



DEPARTMENT OF HOMELAND SECURITY  
Office of Inspector General  
Washington, DC 20528

January 20, 2004

MEMORANDUM

TO: The Honorable Asa Hutchinson  
Under Secretary  
Border and Transportation Security

FROM: Clark Kent Ervin  
Inspector General

SUBJECT: Analysis of the Department of Homeland Security's Second Response to the Recommendations Contained in the Department of Justice Office of the Inspector General's June 2003 Report on the Treatment of the September 11 Detainees, Report Number OIG-04-09

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Attached for your review is our analysis of your second response to the recommendations made by the Department of Justice (DOJ) Office of the Inspector General (OIG) report titled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks," issued on June 2, 2003. Your response and our analysis addressed those open recommendations that apply to the Department of Homeland Security since it was established on March 1, 2003.

While much work still needs to be done, we note your diligence in resolving the important issues identified by the DOJ OIG report. We also appreciate the enormous challenges that confront you as you address national security issues in such a way as to maintain our civil rights and civil liberties.

If you have any questions, please contact Robert L. Ashbaugh, Assistant Inspector General for Inspections, Evaluations, and Special Reviews, at (202) 254-4100.

cc: Anna F. Dixon  
BTS Liaison

The Honorable Glenn A. Fine  
DOJ Inspector General

## **Analysis of the Department of Homeland Security's Second Response to the Recommendations Contained in the Department of Justice Office of the Inspector General's June 2003 Report on the Treatment of the September 11 Detainees**

### **Introduction**

On June 2, 2003, the Department of Justice (DOJ) Office of the Inspector General (OIG) issued a report titled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks." The report described DOJ's response to the September 11 attacks, including the massive investigation initiated by the Federal Bureau of Investigation (FBI), called the PENTTBOM investigation, to identify the terrorists who committed the September 11 attacks and anyone who knew about or aided their efforts. The OIG's report focused on the 762 aliens who were detained on immigration charges in connection with the PENTTBOM investigation during the 11 months after the attacks. Immigration charges were brought against the detainees by the Immigration and Naturalization Service (INS), which was then a part of DOJ, but which has since been transferred to the Department of Homeland Security (DHS).

The report examined all aspects of the detainees' treatment, from the serving of the charging document (Notice to Appear (NTA)), to the policies governing the removal of those detainees from the United States. The report also reviewed the conditions of the detainees' confinement during their detention. Some of the detainees were held in Bureau of Prisons (BOP) facilities, while others were held at INS detention centers or in state or local facilities under contract with INS. The report described the manner in which the BOP classified the detainees – initially putting them under its witness security (WITSEC) group, and the problems this created for those who attempted to communicate with them and visit them. The report offered 21 recommendations to address the issues identified in the DOJ OIG review.

In a memorandum dated August 4, 2002, Asa Hutchinson, the Under Secretary for Border and Transportation Security (BTS) at the DHS, responded on behalf of DHS to the recommendations in the DOJ OIG report concerning immigration issues that are now under the jurisdiction of the DHS. On September 5, 2003, the DOJ OIG replied to DHS with its analysis of the responses and requested additional information. With the establishment of DHS and the transfer of INS functions to it, the DHS OIG now has responsibility for monitoring the implementation of those recommendations that apply to DHS.

DHS responded to our additional requests for information by a second memorandum dated November 21, 2003 (Appendix A). (We received a copy of DOJ's second response dated November 20, 2003, and attached it as Appendix B).

In the following sections, we analyze DHS' second response to each of the recommendations related to DHS. For each recommendation, we provide the:

1. DOJ OIG's original recommendation;
2. DHS' second response; and
3. DHS OIG's analysis of DHS' second response.

As a result of DHS's second response, we are closing recommendations 9 and 20. Recommendations 3, 4, 7, 8, and 21 remain open.<sup>1</sup>

### **Recommendation 3**

Status: Open

#### DOJ OIG Recommendation

The FBI did not characterize many of the September 11 detainees' potential connections to terrorism and consequently they were treated as "of undetermined interest" to the terrorism investigation. In these cases the INS, in an understandable abundance of caution, treated the alien as a September 11 detainee subject to the "hold until cleared/no bond" policies applicable to all September 11 detainees. This lack of a characterization by the FBI also resulted in prolonged confinement for many detainees, sometimes under extremely harsh conditions. Unless the FBI labels an alien "of interest" to its terrorism investigation within a limited period of time, we believe the alien should be treated as a "regular" immigration detainee and processed according to routine procedures. In any case, the DHS should establish a consistent mechanism to notify the FBI of its plans to release or deport such a detainee.

(DHS combined its response to recommendations 3 and 4 under recommendation 4.)

### **Recommendation 4**

Status: Open

#### DOJ OIG Recommendation

Unless the federal immigration authorities, now part of the DHS, work closely with the Department<sup>2</sup> 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 will result in delays, continuing conflicts, and concerns about accountability. At a minimum, we recommend that immigration officials in the DHS enter into a Memorandum of

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<sup>1</sup> As a result of the August 4, 2003 DHS response, we closed recommendations 18 and 19 and do not discuss them further here. Where no action has been taken or the department has indicated its intent to implement measures in the future to address the issues in question, the recommendation is left "open" until corrective action has been taken.

<sup>2</sup> "Department" refers to DOJ.

Understanding (MOU) with the Department and the FBI to formalize policies, responsibilities, and procedures for managing a national emergency that involves alien detainees. An MOU should specify a clear chain of command for any inter-agency working group. Further, the MOU should specify information sharing and reporting requirements for all members of such an inter-agency working group.

#### DHS Second Response

DHS is currently discussing with DOJ a memorandum of understanding (MOU) that could set forth the process for coordination and communications during periods of time in which the country is dealing with events of national impact. DHS believes that our discussions with DOJ will fully address issues raised by these recommendations by describing a consistent procedure for the handling of “special interest” cases. Our discussions currently focus on the need to formalize policies, responsibilities, and procedures that will guide DHS, and particularly ICE [Bureau of Immigration and Customs Enforcement, a subordinate component of DHS], and the FBI in the case of events of national impact involving alien detainees. DHS also foresees the formation of an inter-agency working group consisting of FBI and DHS officials that would meet regularly and share information during such periods. Our discussions should produce a clear chain of command and include a mechanism to resolve any dispute that cannot be resolved by the inter-agency working group. With these new policies and procedures, we believe that the OIG’s concerns will have been addressed. We will report to you on the progress in entering into a new set of procedures and policies with DOJ.

#### DHS OIG Analysis

We believe the development and implementation of an MOU with DOJ as described by the DHS response will appropriately address the issues identified in recommendations 3 and 4. Please provide us with a copy of the MOU or an updated status report describing the progress in developing the MOU by March 5, 2004.

