and hotel rooms, and doing other dirty jobs that Americans won't take. They come for the same reasons that our ancestors came. And they deserve the same respect.

"Every time I have brought this up in Republican circles," says a Bush backer whose parents immigrated legally, "people have accused me of not respecting the law. Shame on us as a country, that we have let 9/11 wound us so deeply as to allow xenophobia to rise to these levels. Shame on us as Republicans, that we have not been able to surpass political fear and enact new immigration laws that can weed out terrorists at the border and allow economic refugees a chance to make a new and legal life here while assisting our economy."

he's Right and he's Wrong

The point is not that Ashcroft was wrong to detain probably harmless people based on any scintilla of a sign that they might possibly be terrorists. Although detention for minor immigration violations is highly unusual, it was justified by the unprecedented nature of the post-9/11 emergency. When officials came across an illegal immigrant who had shared living quarters with one of the 19 hijackers, and another who had a vast collection of photos of the twin towers and anti-American "holy war" propaganda, for example, it made sense to lock them up first and ask questions later. It also made sense to hold them until they were cleared, if any legally valid pretext could be found for holding them.

Ashcroft does not owe anyone an apology for these policies. He does owe apologies to several hundred people for holding them far longer than necessary. He also owes apologies to at least 84 people for the unduly harsh conditions at the Metropolitan Detention Center. And he owes apologies to all [or almost all] 762 detainees for his implication -- in tarring them as "law violators" -- that they deserved to be treated like terrorists.

Ashcroft had the legal power to detain these people, as he has stressed, because they had violated immigration laws. But having the power does not mean never having to say you're sorry.

Stuart Taylor Jr. is a senior writer with National Journal magazine and a contributing editor at Newsweek. His e-mail address is [n]. [c]2003 National Journal. Reprinted by permission; all rights reserved.

LOAD-DATE: June 16, 2003

U.S. SENATOR PATRICK LEAHY

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Statement of Senator Patrick Leahy
Senate Judiciary Committee
"Lessons Learned – The Inspector General's Report on the 9/11 Detainees"
June 25, 2003

On June 2, the Office of Inspector General released a long-awaited report criticizing the conduct of the Department of Justice toward those aliens who were arrested in connection with the investigation into the September 11 attacks. In particular, I thank Glenn Fine and the staff of the Office of Inspector General for doing their job, for noting where we have gone wrong and where we can improve. I know that they could not conduct a truly comprehensive, national review of every case or every setting, but what they did review is important. Unfortunately, the failure of our Committee to call the Attorney General or other senior witnesses from Main Justice and the FBI – or even outside experts who could shed light on the Department's performance – will call into question this hearing's value.

It is disappointing that the Attorney General is not here for this hearing. Last Monday, the Legal Times published a column by Stuart Taylor Jr. entitled, "Why Won't He Apologize?" In it, Mr. Taylor, while criticizing civil libertarians and defending many of the Department's policies, argues:

"[Ashcroft] does owe apologies to several hundred people for holding them far longer than necessary. He also owes apologies to at least 84 people for the unduly harsh conditions at the Metropolitan Detention Center. And he owes apologies to all (or almost all) 762 detainees for his implication ... that they deserved to be treated like terrorists."

Since the Attorney General has declined similar requests for an apology, however, I assume he would not agree with Mr. Taylor or with the requestors. He should be here today to explain why.

The Attorney General undoubtedly is a busy man. Secretary of Defense Rumsfeld and Secretary of State Powell, however, are busy men, too. A June 9 article in Roll Call reported that while Secretary Rumsfeld has testified before the committees that authorize the Defense Department 10 times since 2002 and appears nearly weekly for briefings for Members, and Secretary Powell has appeared before the State Department's authorizing committees eight times during that span, the Attorney General has appeared before the House and Senate Judiciary Committees only three

- more -

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times. I would also note that in his most recent appearance, he shared a single panel with FBI Director Mueller and Homeland Security Secretary Ridge and offered this Committee – which oversees the department he heads -- only a few hours of his time.

We also requested that Deputy Attorney General Larry Thompson, whose office is repeatedly mentioned in the OIG report, and FBI Director Mueller testify at this hearing. It is a regrettable oversight that they were not invited as witnesses either.

Despite my disappointment in the absence of key Justice Department officials, however, I do welcome the witnesses who are here today. I say to Inspector General Fine, you and your office handled a difficult assignment, and I think your report carefully balances the pressures the Department of Justice faced with its obligations as the Nation's preeminent law enforcement agency. It took courage to produce a report that offered substantive criticisms of the Department's response to the September 11 attacks, and I admire you for doing so.

As the report clearly states, and as all of us readily acknowledge, the Justice Department and the government as a whole were under tremendous stress in the wake of the September 11 attacks. But the report also makes clear that the Department committed a series of errors that could have been prevented or minimized. I understand that DOJ and the Department of Homeland Security, which now has primary responsibility for immigration, have agreed to implement a number of the OIG's recommendations, which is good news. This hearing should be part of a larger oversight mission for the Committee, as we monitor how and whether those changes take place, and whether they solve the problems raised in the OIG report. In addition, I renew my call for a hearing with FBI Director Mueller on FISA issues and for Committee consideration of the Leahy-Grassley-Specter Domestic Surveillance Oversight Act.

Perhaps the most lasting impression the OIG report creates is of the Department's failure to draw meaningful or consistent distinctions between those aliens who presented a credible threat and those who simply happened to be discovered by law enforcement officers who were investigating the terrorist attacks. Although it is certainly true that most of the aliens who were detained were not legally present in the United States, the report states that "[s]ome appear to have been arrested more by virtue of chance encounters or tenuous connections to a [] lead rather than by any genuine indications of a possible connection with or possession of information about terrorist activity." (OIG Report, pp. 41-42) Moreover, some Department officials told the OIG that they realized at the time that "many in the group of September 11 detainees were not connected to the attacks or to terrorism in general." (47) For an alien, being classified as a 9/11 detainee made an extraordinary difference for length and conditions of detention, ability to be represented effectively by counsel, and ability to be removed promptly from the United States.

Arrest/Charging: The OIG report cites specific problems that occurred throughout the process, from the time when aliens were taken into custody through the time that they were to be removed. When aliens were arrested in the course of the investigation, Federal regulation called

for them to be charged with an immigration violation within 48 hours, although a longer period was available under "extraordinary circumstances." Since the INS kept no records detailing when charges were brought, however, there was no way for the OIG to evaluate how many times aliens were held for more than 48 hours without being charged. Aliens frequently did not receive a Notice to Appear ("NTA") during the 72-hour period during which the INS' own policies suggested they should be served; indeed, the average length of time exceeded a week. Without such documentation, aliens could not know why they were being held or the specific charges they faced, which in turn inhibited their abilities to obtain effective legal counsel or to request bond re-determination hearings. I agree with the OIG's recommendations that the DHS should document when a charging decision is made, specify what constitutes "extraordinary circumstances" permitting more than 48 hours to bring a charge, and institute as a formal rule the 72-hour limit in serving an NTA.

Opposition to Bond/"Hold Until Cleared" Policy: Those aliens who were taken into custody typically were in for a long stay, due to the Department's decision to oppose bond in all cases, and not to allow the release or removal of any aliens until their cases were "cleared" by the FBI. These decisions were discussed at the highest levels of the Justice Department, and Michael Chertoff, the head of the Criminal Division, is quoted in the report as saying that "we have to hold these people until we find out what is going on." (39)

I think that none of us would second-guess the Department for searching exhaustively for lawful means to hold aliens who truly presented a security threat. And I think that all of us would agree that there is no easy way to determine who does and does not present such a threat. A review of this report, however, suggests that the process by which the Department determined that an alien was "of interest" -- and thus subject to the holding requirements -- was "indiscriminate and haphazard." (70) As the report states, "the Department and the FBI did not develop clear criteria for determining who was, in fact, 'of interest' to the FBI's terrorism investigation." (40) The report offers a number of recommendations to the Department, DHS and the FBI in this area – including the development of clear criteria to determine when an alien is 'of interest' for terrorism purposes and a time limit on making such a designation – and I look forward to hearing the testimony of our witnesses on these recommendations.

While the process by which aliens were determined to be "of interest" was murky, the consequences of such a determination were clear. Receiving FBI clearance took an average of 80 days, a delay the OIG attributes primarily to the FBI's failure to devote sufficient resources to the project. Indeed, as the report details, numerous detainees waited for months to receive clearance even though all investigative work had been completed in a matter of weeks. (62-65) Their cases seem to have simply become lost in the system.

The "no bond" policy – in which the government categorically opposed bond for any alien classified as a 9/11 detainee – not only had an obvious impact on aliens, but also appears to have created ethical dilemmas for INS personnel. Because of the policy, and the FBI's inability or failure to provide detailed information in individual cases to support the government's opposition to bond, the INS Office of General Counsel "became concerned that [INS attorneys'] duty of candor to the Court created an ethical dilemma when [they] argued that aliens be detained without bond and there was no evidence to sustain such positions." (81) When the INS sought to enter into four memoranda with the FBI to memorialize and expedite the process of receiving information about the detainees in its custody, a senior attorney in the Deputy Attorney General's office allegedly said "there was no need to document the clearance process in this written fashion." (85) The OIG found that in light of how lengthy the FBI clearance process turned out to be, and the Department's growing realization that "many of these detainees were guilty of immigration violations alone," DOJ should have "re-evalute[d] its original decision to deny bond in all cases." (88)

Aliens with Removal Orders: An additional significant issue was the Department's consistent policy of keeping in custody 9/11 detainees who had been ordered removed and who were in fact removable. I wrote to the Attorney General in November 2001 to express my concerns about this policy, after the death in custody of Muhammad Rafiq Butt, a Pakistani national who had accepted a voluntary departure order. Apparently, the INS was also concerned at that time about the legality of detaining aliens with valid removal orders, especially after the 90-day statutory deadline for removal. There is a dispute between the INS and the Deputy Attorney General's office about how much time elapsed before those concerns were communicated. Concerns about the policy were sufficiently widespread, however, that the OIG reports that attorneys at both the Deputy Attorney General's office and the Office of Immigration Litigation at DOJ were concerned about *Bivens* liability for INS officials. (96) In addition to being concerned about personal liability, INS attorneys were concerned about the impact an indefinite detention policy would have upon the Justice Department's larger efforts to obtain cooperation from the Arab and Muslim communities. (99-100)