#### **Recommendation 7**

Status: Open

#### DOJ OIG Recommendation

We recommend that the immigration authorities in the DHS issue instructions that clarify, for future events requiring centralized approvals at a Headquarters’ level, which District or office is responsible for serving NTAs on transferred detainees: either the District in which the detainee was arrested or the District where the detainee is transferred.

#### DHS Second Response

DHS agrees with the need for comprehensive instructions to clarify, for future events requiring centralized approvals at the headquarters’ level, how NTAs shall be served on

transferred detainees. Based on past experience, ICE has decided to establish procedures to localize the initial clearance of NTAs in the field offices. Further, local ICE offices will be responsible for serving NTAs in all but a limited number of cases involving national security and related grounds. This guidance will be disseminated to the field.

#### DHS OIG Analysis

The DHS' development of comprehensive instructions for serving NTAs addresses the issues identified in recommendation 7. However, this action resolves only part of the issue. The instructions should also assign responsibility for managing those detainees held on "national security and related grounds" and provide appropriate guidance and procedures. Please provide us a copy of the instructions and the implementing memorandum provided to the field or an updated status report describing the progress in developing the instructions and the memorandum by March 5, 2004.

#### **Recommendation 8**

Status: Open

#### DOJ OIG Recommendation

We recommend that 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 72-hour NTA service objective to a formal requirement. Further, we recommend that the DHS specify the "extraordinary circumstances" and the "reasonable period of time" when circumstances prevent the charging determination within 48 hours. We also recommend that the DHS provide, on a case-by-case basis, written justification for imposing the "extraordinary circumstances" exception and place a copy of this justification in the detainee's A-File.

#### DHS Second Response

We are committed to ensuring that DHS officials make determinations to charge an individual as expeditiously as possible after arrest and within 48 hours, and that they serve formal charges on an alien (the Notice to Appear) who is being detained within 72 hours of the time he or she is arrested. At the same time, we believe that there is a need to retain flexibility in the process based on unique and extraordinary circumstances that may develop. Therefore, DHS will issue new guidance to the field that incorporates the following elements:

- A determination will be made within 48 hours of the arrest as to whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear (NTA) and warrant of arrest will be issued.
- The charging determination and the date of the service of the NTA, if any, shall be documented in the alien's official file.

- Service of the NTA on the alien shall be made within 72 hours of the arrest.
- These parameters need not be applied in the event of an emergency or other extraordinary circumstance, in which case a determination will be made as soon as possible.
- An emergency or other extraordinary circumstance exists in the following narrow circumstances: if there is a significant infrastructure or logistical disruption such as a weather emergency or terrorist act(s), or, there is a compelling law enforcement need.

Procedures and a form to annotate the charging determination and the service of the NTA will be developed and disseminated to the field. This guidance will be issued along with the final policies and procedures negotiated with the DOJ.

#### DHS OIG Analysis

The DHS' development of proposed procedures for making charging determinations and serving the NTAs address all but one of the issues identified in recommendation 8. The original recommendation included the provision "that the DHS provide, on a case-by-case basis, written justification for imposing the 'extraordinary circumstances' exception and place a copy of this justification in the detainee's A-File." This provision was intended to help prevent inappropriate application of the "extraordinary circumstance" exception and to provide a formal record to justify the delays in serving NTAs. This provision serves, in part, to protect the DHS from inadvertently violating the alien's civil rights. Please provide us a copy of the charging and NTA serving procedures and the implementing memorandum provided to the field or an updated status report describing the progress in developing the instructions and the memorandum by March 5, 2004.

#### **Recommendation 9**

Status: Closed

#### DOJ OIG Recommendation

We recommend that Offices of General Counsel throughout the Department establish formal processes for identifying legal issues of concern – like the perceived conflict between the Department's "hold until cleared" policy and immigration laws and regulations – and formally raise significant concerns, in writing, to agency senior management and eventually Department senior management for resolution. Such processes will be even more important now that immigration responsibilities have transferred from the Department to the DHS. Offices of General Counsel through DOJ should establish formal processes for identifying legal issues of concern in writing to senior DOJ officials.

## DHS Second Response

As we create the new department, we are very mindful of the need to provide effective lines of communication. In order to implement the spirit of this recommendation, we will take two steps. First, we will not hesitate to communicate through proper channels within DHS and to our colleagues within DOJ regarding issues of mutual concern. The proposed policies we are discussing with DOJ would identify key senior positions within each department that will be responsible for resolving any issues between the components that have not been resolved in the due course of business.

Second, DHS's leadership will encourage employees throughout the organization to raise issues of concern. We will make clear during a time of events of national impact, employees throughout the organization may raise issues of concern to either the DHS General Counsel of the department's Officer for Civil Rights and Civil Liberties. Both of these officials report directly to Secretary for Homeland Security, and therefore can present issues to the senior leadership for the department. Both of these officials will also ensure the confidentiality of the identity of those who raise concerns. This mechanism will promote a free flow of communication about critical issues that face the department during times of crisis.

## DHS OIG Analysis

DHS believes that its processes for raising legal issues to senior DHS managers are adequate and that it will reiterate the importance of raising these issues during a time of national crisis. We continue to believe that the DHS Office of General Counsel should establish a formal process to discuss legal issues and to ensure those issues are raised to appropriate DHS leaders in a timely manner. As noted in the original recommendation regarding the "hold until cleared" policy, senior DOJ officials were never aware of the problem and therefore, could not intervene to resolve the issue. Further, the legal opinion covering this issue was not rendered until February 2003, more than a year after INS attorneys first identified the issue. However, the processes described in the DHS response should be adequate to address legal issues properly as they arise during a crisis if fully implemented. Therefore, given DHS' responsiveness to this issue, we are closing the recommendation.

### **Recommendation 20**

Status: Closed

## DOJ OIG Recommendation

How long the INS legally could hold September 11 detainees after they have received final orders of removal or voluntary departure orders in order to conduct FBI clearance checks was the subject of differing opinions within the INS and the Department. A February 2003 opinion by the Department's Office of Legal Counsel concluded, however, that the INS could hold a detainee beyond the normal removal time for this purpose. That issue is also a subject in an ongoing lawsuit.

Regardless of the outcome of the court case, we concluded that the Department failed to turn its attention in a timely manner to the question of its authority to detain such individuals. Where policies are implemented that could result in the prolonged confinement of illegal aliens, we recommend that the Department carefully examine, at an early stage, the limits on its legal authority to detain these individuals.

#### DHS Second Response

We are committed to strengthening our efforts to conduct post-order custody reviews. We will ensure that post-order custody reviews are conducted consistently and effectively, and, as described below, will issue new guidance to ICE field offices to guarantee that these reviews are completed. With regard to the legal opinion by the DOJ's Office of Legal Counsel, it is critical to remember the role of that office plays in the federal government. The Office of Legal Counsel's role is much broader than providing legal advice within its own agency; in certain important circumstances, the Office is responsible for providing legal advice to the entire Executive Branch. Given this context, the DOJ Office of Legal Counsel's opinion will continue to govern DHS's policies and practices in this area.

#### DHS OIG Analysis

This issue identified by this recommendation has more to do with the failure of DOJ and INS to come to grips with their legal authority to hold aliens beyond the normal removal period than it had to do with post-order custody reviews (POCR). The DHS response to recommendation 21 below more directly addresses the POCR issue. This recommendation is related to recommendation 9 discussed earlier, which deals with identifying and raising legal issues to senior DHS managers' attention. As we stated in our analysis of recommendation 9, the processes described in the DHS response should be adequate to address legal issues properly as they arise during a crisis if fully implemented. Therefore, we are closing the recommendation.

### **Recommendation 21**

**Status: Open**

#### DOJ OIG Recommendation

The INS failed to consistently conduct Post-Order Custody Reviews of September 11 detainees held more than 90 days after receiving final orders of removal. These custody reviews are required by immigration regulations to assess if detainees' continued detention is warranted. We understand that under Department policy in effect at the time, the INS was not permitted to remove September 11 detainees until it received FBI clearances. We believe the INS nevertheless should have conducted the custody reviews, both because they are required by regulation and because such reviews may have alerted Department officials even more directly that a number of aliens were being held beyond the 90-day removal period. We recommend that the DHS ensure that its field offices



consistently conduct Post-Order Custody Reviews for all detainees who remain in its custody after the 90-day removal period.

### DHS Second Response

We agree with this recommendation, and have taken steps to ensure effective coordination and communication with regard to post-order custody reviews (POCRs). Under the new ICE field structure, ICE Headquarters management officials have control of field elements that are charged with completing POCRs, and have established a clear chain of command. This new chain of command, coupled with improved coordination between DOJ and DHS, and current ongoing training for our field personnel, should ensure that POCRs are completed in a timely manner in the future. ICE is confident these actions will result in greater accountability and responsiveness.

Under the current ICE practice for detained aliens with either a final order of removal or voluntary departure, where there is FBI interest, ICE promptly notifies FBI of pending removal action and asks the FBI to provide within a specific timeframe information indicating why the alien should remain in custody. This request is typically made at the point that ICE has a travel document in hand and is in a position to move the alien.

In summary, DHS will take strong action to carefully monitor each individual situation in which an alien remains in custody after the 90-day removal period.

### DHS OIG Analysis

DHS' response is little changed from its initial response of August 4, 2003. At that time, we stated that DHS did not provide details on how the new ICE field structure and chain of command would improve the POCR process. We also commented that the response did not describe how ICE was going to monitor the POCR process to ensure compliance with the procedures. Therefore, we again ask for a copy of ICE's post-order custody review monitoring plan and an explanation of how the revisions to its chain of command and field structure are relevant to this issue or an updated status report on developing this plan by March 5, 2004.

Appendix A: DHS' Second Response  
Appendix B: DOJ's Second Response

**Appendix A**  
Department of Homeland Security Second Response

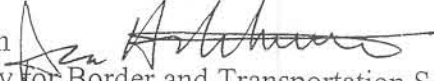


# Homeland Security

November 21, 2003

## MEMORANDUM

TO: Clark Kent Ervin  
Acting Inspector General

FROM: Asa Hutchinson   
Under Secretary for Border and Transportation Security

SUBJECT: Response to the U.S. Department of Justice Office of Inspector General Report, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*.

Our core mission at the Department of Homeland Security is not just to protect America's assets – our buildings and airports and power plants - but to protect America and our way of life. We are committed to ensuring that as we take aggressive measures to improve our nation's security, we will implement those measures in ways that respect our civil rights and civil liberties.

In this context, the Department of Homeland Security (DHS) takes very seriously the findings and recommendations contained in the Department of Justice Inspector General's report (DOJ OIG report) regarding September 11 detainees. Of course, the report analyzes events that took place before the formation of our Department. Nevertheless, the report is highly relevant to our work. As you know, DHS assumed many of the immigration functions that were, during that critical time period, part of the Justice Department. We are working closely with our outstanding colleagues in DOJ as we manage together this major reorganization of the federal government. The two agencies are working together to establish effective means of coordination and communication in a number of areas, including with regard to situations involving aliens of interest to terrorism investigations.

As described in this memorandum, we have taken significant steps to remedy concerns identified by the Inspector General regarding the handling of aliens in the aftermath of September 11. Some of our actions preceded the findings by the Inspector General while others were developed after careful review of the report and recommendations. Moreover, we consider this an on-going process – long after we have addressed the recommendations by the Inspector General in this report, we will continue to review our policies and procedures to ensure that we carefully respect the civil rights and civil liberties of all people in the United States.



## I. BACKGROUND

On June 2, 2003, the DOJ OIG issued the report, "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks." The OIG report examined the treatment of seven hundred and sixty-two aliens detained in connection with DOJ's terrorism investigation. The report identified concerns with respect to: the length of the detainees' confinement; the process to clear individual detainees of a connection to the September 11 attacks or terrorism in general; bond determinations; the removal process and the timing of removal; and conditions of confinement, including access to legal counsel. The DOJ OIG made twenty-one recommendations to DOJ and DHS related to the issues discussed in the report.

On June 17, 2003, you sent me a memorandum stating that the DHS Office of Inspector General (DHS OIG) would monitor the recommendations made by the DOJ OIG to ensure that DHS takes appropriate and corrective action.

On August 4, 2003, I provided you with DHS's interim responses to the OIG report. By memorandum of July 21, 2003, the Deputy Attorney General, on behalf of the Attorney General's office, the Federal Bureau of Investigation (FBI), and the Bureau of Prisons (BOP), provided the DOJ OIG with responses.

On September 4, 2003, the DOJ OIG sent a letter and report to DOJ and DHS analyzing each agency's responses to the recommendations. The analysis noted that both agencies are taking the OIG recommendations seriously and taking steps to address many concerns raised by the report. While the DOJ OIG concluded that DHS responses adequately addressed some recommendations, it rightly concluded that additional information is necessary to address others. The purpose of this memorandum is to provide that additional information.