It is commendable that the "hold until cleared" policy was eventually modified to permit the removal of certain aliens with final removal orders, but I agree with the OIG that "the INS and the Department did not address this issue in a timely or considered fashion." (108) I also agree both that the INS should have pressed the issue more insistently, and that even in the absence of such pressure, the Deputy Attorney General's office had "enough information to realize that this was a significant legal issue that needed to be addressed." (110)

Detention Conditions/Right to Counsel: The report also reaches disturbing conclusions about the treatment of those detainees held by the Federal Bureau of Prisons (BOP) at the Metropolitan Detention Center (MDC) in New York. Much has been said, and rightly so, about the "pattern of physical and verbal abuse" these detainees experienced. (142) It is a bedrock principle of the American justice system that even the worst offenders should not experience such abuse at the

hands of their jailers. The violation of that principle is all the more offensive where its recipients are detained on civil, not criminal, violations, and where the assignment of detainees to the MDC was largely haphazard.

In addition to detailing physical and verbal abuse, however, the report describes the barriers the detainees who were held in the MDC faced in obtaining and communicating with counsel. First, the Deputy Attorney General's office reportedly told the head of the BOP "not to be in a hurry" to allow the detainees to have outside communications, including legal calls and visits, and that the detainees appear to have been held incommunicado for "several weeks." (113, 158) Then, the detainees' status was so closely guarded that even some MDC employees were unaware they were there - presumably as a result, at least three attorneys were incorrectly told that their clients were not present at the facility. (116) This state of affairs cannot be attributed to the confusion in the immediate aftermath of the attacks – the OIG found that attorneys were still receiving incorrect information about their clients' whereabouts *more than six months* after the attacks. (159) It was not significantly easier for detainees to speak to their attorneys by phone - they were allowed only one call a week, and calls met by answering machines or, in some reported cases, *busy signals*, counted as their weekly call. (134)

Overall, the OIG found that the BOP's decisions "severely limited" the detainees' abilities to obtain meaningful representation. (130) This is a matter that deserves the attention of DOJ and DHS, and I look forward to hearing today how it will be addressed.

Conclusion: The Office of Inspector General has performed a valuable service in producing this report. I was dismayed by the defensiveness of the Justice Department's initial reaction to the report, which suggested that Department officials somehow read the report as a vindication. These findings are not a vindication; they are a portrait of mistakes and policy misjudgments made in during a difficult time. I am pleased that both DOJ and DHS have since recognized the wisdom of the Inspector General's conclusions and recommendations, and I look forward to hearing their testimony today.

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STATEMENT OF DAVID NAHMIAS
COUNSEL TO THE ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING
INSPECTOR GENERAL REPORT ON 9/11 DETAINEES

PRESENTED ON
JUNE 25, 2003

Mr. Chairman, Senators, I welcome the opportunity to appear before you today to participate in this hearing.

My name is David Nahmias. For the seven years before the September 11 attacks, I was an Assistant United States Attorney in Atlanta, where I prosecuted a variety of violent crimes and fraud and public corruption cases, and worked for several years on the Olympic Park Bombing investigation that led to the indictment of Eric Robert Rudolph. After 9/11, I decided that I wanted to dedicate my efforts to the battle against international terrorism. I was fortunate enough to be selected by Michael Chertoff to serve him and the Department of Justice as Counsel to the Assistant Attorney General for the Criminal Division. I began shuttling between Atlanta and Washington in October of 2001 and have served full-time here since January of 2002. My work involves the supervision and coordination of terrorism investigations around the country and internationally, particularly those associated with the Al Qaeda organization.

I would start by recognizing the value of the Inspector General's (IG's) report. At a hearing before your colleagues in the House of Representatives on June 5, the Attorney General testified that the IG plays a valuable role in the Department of Justice in critiquing our performance and recommending ways we can improve.

To put the report into context, however, I would urge you to remember that we experienced a crisis of unprecedented proportions during the months that followed September 11, 2001. Beginning moments after the attacks on our nation, Department officials from numerous components, including employees of the Federal Bureau of Investigation (FBI), the former Immigration and Naturalization Service (INS), the United States Marshals Service, the Bureau of Prisons (BOP), the Criminal Division, and many United States Attorney's Offices, worked tirelessly to do everything within our legal authority to protect against another terrorist attack. The IG report properly recognizes that the Department was operating under the most difficult of circumstances, particularly in the New York City area, where there were enormous logistical issues resulting from the devastation surrounding the World Trade Center.

We had to take immediate steps to find out who had planned and executed the attacks, who had conspired with the terrorists, and who might be planning future acts of terrorism. As former Assistant Attorney General Michael Chertoff stated, in response to questions posed by Senator Leahy during this Committee's recent consideration of Mr. Chertoff's nomination to the federal bench, senior members of the Department formulated a general investigative strategy in response to the September 11 attacks. That strategy was:

First, to follow each of the many thousands of financial, communications, physical, and other leads generated from the September 11 investigation;

Second, to identify individuals linked by these leads with the hijackers or other terrorists; to investigate those persons fully; and to charge those persons if there was evidence that they had violated the law; and

Third, to make appropriate legal arguments in court to detain those charged persons until such time as we concluded that they were not part of the September 11 terrorist conspiracy or any other terrorist-related activity.