## II. SUMMARY OF DHS ACTIONS TO ADDRESS THE OIG REPORT

Well in advance of the release of the OIG Report, DHS and its Border and Transportation Security Directorate (BTS) had initiated a series of actions and policy changes that address several of the OIG's findings and recommendations. The OIG report served as an additional catalyst for a reevaluation of policies and practices surrounding the detention of aliens in the context of events of national impact. Over the past several months, we have carried out a comprehensive internal review of immigration-related operations in DHS. Working at my direction, the review has been led by C. Stewart Verdery, Jr., the Assistant Secretary for Border and Transportation Security Policy and Planning; Daniel W. Sutherland, the Department's Officer for Civil Rights and Civil Liberties; and, Victor X. Cerda, the Acting Principal Legal Advisor for BTS's

Immigration and Customs Enforcement Bureau (ICE). As part of this review, we met with and considered the views of a coalition of civil rights and civil liberties groups that expressed concerns about the government's handling of the investigations and detentions of aliens in the period following September 11. We also received insight from scholars who have studied the post-September 11 immigration measures.

While we provide a specific response for each of the OIG's recommendations, our actions fall into five broad categories.

First, we are diligently working to improve coordination between DHS and DOJ. Many of the issues discussed in the OIG report relate to issues of communication between the Federal Bureau of Investigation (FBI) and the Immigration and Naturalization Service (INS) in the weeks and months following September 11, 2001.<sup>1</sup> It is critical to remember how devastating the events of September 11 were to those who were responsible for enforcing our nation's laws. Numerous government locations had to be evacuated, including law enforcement offices and immigration detention facilities. When anthrax was mailed to several government facilities, the work was made even more difficult. Throughout these weeks and months, federal investigators, intelligence analysts, detention officers, prosecutors, and judges performed under extremely difficult circumstances. America is proud of the heroic and courageous work done by our country's law enforcement community.

While recognizing the incredible work done during that time period under difficult circumstances, it is appropriate to make changes in policy to ensure that our communications and coordination are improved in case such an event is repeated. One of the critical items that we are addressing is coordination between DOJ, primarily the FBI, and DHS's law enforcement officers and attorneys. DHS is discussing with DOJ a proposed memorandum of understanding (MOU) that would improve our coordination and flow of communications. Our discussions are centering on the need for a concrete set of procedures to handle a large-scale influx of alien detainees who may present national security risks. We believe that these new policies and procedures would significantly improve coordination between these agencies with regard to the detention of aliens during times of national impact.

Second, we will institute changes in policy to ensure that aliens who are arrested are informed of the charges against them in a timely fashion.<sup>2</sup> The OIG concluded that

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<sup>1</sup> At the time, the FBI and INS were both part of the Department of Justice. Under the Homeland Security Act of 2002, the INS was replaced by three new organizations that are part of the Department of Homeland Security: the Bureau of Immigration and Customs Enforcement (ICE), the Bureau of Customs and Border Protection (CBP), and the Bureau of Citizenship and Immigration Services (CIS). The first two are part of the Border and Transportation Security Directorate, and the third reports directly to the Deputy Secretary of Homeland Security.

<sup>2</sup> At several places in this memorandum, we refer to policy changes that we will soon put in place. It is our judgment that we should issue to the field all policy changes at one time. If we issue policy directives in a piecemeal fashion, it might serve to confuse rather than guide DHS employees as they carry out their duties. Therefore, when DHS concludes its negotiations with DOJ regarding an MOU, a comprehensive set of guidance will be issued to the field. We are committed to concluding these negotiations in the

immigration officials did not promptly serve some of the detainees with documents explaining the charges filed against them. According to the OIG Report, at least twenty-five percent of detainees were held more than three days without being provided a reason for their arrest. DHS is taking steps necessary to formalize the process for ensuring that aliens are promptly informed of the charges against them. As explained below, we will soon issue guidance aimed at formalizing the practice of providing service to the alien of a notice of charges within 72 hours of the time an alien has been arrested and detained. If specific "extraordinary circumstances" are present, the charging decision and notice to the alien can be served within an additional short period of time. The guidance will define what is intended by extraordinary circumstances and provide that the notice be served as soon as practicable.

A related issue is the OIG's concern that immigration headquarters office and field offices were not sufficiently coordinated with respect to which office was responsible for issuing the notices of charges. As explained below, DHS will issue procedures that will localize the initial clearance of the Notices to Appear. The procedures will also state that local offices will be responsible for serving the Notices to Appear in all but a limited number of cases – cases involving national security and related grounds. We are confident that this division of responsibilities will ensure a more timely and efficient process of notifying aliens that are detained of the charges against them.

Third, we are committed to ensuring that DHS independently reviews the individual circumstances of each case in which the FBI requests detention solely based upon information regarding an alien's possible association to terrorism. Directions have been given that DHS officers and attorneys carefully study the underlying facts in each case and make assessments as to both the necessity for detention and the appropriate conditions of confinement in every case. By doing so, the agency will properly exercise its responsibilities concerning the arrest and detention of aliens. This will also ensure that ICE can make the proper recommendations to the immigration courts on bond, detention and removal. This independent assessment is essential because ICE attorneys are officers of the court and must have confidence in the representations made to the court.

Fourth, we have already taken strong steps toward monitoring and oversight of the conditions of confinement for detainees. ICE's Detention and Removal Office (DRO) issued a new "detention standard" in July 2003 that ensures that immigration and customs enforcement officials visit detainees regularly to monitor conditions of confinement and address concerns. The OIG has concluded that this detention standard resolves the recommendations related to conditions of confinement. Nevertheless, we are committed to revisiting our detention practices to ensure that they are both strong and fair. This review of our detention policies is on-going. The Officer for Civil Rights and Civil Liberties will continue to work closely with DRO on this project.

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immediate future. The comprehensive guidance will discuss, at a minimum, the terms of the new policies and procedures established with respect to DOJ; the procedures for ensuring that aliens are informed of the charges against them in a timely fashion; the procedures for localizing the initial clearances of Notices to Appear; and, the procedures for robust post-order custody reviews.

Finally, we are committed to strengthening our efforts to conduct post-order custody reviews. The OIG recommended that DHS improve efforts to review the cases of those aliens detained for more than 90 days after receiving final orders of removal. We will ensure that post-order custody reviews are conducted consistently and effectively, and, as described below, will issue new guidance to ICE field offices to guarantee that these reviews are completed.

By strengthening our policies and practices in these five primary areas, we believe that DHS furthers its goals of strengthening national security and upholding the rule of law.

### III. SPECIFIC RESPONSES TO THE DOJ OIG RECOMMENDATIONS

The following are DHS's specific responses to recommendations that apply to areas in which DHS has jurisdiction.