The strategy contemplated that either criminal or administrative immigration charges would be filed, as appropriate and supported by the evidence, against those who were encountered during the course of the investigation. The strategy was built on the recognition that it can be very difficult to detect terrorists and terrorist plots, and that every lead should therefore be pursued as far as possible, because one missed lead could prove to be the connection to another catastrophic attack.

The Inspector General's report focuses on 762 aliens who were detained, pursuant to this strategy, during the course of the investigation. All of the detained aliens were in the U.S. illegally and were lawfully detained while their ties to terrorism were investigated. They were all charged with criminal offenses or civil violations of federal immigration law.

It should be understood that, under the immigration law, an illegal alien in removal proceedings is not entitled to bond as a matter of right. Release on bond is a discretionary benefit. It would have been a disservice to the American people we work so hard to protect to release an illegal alien whom the FBI indicated it wanted to further investigate for connection with the September 11 attacks.

The report notes that the process of investigating and clearing each individual alien took some time. As the Attorney General stated during his testimony before the House Judiciary Committee on June 5, the Department of Justice had no interest in detaining people any longer than was necessary to investigate them. Cases were referred to an interagency working group that met daily at FBI Headquarters. The Criminal Division participated in that working group, and our attorneys were in daily contact with the various United States Attorney's offices that were working with the FBI on the investigation. Because the FBI and INS had centralized review of the cases, the Department's senior leadership and the interagency working group were in a position to monitor the progress of the overall investigation and determine connections among individuals. We saw the nationwide 9/11 investigation – as we now see our overall effort to prevent terrorist attacks – as a mosaic, with all of the local field offices providing information to put together as many pieces of the puzzle as possible.

The Attorney General has reaffirmed the judgment that this policy was and is sound. We did not know who these people were. If we had released or granted bond to an illegal alien who went on to commit another terrorist attack, we would have failed in our responsibilities to keep

America safe. Indeed, in the past the Inspector General has issued such reports critical of the Department's failure to protect citizens from violence perpetrated by previously-detained illegal aliens who were then released, removed, or allowed to depart, such as the Texas railway serial killer, Rafael Resendez Ramirez and the 1997 "Brooklyn Bombers."

These two Inspector General reports reflect the reality that illegal aliens who are not detained are very likely to flee or abscond. In fact, just this February, the Inspector General issued a detailed report that found that aliens who are not detained usually flee and elude deportation. The report noted that 87% of nondetained aliens are not actually deported once their immigration proceedings are concluded and that high risk aliens were particularly unlikely to be found in order to be deported. The risk after our experience on September 11, 2001 was too great to take such chances.

Some people criticize us on the grounds that we did not charge any of the detainees with terrorism. But as you know, Zacarias Moussaoui was detained shortly before September 11 based on immigration charges, and he is among the aliens covered by the policy at issue here. After being detained for more than two months in INS custody, Moussaoui was indicted for participation in the terrorist conspiracy that led to the 9/11 attacks. How could we have answered to the American people we serve if Moussaoui had been deported or released on bond?

There is another simple answer to the criticism that we have not brought terrorism charges against these aliens. The detainees were all immigration law violators and thus

removable on that ground alone. There are good reasons to pursue only the most easily proved immigration charge in the immigration system. Unlike in the criminal system, the sanction for immigration violations – removal – does not increase if more numerous or more serious violations are alleged. If the alien is removable for overstaying his visa, there is no need to prove that he engaged in terrorist activity, particularly if to do so may involve compromising sources or otherwise damaging ongoing investigations. Or, the underlying evidence on the security-related removal charge may be classified and cannot be declassified without harming national security. In the past, certain aliens who have been charged or detained based on security concerns have asserted claims for asylum based on the fact that they have been labeled as "terrorists" by the United States government, thus prolonging the proceedings. Therefore, it is often decided to forgo filing terrorism-related immigration charges because the result is the same: removal. The goal is to accomplish the result in a manner that best protects the national security and uses our limited resources most wisely.

Likewise, just because we do not charge someone criminally with terrorism, does not necessarily mean that there were no terrorist ties. There may be many reasons why we decide not to bring such a case. The decision not to charge in any criminal case may be made because there is insufficient evidence to prove terrorist activity beyond a reasonable doubt, but it also may be because we do not want to reveal sources or because other evidence is classified. Sometimes we charge suspected terrorists with non-terrorism related crimes when we have the evidence to do so. Other times we may be satisfied simply to remove the person from the United States and make sure that he does not return.

It is important to distinguish between our policy of detaining illegal aliens suspected of terrorism and the conditions of their confinement. As Mr. Lappin's testimony makes clear, we do not condone the abuse of anyone being held in federal custody. The Inspector General's report mentions allegations of abuse by specific detainees and other problems with the conditions of confinement at the Metropolitan Detention Center in Brooklyn. Some of these allegations remain under investigation and it would be premature to draw any conclusions. However, as the Attorney General stated on June 5: "We do not stand for abuse, and we will investigate those cases. . .We don't tolerate violence in holding individuals. That's not a policy of the department . . . [w]e'll seek to correct those situations."

The Inspector General has requested that the Department of Justice components with jurisdiction over issues raised by the report, as well as the Department of Homeland Security, provide a response to the 21 recommendations made in the report. As the Attorney General has stated, the Department of Justice welcomes constructive criticism. I understand that the Department is still in the process of reviewing the recommendations. I would note that, before the report was issued, the Department had already made adjustments in some areas that are consistent with the IG's recommendations. For example, in early March, the Attorney General signed a memorandum of understanding (MOU) that mandates the sharing with the Department of Homeland Security (DHS) of information sharing related to terrorism and threats to the national security. This MOU should provide the basis for making the sort of improvements recommended in the report. The Department of Justice, and the FBI in particular, will need to

provide information to DHS for them the make an initial determination about whether to allow an illegal alien to be freed on bond.

In closing, I want to reiterate the following four points: (1) All detainees were illegally in the United States and their detentions were legal and constitutionally valid; (2) It is clear that non-detained illegal aliens, even those who are not suspected of having terrorist ties, flee; (3) Our central mission was and is to prevent another terrorist attack; and (4) The Department of Justice is always looking for ways to improve.

Thank you. I would be happy to attempt to answer your questions at this time.

Statement of
Michael E. Rolince, Acting Assistant Director in Charge
Federal Bureau of Investigation
Washington Field Office

Before the
Senate Judiciary Committee
June 24, 2003

Good morning Mr. Chairman and Members of the Committee. On behalf of the Federal Bureau of Investigation, I would like to thank you for the opportunity to discuss the Inspector General's report on the September 11 detainees. I would also like to recognize the Inspector General and his staff for their efforts in putting the report together.

The FBI is aware that delays in the clearance process led to some extended, but legal, detentions. I believe delays in our clearance process and inconsistencies in the classification of detainees, while unintentional, should be recognized, as should the fact that each of the 762 illegal aliens was lawfully detained. The Office of the Inspector General (OIG) pointed out possible areas of improvement, and we are in the process of closely examining their findings and, in concert with the Department of Justice, implementing recommendations that we believe will improve the process in the future. We will certainly work with the OIG as we continue our ongoing efforts to improve the FBI's counterterrorism program.

That being said, I think it is important to understand the context in which these detentions occurred.

In the days, weeks and months after the terrorist attacks of September 11, 2001, the FBI by necessity worked under the assumption based on consistent intelligence reporting, that a second wave of attacks could be coming. We did not know where, when, or by whom, but we knew that the lives of countless Americans could depend on our ability to prevent that second wave of terror. The pressure placed on both the law enforcement and the intelligence community was tremendous and we certainly had more questions than answers. If air travel resumed, would one or more planes slam into a building full of people? Could the attack come in another form, such as chemical or biological? We had to proceed with an excess of caution because the consequences of releasing someone who really was a terrorist could have cost thousands of lives. And given the choice between finishing checks on those already in custody or locating and neutralizing the seemingly endless threats that were still being reported and investigated, we made a conscious decision to prioritize and neutralize potential threats first. In addition, given the primary goal of protecting the security of the American people, the FBI believed it would have been irresponsible to simply release individuals who, not only were in the country illegally, but also were potential threats or who may have crucial information related to the attacks, particularly given that the federal government had the legal authority to detain them based upon their illegal presence in the United States. In fact, the OIG Report recognizes and agrees with the priority of prevention over investigation in the days following 9/11.

In order to put the 9/11 response in proper perspective, it is important to understand the responsibilities of the International Terrorism Operations Section within the FBI's Counterterrorism Program in the years that preceded the unprecedented attacks. As Director Mueller noted recently, prior to 9/11 we had only 535 Special Agents assigned to International terrorism matters worldwide and only 82 agent and support staff serving at FBIHQ. In spite of that finite staff our responses to the threats posed and the resultant successes should not go unrecognized. As you now know, Usama Bin Laden and Al Qa'ida were the subjects of sealed indictments obtained prior to the attacks on our embassies in Dar Es Salaam, Tanzania and Nairobi, Kenya on August 7, 1998. Following those attacks, the FBI deployed over 1,000 agents and later secured the indictments of 23 individuals responsible for the deaths of 244 persons to include 12 Americans and the wounding of over 5,000 mostly Kenyan and Tanzanian citizens. The FBI in concert with the United States Attorneys Office in the Southern District of New York gained convictions of four subjects and we await the extradition of three others currently in custody in the United Kingdom.

Additionally, the FBI's International Terrorism Operations Section, known as ITOS, was responsible for: coordinating the forensic deployment to Kosovo; the massive investigation and offshore recovery efforts following the October 1999 crash of Egypt Air flight 990; the response to Al-Qa'ida's December 1999 Millenium conspiracy to attack us in the United States, Jordan and Yemen; and the October 12, 2000 attack on the USS Cole in which 17 brave U.S. sailors lost their lives.

While those investigations consumed significant resources, we remained committed to and actively involved in dozens of extraterritorial cases to include the June 1985 Hizballah hijacking of TWA flight 847 which ended in the brutal murder of U.S. Navy diver Robert Stetham. The United States holds three of the top 22 International Terrorist fugitives responsible for that crime.