#### Enhancing Communications and Coordination

- **RECOMMENDATION 1.** 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. The FBI should 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.
- **RECOMMENDATION 2.** The FBI should provide DHS with a written assessment of an alien's likely association with terrorism shortly after arrest and preferably within 24 hours, and promptly communicate any changes in their assessment.
- **RECOMMENDATION 3:** Unless the FBI labels an alien "of interest" to its terrorism investigation within a limited period of time, we believe the alien should be treated as a "regular" immigration detainee and processed according to the routine procedures. The DHS should establish a consistent mechanism to notify the FBI of its plans to release or deport such a detainee.
- **RECOMMENDATION 4:** At a minimum, we recommend that immigration officials in the DHS enter into a Memorandum of Understanding (MOU) with the Department and the FBI to formalize policies, responsibilities, and procedures for managing a national emergency that involves alien detainees. An MOU should specify a clear chain of command for any inter-agency working group. Further, the MOU should specify information sharing and reporting requirements for all members of such an inter-agency working group.

**Response:** DHS is currently discussing with DOJ a memorandum of understanding (MOU) that could set forth the process for coordination and

communications during periods of time in which the country is dealing with events of national impact. DHS believes that our discussions with DOJ will fully address the issues raised by these recommendations by describing a consistent procedure for the handling of "special interest" cases. Our discussions currently focus on the need to formalize policies, responsibilities, and procedures that will guide DHS, and particularly ICE, and the FBI in the case of events of national impact involving alien detainees. DHS also foresees the formation of an inter-agency working group consisting of FBI and BTS officials that would meet regularly and share information during such periods. Our discussions should produce a clear chain of command and include a mechanism to resolve any dispute that cannot be resolved by the inter-agency working group. With these new policies and procedures, we believe that the OIG's concerns will have been addressed. We will report to you on progress in entering into a new set of procedures and policies with DOJ.

### Notice of Charges

- **RECOMMENDATION 7:** Immigration authorities should issue instructions that clarify, for future events requiring centralized approvals at a Headquarters' level, which District Office is responsible for serving Notices to Appear (NTA) on transferred detainees.

**Response:** DHS agrees with the need for comprehensive instructions to clarify, for future events requiring centralized approvals at the headquarters' level, how NTAs shall be served on transferred detainees. Based on past experience, ICE has decided to establish procedures to localize the initial clearance of NTAs in the field offices. Further, local ICE offices will be responsible for serving NTAs in all but a limited number of cases involving national security and related grounds. This guidance will be disseminated to the field.

- **RECOMMENDATION 8:** We recommend that the DHS document when the charging determination is made, in order to determine compliance with the "48-hour rule." We also recommend that DHS convert the 72-hour NTA service objective to a formal requirement. Further, we recommend that the DHS specify the "extraordinary circumstances" and the "reasonable period of time." We also recommend that the DHS provide, on a case-by-case basis, written justification for imposing the "extraordinary circumstances" exception.

**Response:** We are committed to ensuring that DHS officials make determinations to charge an individual as expeditiously as possible after arrest and within 48 hours, and that they serve formal charges on an alien (the Notice to Appear) who is being detained within 72 hours of the time he or she is arrested. At the same time, we believe that there is a need to retain flexibility in the process based on unique and extraordinary circumstances that may develop. Therefore, DHS will issue new guidance to the field that incorporates the following elements:



- A determination will be made within 48 hours of the arrest as to whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear (NTA) and warrant of arrest will be issued.
- The charging determination and the date of service of the NTA, if any, shall be documented in the alien's official file.
- Service of the NTA on the alien shall be made within 72 hours of the arrest.
- These parameters need not be applied in the event of an emergency or other extraordinary circumstance, in which case a determination will be made as soon as practicable.
- An emergency or other extraordinary circumstance exists in the following narrow circumstances: if there is a significant infrastructure or logistical disruption such as a weather emergency or terrorist act(s), or, there is a compelling law enforcement need.

Procedures and a form to annotate the charging determination and service of the NTA will be developed and disseminated to the field. This guidance will be issued along with the final policies and procedures negotiated with the DOJ.

### **Issues of Concern During Times of National Impact**

- **RECOMMENDATION 9:** INS General Counsel should institute formal processes to ensure that issues of legal concern are communicated to senior management at DOJ in a proper and timely manner.

**Response:** As we create the new Department, we are very mindful of the need to provide effective lines of communication. In order to implement the spirit of this recommendation, we will take two steps. First, we will not hesitate to communicate through proper channels within DHS and to our colleagues within DOJ regarding issues of mutual concern. The proposed policies we are discussing with DOJ would identify key senior positions within each Department that will be responsible for resolving any issues between the components that have not been resolved in the due course of business.

Second, DHS's leadership will encourage employees throughout the organization to raise issues of concern. We will make clear that during a time of events of national impact, employees throughout the organization may raise issues of concern to either the DHS General Counsel or the Department's Officer for Civil Rights and Civil Liberties. Both of these officials report directly to the Secretary for Homeland Security, and therefore can present issues to the senior leadership of the Department. Both of these officials will also ensure the confidentiality of the identity of those who raise such concerns. This mechanism will promote a free flow of communication about critical issues that face the Department during times of crisis.

## Detention Standards

- **RECOMMENDATION 18:** We recommend that the DHS amend its detention standards to mandate that District Detention and Removal personnel visit immigration detainees at contract facilities. We further recommend that the DHS issue procedures to mandate that contract detention facilities transmit documentation to the appropriate DHS field office that describes why immigration detainees have been sent to SDUs.
- **RECOMMENDATION 19:** We recommend that DHS field offices conduct weekly visits with detainees arrested in connection with a national emergency like the September 11 attacks to ensure that they are housed according to FBI threat assessments. In addition, the DHS should ensure that the detainees have adequate access to counsel, legal telephone calls, and visitation privileges consistent with their classification.

**Response:** The DHS interim response to the DOJ OIG provided detailed information on ICE's new Detention Standard on Staff-Detainee Communication. The central goal of this new standard is to ensure that ICE personnel monitor detention conditions and to promptly address concerns that arise. The standards also include specific timeframes during which officers must respond to certain enumerated detainee requests.

As noted above, the DOJ OIG concluded that Recommendations 18 and 19 were "closed" after determining that the new detention standard fully addressed the issues raised by these recommendations. A copy of the detention standard is attached.

DHS is committed to ensuring that DRO closely monitor the implementation of the directives in the detention standards, including the new standard on staff-detainee communications. We will pay careful attention to inspections and audits performed by those inside and outside the organization. Detainees in DHS-controlled facilities are required to have access to counsel, telephone calls, and visitation privileges. The Officer for Civil Rights and Civil Liberties will continue to work closely with DRO to strengthen facilities inspections and ensure that access to counsel is fully afforded.