I would be remiss if I did not point that today we meet on the Seventh Anniversary of the June 25, 1996 attack by Saudi Hizballah at Khobar Towers which resulted in the deaths of 19 courageous airmen. Thanks largely to the tireless efforts of former FBI Director Louis Freeh, five years after the attack, a painstaking and at times frustrating investigation reached a milestone. Thirteen individuals were indicted in the Eastern District of Virginia, four of whom remain on the Top 22 International Terrorist fugitives list.

Additionally, ITOS coordinated the FBI's response to the kidnapings and murders of Americans by the Abu Sayyaf in the Philippines and by the FARC in Colombia. In fact, on April 30, 2002, Attorney General Ashcroft announced the indictment of six FARC members charged with killing three Americans in 1999. ITOS also coordinated the FBI's response to the killing of U.S. citizens over a 20 year period by the terrorist organization 17 November in Greece. The first killing attributed to 17 November was the December 23, 1975 assassination of CIA station chief, Richard Welch. Today, 19 defendants are currently on trial in Greece for the murder of 23 people including four Americans.

Simply stated, Senators, the men and women in ITOS were fully engaged in the war on terrorism and applied every resource available.

In the aftermath of the 9/11 attacks, the FBI's response was immediate. In a matter of hours we had deployed to each of the crash sites, ordered dozens of seasoned management personnel back to Washington, and fully staffed a 24/7 operation at our Command Center with up to 500 persons representing approximately 30 federal agencies. At the height of the 9/11 investigation, known as PENTTBOM, the FBI assigned 7,000 agents to assist full-time. The majority were reassigned from other national security and criminal investigative work. The lack of prior counterterrorism training and experience, although not recognized by the OIG, needs to be factored into this discussion.

Before the month was out, we were faced with another unique attack - Anthrax. Not knowing whether we faced a domestic threat, an international threat, or a follow-on attack by Al-Qa'ida, we again responded with significant resources as we dealt with an unknown killer or killers, first in Florida, then in New York, and finally here on Capitol Hill. Additionally, we turned our attention to the kidnapping of journalist Daniel Pearl and the crash of American Airlines flight 587 in Queens on November 12, 2001. In order to ensure the security of the Winter Olympics in Salt Lake City, and drawing lessons from the prior attack in Atlanta, we deployed 1103 agent and support personnel, in addition to those assigned to our Salt Lake City office.

Meanwhile, PENTTBOM became the largest and most complex investigation in the history of the FBI. In spite of operating under severe handicaps, the New York Office - relocated to a garage on 26th street, and lacking a proficient infrastructure - began a 24/7 operation utilizing 300 investigators from 37 agencies. The 1-800 toll-free line set up in our Atlanta office received 180,000 calls from a shocked public eager to assist. 225,000 e-mails were received on the FBI's internet site. Evidence response teams from throughout the country were dispatched to New York, Washington and Pittsburgh.

Nationwide we covered over 500,000 investigative leads and conducted over 167,000 interviews. We collected over 7,500 pieces of evidence which were submitted for analysis. Working in conjunction with New York City agencies and authorities, we helped process over 1.8 million tons of debris for investigative leads and victim identification and took more than 45,000 crime scene photographs.

As this massive investigation unfolded, the concern of follow-on attacks was critical to our thinking and to our development of an investigative strategy. As investigators came upon individuals who were in this country illegally, it was absolutely essential to determine to the extent possible, any connection to the September 11th attacks and/or the threat posed by them, if any. To do otherwise would have been irresponsible, if not negligent.

As for the clearing process itself, the OIG Report states that some investigations were straightforward. That is true, but even so-called "straightforward" investigations take time. Many of the investigations were far from straightforward. For each detainee we had to conduct a preliminary investigation. This is more than a name check or Lexis-Nexis search. It often requires getting court-approved checks for phone records or computer records. It may involve translation services, multiple interviews, surveillance and other time-consuming work.

This policy was sound. We did not know who these people were -- some had numerous identity documents and others had failed polygraphs on questions such as "did you know any of the hijackers?" or "were you involved in the September 11th attacks?"

It is also important to clarify another point which I believe has been significantly confused in the media -- that is the issue of some individuals being "cleared" of terrorism ties. The fact that an illegal alien was prosecuted for non-terrorism crimes or deported rather than prosecuted, does not mean that the alien had no knowledge of or connection to terrorism. For example, one immigration detainee who pled guilty to conspiracy to commit identification fraud and aiding and abetting the unlawful production of identification documents traveled overnight with two of the hijackers. The name and address of another immigration detainee, who pled guilty to identification fraud, was used by Al Qa'ida cell members in Hamburg, Germany to attempt to obtain U.S. visas.

In many cases, the Department of Justice, in conjunction with the FBI, determined that the best course of action to protect national security was to remove potentially dangerous individuals from the country and ensure that they could not return. Charges may have been withheld in such situations if, for example, they could have compromised ongoing investigations or sensitive intelligence matters.

Many leads took us overseas and therefore took time to resolve. It would have been a disservice to the American people we work so hard to protect for the FBI not to check with the law enforcement and intelligence organizations of the countries of origin for name checks and traces in certain instances. Then, as now, we had no control over the length of time our counterparts overseas took to accomplish these checks. Please do not lose sight of the fact that these investigations were taking place simultaneous with the investigation of the 19 hijackers, the processing of the crash sites and the resolution of the "second wave" threats.

The OIG Report concluded, "The Justice Department faced enormous challenges as a result of the September 11 terrorist attacks, and its employees worked with dedication to meet these challenges." I am pleased that the Inspector General recognizes the dedication displayed by so many in the FBI, other DOJ agencies, and our local, state and federal partners on the JTTFs throughout this country in response to the events of September 11th.

At the same time, we recognize that we can always improve, and we have done so. Over the last twenty months, Director Mueller has refocused the FBI's priorities and the Bureau has made great strides in adapting to its mission of preventing terrorist attacks. The changes we have implemented and others that are ongoing, will ensure that should we ever face a similar crisis, we will handle that crisis with even greater efficiency and speed.

As I mentioned earlier, the vast majority of Special Agents engaged in the PENTTBOM investigation in the early months were not experts in counterterrorism. Today, we have a much larger pool of agents dedicated to and trained in counterterrorism. We have greatly increased the number of strategic analysts, vastly improved their training through the new College of Analytical Studies, and provided them with advanced new software tools to enhance their strategic intelligence capabilities. We have hired nearly 300 additional foreign language translators. New "Fly Away Squads" are now on standby to lend specialized counterterrorism knowledge and expertise, language capabilities, and analytical support around the country and the world as needed. This particular capability was utilized in Buffalo, Detroit, and Portland to assist local FBI offices and recently in Morocco to assist our counterparts in their investigations.

We have new flexibility to mobilize additional personnel as needed. The newly created Office of Intelligence will enable the FBI to assess gaps, devise strategies and implement plans for intelligence collection. It will help us quickly make the connections necessary to prevent terrorist attacks, and to determine a subject or suspect's connections to terrorism with greater efficiency then ever before.

Today, we have better coordination and information sharing with our partner agencies than ever before, and yet we recognize the need for continued improvement. The number of regional Joint Terrorism Task Forces has been increased from 35 in 2001 to 66 today. The new National JTTF acts as a national liaison entity and transmits information on threats and leads from the 30 participating agencies at FBI headquarters to the local JTTFs. We have CIA terrorism experts detailed to the FBI and our terrorism experts detailed to CIA. We are working with our former INS colleagues, now in the new Department of Homeland Security. The Bureau of Immigration and Customs Enforcement plays a critical role on our JTTFs.

The FBI acknowledges that our success is measured not only by how effectively we disrupt acts of terrorism, but also by how well we protect the Constitutional rights and cherished liberties of Americans in the process. We will continue to work to find new ways to continue to meet both of these crucial missions.

Thank you for affording me the opportunity to participate in today's discussion on this important topic, and I look forward to answering any questions that you may have.

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In October 2001, Attorney General John Ashcroft announced that just as former attorney general Robert F. Kennedy would arrest a mobster for spitting on the sidewalk, so Ashcroft would use all available laws, especially immigration law, to lock up suspected terrorists and thereby "prevent terrorist attacks." Last Monday, the Justice Department's inspector general reported on the results of this initiative in unsparing detail. More than 730 foreign nationals were locked up after Sept. 11, 2001, on immigration charges and labeled "of interest" to the Sept. 11 investigation. In the end, not a single one was charged with the crimes of that day or any other terrorist crime. The FBI ultimately cleared nearly all of them of any connection to terrorism whatsoever.

The inspector general's report paints a stark picture of practices previously kept secret. Though innocent of terrorism, the detainees were all treated as terrorists. They were held in secret and tried in secret on routine immigration charges. To this day, the government refuses to disclose their names. Many were held in 23-hour-a-day lockdown. (One hour was, in theory, for exercise.) They were initially barred from communicating with each other and the outside world, including lawyers.

Many were physically and verbally abused, the report concluded. They were held without bond, without regard to any actual evidence that they were dangerous, a flight risk or tied to terrorism. Even detainees whose immigration cases were fully resolved and who were ready and willing to leave the country were kept locked up simply because the FBI had not "cleared" them, a process that took an average of 80 days, and as long as 244 days, to complete. They were presumed guilty until proven innocent.

The inspector general's report illustrates what happens when the government adopts a "preventive" law enforcement strategy, as Ashcroft has so proudly done since the terrorist attacks. The justice system is generally backward-looking. The presumption of innocence and due process require objective evidence that an individual has actually done something wrong before he can be stuck in a prison cell. Authorities need not wait until the bomb goes off; conspiracy laws permit punishment for crimes discovered in the planning stage. But even conspiracy convictions require proof that an individual has taken some specific acts toward the conspired end.

Ashcroft wants to do more than capture and prosecute individuals who commit or conspire to commit terrorist acts. Understandably, he seeks to prevent the next atrocity from occurring. But the inspector general's report reveals the dangers of Ashcroft's approach. People were picked up on anonymous tips that "too many" Muslims worked in a convenience store, or that a Muslim neighbor kept odd hours, or simply because they were in a place the FBI visited during the investigation into Sept. 11. In the end, the attorney general was shooting in the dark, and virtually every shot missed.