## Removal Issues

- **RECOMMENDATION 20.** How long the INS legally could hold September 11 detainees after they have received final orders of removal or voluntary departure orders in order to conduct FBI clearance checks was the subject of differing opinions within the INS and the Department. A February 2003 opinion by the

Department's Office of Legal Counsel concluded, however, that the INS could hold a detainee beyond the normal removal time for this purpose. We recommend that the Department carefully examine the limits on its legal authority to detain these individuals.

**Response:** We are committed to strengthening our efforts to conduct post-order custody reviews. We will ensure that post-order custody reviews are conducted consistently and effectively, and, as described below, will issue new guidance to ICE field offices to guarantee that these reviews are completed. With regard to the legal opinion issued by the DOJ's Office of Legal Counsel, it is critical to remember the role that office plays in the federal government. The Office of Legal Counsel's role is much broader than providing legal advice within its own agency; in certain important circumstances, the Office is responsible for providing legal advice to the entire Executive Branch. Given this context, the DOJ Office of Legal Counsel's opinion will continue to govern DHS's policies and practices in this area.

- **RECOMMENDATION 21:** The Department of Homeland Security needs to ensure that its field offices consistently conduct Post-Order Custody Reviews (POCRs) for all detainees who remain in its custody after the 90-day removal period.

**Response:** We agree with this recommendation, and have taken steps to ensure effective coordination and communication with regard to post-order custody reviews (POCRs). Under the new ICE field structure, ICE Headquarters management officials have control of field elements that are charged with completing POCRs, and have established a clear chain-of-command. This new chain of command, coupled with improved coordination between DOJ and DHS, and current ongoing training for our field personnel, should ensure that POCRs are completed in a timely manner in the future. ICE is confident these actions will result in greater accountability and responsiveness.

Under the current ICE practice for detained aliens with either a final order of removal or voluntary departure, where there is FBI interest, ICE promptly notifies FBI of the pending removal action and asks the FBI to provide within a specific timeframe information indicating why the alien should remain in custody. This request is typically made at the point that ICE has a travel document in hand and is in a position to move the alien.

In summary, DHS will take strong action to carefully monitor each individual situation in which an alien remains in custody after the 90 day removal period.

#### IV. CONCLUSION

Over the past several months, the Department of Homeland Security has undertaken a close review of policies, regulations and procedures. The DOJ OIG report has served as a

helpful tool in this process. The activities related to arrest, detention, litigation, and removal for which we are responsible will be carried out under a streamlined process should an event of national impact occur in the future. By implementing the policy changes outlined above, DHS intends to move forward in ways that support national security while honoring the rule of law.

**Appendix B**  
Department of Justice Second Response



U.S. Department of Justice


Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

November 20, 2003

MEMORANDUM FOR THE INSPECTOR GENERAL

FROM: James B. Comey, Jr.   
Acting Deputy Attorney General

SUBJECT: Response to Recommendations Regarding September 11 Immigration Detainees

This is a response to your September 4, 2003, request for additional information related to the recommendations concerning the report on the September 11 detainees. Since our July 21 response, the Department of Justice has continued to work to appropriately implement the Office of Inspector General's (OIG's) recommendations. We believe that we have made significant progress.

**Recommendation 1**

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.

In addition, the FBI should 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.

DOJ Response

In September 2002, the Department imposed a requirement that the Office of the Deputy Attorney General approve the addition of all new cases to the September 11 special interest

detainee list. The addition of new names to the list had to be based in part on the FBI's representation that the case was clearly linked to the September 11 investigation. As the report indicates, there are very few aliens who remain detained who were encountered during the course of the September 11 criminal investigation.

With regard to future investigations, we agree with the basic premise of the recommendation and will ensure that the FBI works with the Department of Homeland Security (DHS) to establish criteria for such investigations (the specific criteria will depend on the nature of the national emergency). We would note that investigating an individual for ties to terrorism is not as simple as conducting database checks. There are many other steps that are taken, depending on the type of investigation being conducted. Even if the FBI possessed no specific information that a specific alien had ties to terrorism, if we were to experience another large-scale terrorist attack on U.S. soil, it is likely that the FBI would want to check with other agencies, both in the U.S. and abroad, before making a final determination that an alien arrested in connection with the investigation of such an attack in fact had no ties to terrorism.

#### OIG Analysis

In our report, we found that the decision to detain and classify aliens as persons "of interest" to the PENTTBOM investigation often was indiscriminate and haphazard. Therefore, we recommended that the DOJ develop clear and objective criteria to guide its classification decisions in future cases involving mass arrests of illegal aliens in connection with terrorism investigations. According to the DOJ's response, its new policy requires that individuals added to the special interest detainee list must be approved by the Deputy Attorney General's office and be clearly linked to terrorism.

While this new procedure will address the lack of uniformity with regard to special interest detainees arrested in connection with the September 11 investigation, we are concerned that this procedure may not be adequate in the future. The objective of the recommendation was to encourage development of a protocol or procedures to enable the DOJ to react effectively and consistently in the event of a future crisis. We also question whether staff from the Deputy Attorney General's Office can effectively play such a "gatekeeper" role with respect to deciding whether a large number of detainees are placed on a special interest list, given their numerous other pressing duties and the large number of decisions that might have to be made on cases throughout the nation.

In addition, the OIG report recognized that investigating a detainee for possible ties to terrorism involves much more than database checks, particularly for those aliens who the FBI actually suspected of having ties to terrorism. However, the report detailed the degree to which the FBI was unable to complete clearance investigations - including checks with other agencies - within the quick time frames that senior DOJ officials thought it could. For example, the FBI did

not have the procedures in place or apply the resources needed to analyze large amounts of name check and database information it received from the Central Intelligence Agency (CIA). As detailed in the OIG report, this CIA information sat unreviewed for weeks at FBI Headquarters. As a result of these and other problems encountered in the aftermath of the September 11 attacks, the OIG recommended that the FBI adopt a tiered approach to detainee background investigations that acknowledges the differing levels of inquiry that may be appropriate to clear detainees of connections to terrorism.

The DOJ response does not address these issues directly, including how to more effectively classify detainees at the outset of an investigation, how to prioritize clearance investigations, and how to better allocate FBI resources to conduct such investigations. While we agree with the statement in the DOJ response that the specific investigative criteria to be used during an emergency will depend, to some extent, on the nature of the emergency, we continue to believe that the FBI should develop general criteria and guidance to assist its field offices in making more consistent and uniform assessments of an illegal alien's potential connections to terrorism. We also believe the DOJ should not wait until another national emergency to create such criteria.

To close this recommendation, we request that the DOJ provide by October 3, 2003, additional information about the FBI's efforts to work "with the [DHS] to establish criteria for such investigations (the specific criteria will depend on the nature of the national emergency)."