What's worse, the inspector general's report provides only a partial snapshot of the preventive detention campaign. It covers only those suspects picked up between September 2001 and August 2002, even though the campaign continues to this day. And it addresses only a fraction of those detained. Seven weeks into the Sept. 11 investigation, the Justice Department announced it had detained 1,182 persons, but the report focuses only on those detained on immigration violations, not those held on criminal charges or as material witnesses. It also does not address the more than 1,100 persons the Justice Department has detained in connection with the Absconder Apprehension Initiative, or the 2,747 persons it detained when they showed up for Special Registration, two other antiterrorism initiatives targeted at Arab and Muslim foreign nationals. Together, that makes somewhere between 4,000 and 5,000 preventive detentions. To this date only one of those detainees has been convicted on a terrorism criminal charge -- Karim Koubriti, who was convicted last Tuesday in Detroit of conspiracy to support terrorism. (A second person convicted in that trial had not been subject to preventive detention.) The targeting of Arabs and Muslims has been a total failure, and it has so alienated the targeted communities that we have almost certainly lost opportunities for gathering information that might help us find real terrorists.

Because preventive law enforcement is directed at future crimes, law enforcement authorities often run up against legal protections and safeguards. Ashcroft did an end run around these protections. In the criminal justice system, individuals cannot be arrested and tried in secret. Using immigration law, Ashcroft did just that with hundreds of Sept. 11 detainees. In the criminal justice system, a person must be brought before a magistrate on criminal charges within 48 hours of his arrest. So Ashcroft turned to immigration law again to arrest people on no charges at all, and to hold them for many weeks before they were charged and given any hearing before a judge. (Even then, the hearing was before an administrative judge ultimately answerable to Ashcroft himself.) In the criminal justice system, a judge's order to release an individual must be carried out unless overturned by a higher judge; Ashcroft empowered his immigration prosecutors to hold foreign nationals in detention even after immigration judges had ruled that they should be released.

Preventive law enforcement also typically targets the most vulnerable. The American public would not stand for such measures if they were applied broadly. Had Ashcroft locked up hundreds of U.S. citizens unconnected to terrorism under similar conditions, the political and legal reaction would have been swift and sharp. But foreign nationals do not vote. And by targeting foreigners, the government reassures the citizenry that "our" rights need not be sacrificed in the name of national security; it is enough to sacrifice "their" rights. In times of crisis, when the public is prone to draw lines between "us" and "them," this is an especially tempting -- though ultimately illegitimate -- way to strike the balance between liberty and security.

This, of course, is not the first time that federal authorities have adopted such preventive measures in response to threats to security. In 1919, the United States was rocked by a series of terrorist bombings. Mail bombs were found addressed to 18 prominent people, including Supreme Court Justice Oliver Wendell Holmes, Attorney General A. Mitchell Palmer, two U.S. senators, and business leaders John D. Rockefeller and J.P. Morgan. A month later a bomber blew off the front of Palmer's home in Georgetown.

Then, as now, the government went into "preventive" mode, and exploited immigration law to sweep broadly and blindly. In a series of coordinated raids, officials arrested thousands of foreign nationals, not for their involvement in the bombings, but for pretextual immigration offenses and political associations. Like the Sept. 11 detainees, they were held and interrogated incommunicado, denied release on bond and refused access to lawyers. Hundreds were deported. No bombers were found. And like Ashcroft's sweep, the Palmer Raids targeted the most vulnerable -- foreign nationals. As Louis Post, assistant secretary of labor during the Palmer Raids, wrote, "The force of the delirium turned in the direction of a deportation crusade with the spontaneity of water flowing along the course of least resistance."

The Palmer Raids are now viewed as a tragic mistake, another in a long line of government overreactions in times of crisis. But it was not always so. The **Washington Post** editorial writers responded to the initial raids by insisting that "[t]here is no time to waste on hairsplitting over infringement of liberty." The tide turned when an influential blue-ribbon panel -- including Harvard Law School Dean Roscoe Pound and professor Felix Frankfurter -- issued a blistering report condemning the raids' abuses.

It remains to be seen whether the inspector general's report will bring about a similar response. Early signs are not encouraging. Justice Department spokeswoman Barbara Comstock said: "We make no apologies for finding every legal way possible to protect the American public from further terrorist attacks." She did not explain how locking up hundreds (and now thousands) of people unconnected to terrorism has protected the American public. Ashcroft himself expressed no regrets in testimony before Congress on Thursday, and had the nerve to ask for even broader preventive detention powers, this time extending to citizens. Ashcroft's response recalls Palmer's retort to criticism of his raids: When you are "trying to protect the community against moral rats you sometimes get to thinking more of your trap's effectiveness than of its lawful construction."

In the end, it's not clear what we learned from the Palmer Raids. While they are now condemned, their architect -- not Palmer but a young J. Edgar Hoover, then head of the Justice Department's "Alien Radical" Division -- spent the rest of his career seeking to wield against U.S. citizens the questionable preventive tactics of guilt by association, political spying and administrative shortcuts on due process that he had employed against foreign nationals in his first job. In the McCarthy era, he succeeded. Perhaps he, not Robert Kennedy, is Ashcroft's actual role model.

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</body>**David Cole** is a professor at Georgetown University Law Center, and author of the forthcoming "Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism" (New Press).

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