#### DOJ Response to OIG Analysis

The FBI is in agreement that we need to work closely with DHS so that subjects are not detained unnecessarily. In order to facilitate this, the FBI has joined in partnership with multiple Federal agencies, including DHS, in the establishment of the Terrorist Threat Integration Center (TTIC). The TTIC will maintain a database that will function as a reference library or "one-stop-shop" for all identities information on international terrorists known to the U.S. Government (USG). This central repository of terrorist identities information will be available through a classified website to those with appropriate access (including all JTTFs), as well as serving as the mechanism for nominating individuals to the newly created Terrorist Screening Center, for watchlisting. It is intended that the FBI analysts assigned to TTIC will manage the FBI's records being inputted into the TTIC database. Director Mueller has directed field offices of the FBI to place the subjects of open terrorism related investigations into the FBI's Terrorism Watch List which is housed within the National Criminal Information Center (NCIC), in the Violent Gangs and Terrorist Organization File (VGTOF). The Terrorism Watch List has been the Counterterrorism Division's single, integrated listing of individuals of an investigative interest to



the FBI, be that the lone terrorist subject or a specific terrorist group. It was designed to assist both the intelligence and law enforcement communities in their investigations of terrorist groups and/or individuals. The Terrorism Watch List (VGTOF) is in the process of being consolidated into a single data base managed by the TTIC and the Terrorist Screening Center.

The Terrorist Screening Center (TSC) will consolidate all existing terrorist watch lists currently being used by the United States Government into a single function to provide accurate information to terrorist screeners around the country on a 24-hour, 7 days a week, real-time basis. This function will consolidate into one central location information that law enforcement, the Intelligence Community, and the State Department already possess. This integration of existing watch list functions of a variety of agencies will enhance the coordination, consistency and accuracy of on-going efforts by creating a mechanism for one-stop shopping to be used by local, state, and Federal officers, as well as others who may have a need to receive this information, consistent with the Memorandum of Understanding implementing the TSC.

The FBI is of the opinion that the establishment of this critical program will serve as the first step for the field offices, and their counterparts in DHS, in making a determination of whether a subject should be further investigated and/or detained. In those instances where there is a match of the alien, the FBI recommendation to DHS would be that the alien is held for further investigation. If there is no match, the recommendation would be to allow the subject to be released on bond pending removal proceedings. Again, the FBI may request that DHS continue to detain an alien even if the subject has no identifiable traces with anyone within the USIC, if the nature of the subject's activity indicated that they were involved in the planning of, or participation in, a terrorist related activity. All of these decisions would be made at the FBIHQ level, with input from the field offices, and the recommendation of the FBI would be passed to the DHS and/or BOP through the National Joint Terrorism Task Force (NJTTF). Through the continued cooperation shown in the NJTTF, which was not in existence prior to September 11, 2001, the FBI will be better prepared to resolve alien background checks in a timely and efficient manner. In previous OIG correspondence, the concern around the FBI's definition of "a subject of interest" who would meet the criteria for detention was heard by the FBI. In the future, the FBI would consider "a subject of interest" as those individuals whose name and identifying information appear in the Terrorist Screening Center (Identities Tracking Database), or the circumstance surrounding the subject's detention would indicate a pending act of terrorism. If a subject's name is not in the Identities Tracking Database (ITD), and there is no apparent act of terrorism, the clearance of the investigation will occur at the level of the Special Agent in Charge (SAC) of the field office conducting the investigation, with notification to the appropriate unit within FBIHQ. This system will directly address the OIG's concern that clearance investigations, including checks with other agencies, is completed in a timely manner.

Prior to September 11, 2001, the FBI had 12% of total agent resources working on counterterrorism investigations. In the first three months following the attacks, more than half of the FBI's total resources were working on counterterrorism investigations. By the end of June 2003, the number of field agents working counterterrorism had leveled out to approximately 26% of total resources. However, the number of agents working on counterterrorism investigations has continued to be higher than the Funded Staffing Level (FSL) and, as of September 3, 2003, the Counterterrorism Division was utilizing approximately 950 agents over FSL.

The FBI has enhanced the National Name Check Unit, within the Records Management Division, to where it stands today with 119 full time employees. The National Name Check Unit is now in a position to directly deal with the large amount of CIA cables being received by the FBI requesting name checks. In those cases where there are name matches, the cables are directed to the appropriate unit within FBIHQ which has responsibility for either the subject's country of origin, or group affiliation, for further investigation and analysis. With this re-allocation of resources, the FBI is in a better position today to deal with a similar situation to the detention of aliens as occurred in the days, and months, after September 11, 2001.

FBIHQ has established a policy (effective January 25, 2002) which requires each field office to report, via "Urgent Reports", all significant events occurring within a field office's jurisdiction to the Strategic Information & Operations Center (SIOC) immediately. The detention of any alien on the grounds of suspected terrorism connections would require such a reporting to FBIHQ.

Priority criteria for FBI investigations has been developed. Threats reported to the FBI through the CT Watch receive the highest priority as the primary mission and focus of the FBI is to prevent, detect and deter terrorist attacks against the United States and its citizens both at home and abroad. Of the threats received, those dealing with weapons of mass destruction, including chemical, biological, radiological and nuclear threats are given the highest priority. Counterterrorism operations and investigations are prioritized based on the FBI's National Threat Assessment. This threat assessment identified the known, active, terrorist groups having a presence in the United States and ranked them into three tiers. Those that are prioritized in the first tier have high intentions to harm the homeland, moderate to strong links with Al-Qa'ida, and high capabilities to inflict harm. Those that are in the third tier may not have any perceived intention to harm the United States homeland, little or no link with Al-Qa'ida and a low capability to inflict harm today. The prioritization of groups does not mean that those lower tiered groups are necessarily less threatening. Each threat to the United States must be investigated and each is considered significant until proven otherwise. This same criteria will be used in any future major investigation where large numbers of individuals are subject to detention.

## **Recommendation 2**

The FBI should provide immigration authorities (now part of the Department of Homeland Security (DHS) and the BOP with a written assessment of an alien's likely association with terrorism shortly after an arrest (preferably within 24 hours). This, in turn, would assist the immigration authorities in assigning the detainee to an appropriate detention facility and the BOP in determining the appropriate security level within a particular facility. In addition, the FBI should promptly communicate any changes in its assessment of the detainee's connection to terrorism so that the DHS and BOP can make appropriate adjustments to the detainee's conditions of confinement.

### DOJ Response

We agree with the idea that the FBI should provide DHS and BOP with a statement as to whether or not the FBI has a continued interest in an individual alien as expeditiously as possible. The FBI should also update DHS and BOP as new information of significance becomes available. Depending on the individual circumstances of the national emergency and the number of aliens involved, however, it may not be possible for the FBI to provide detailed written information as to an alien's suspected ties to terrorism within the twenty-four hour time frame suggested by the OIG. Also, it may not be desirable for the FBI to widely disseminate sensitive law enforcement or national security information related to the FBI's specific concerns about an individual alien. We will work with DHS to designate points of contact within the FBI, BOP and DHS to exchange information that is particularly sensitive through established channels.

### OIG Analysis

The DOJ appears to agree in principle with the recommendation that the FBI should provide the DHS and the BOP with a statement of its interest in a detainee held in connection with a terrorism investigation as expeditiously as possible. We also recognize that in some cases the FBI should not disseminate sensitive law enforcement information about a particular detainee, and we realize that a variety of factors will affect what information can and should be provided. However, we believe the FBI should normally provide the DHS with sufficient information to justify continued detention, denial of bond, and other restrictive actions. In addition, the FBI should provide the DHS and the BOP with timely information on individual detainees to enable both agencies to make appropriate decisions on detention security levels. Moreover, we believe that, in most cases, the FBI's statements should be provided to the DHS and the BOP in writing, and should be maintained in the detainee's case file.

To close this recommendation, we request that the FBI provide us by October 3, 2003, with specific details of the type of information it plans to provide to the DHS and the BOP with regard to its continued interest in a detainee.

#### DOJ Response to OIG Analysis

The FBI agrees with the recommendation of providing a "statement of interest" to DHS and BOP. While the FBI may not be able to provide such a statement within 24 hours in all cases, the FBI will provide the statement as expeditiously as possible while maintaining the integrity of the investigation and the national security of the United States. The FBI will strive to provide the "statement of interest" to DHS and BOP in writing. In circumstances where a written statement is not possible, the FBI will provide an initial statement of interest verbally and will provide a written statement as soon as possible thereafter. The FBI is in a position to provide a classified statement of interest to the appropriate DHS/BOP member, with a security clearance, on the NJTTF. The FBI has established points of contact with the DHS and BOP, by placing members of both organizations at the National Joint Terrorism Task Force (NJTTF), and it would be through this formal relationship that the dissemination of the information would occur. The FBI has also detailed personnel within the DHS to facilitate the exchange of information in the event that the DHS/BOP personnel assigned to the NJTTF were not available. Classified statements of interest will be protected under laws and procedures that apply generally to classified national security information.

The FBI is of the opinion that with the creation of TTIC, and the FBI's active participation in this program, the entire intelligence community, not only the DHS, will have more complete access to all of the pertinent terrorist files in the FBI. Through TTIC, those members of the DHS and BOP with the appropriate access to TTIC's classified website will be able to review the file of a subject and the basis of that investigation. Any recommendations regarding detention of a subject would come from the appropriate unit at FBIHQ having oversight of the subject under investigation, with input from the appropriate field division. The Terrorist Screening Center (TSC) will be responsible for developing appropriate policies and criteria to ensure the accuracy of information in the consolidated watch list data base and to ensure that the legal safeguards are in place to protect the privacy rights and personal freedoms, consistent with our Constitution and legal framework. The TSC will also be responsible for quality control issues, such as ensuring the appropriateness of entering a particular name when warranted. It will consolidate overall responsibility for day-to-day operation of the nation's various terrorist watch lists into a single interagency Center for the purpose of continuing efforts to protect the nation. As called for by the 9/11 Congressional Joint Inquiry, this streamlined approach is designed to not only enhance operational efficiencies but to also clearly designate responsibility for the system - all with the goal of making the country safer.

#### **Recommendation 4**

Unless the 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, continuing conflicts, and concerns about accountability. At a minimum, we recommend that immigration officials in the DHS enter into an Memorandum of Understanding (MOU) with the Department and the FBI to formalize policies, responsibilities, and procedures for managing a national emergency that involves alien detainees. An MOU should specify a clear chain of command for any inter-agency working group. Further, the MOU should specify information sharing and reporting requirements for all members of such an inter-agency working group.

#### DOJ Response

The creation of a new Department of Homeland Security (DHS) has, by definition, changed the way such a situation will be handled in the future. In particular, initial decisions whether to seek to detain illegal aliens during the course of an investigation into their possible terrorist ties will be made primarily by DHS. The Department of Justice and the FBI will continue to provide information for DHS to use in that process. We believe that the information sharing MOU already signed by the Department of Justice and DHS will provide DHS with information relevant to detention determinations. We are willing to consider taking additional measures and providing additional information requested by DHS as well. We have communicated the substance of our response on this recommendation to DHS and are awaiting their views.

Finally, as noted in our response to recommendation 1, we would note that there are likely to be cases where the FBI may not have a great deal of specific information about an individual alien but it may nevertheless be extremely concerned about the release of the alien without further investigation. In that regard, we disagree with the implied point made in the recommendation's preface, that the fact that an alien was arrested in connection with a PENTTBOM lead was not a sufficient basis for detention. Release on bond during removal proceedings is discretionary relief, not a right. The fact that an alien was encountered during a PENTTBOM lead and warranted further investigation by the FBI was a basis for the concern that the alien posed a danger and a risk of flight and was thus a proper basis for pursuing detention. We do agree, however, that efforts should be made to pursue investigative leads quickly to keep such detention brief, understanding that FBI resources again may face competing priorities in the event of future terrorist attacks.

## OIG Analysis

As noted in the DOJ's response, in March 2003 the DOJ entered into an MOU with the DHS and the CIA that, according to the MOU, "provides a framework and guidance to govern information sharing, use, and handling" between the three agencies. Section 3(p) of the MOU, entitled "Information Sharing Mechanisms," states that as soon as practicable the agencies "shall agree upon specific mechanisms" for sharing specific information and may designate "focal points, to maximize the effectiveness and coordination for providing covered information. Subsequent arrangement for information sharing may be reached upon the approval of the parties of their designees."

This MOU, while providing a broad framework of inter-agency cooperation, necessarily does not provide the level of detail specific to many potential scenarios. Moreover, as evidenced in the sections cited above, the MOU envisions the creation of additional mechanisms for sharing information on a variety of issues.

With respect to our recommendation, the OIG suggested that the DOJ and the DHS formalize policies, responsibilities, and procedures for managing a national emergency that involves alien detainees. The DOJ's response appears receptive to this idea, and suggests that it is willing to consider taking additional steps, beyond those outlined in the broad MOU, to provide the DHS with additional information relevant to its detention determination for aliens. However, the response does not state what the additional steps will be or how they will be implemented.

To close this recommendation, we request that the DOJ and the DHS provide by October 3, 2003, further information as to the specific mechanisms for managing a national emergency that involves alien detainees. In addition, we request a copy of the DHS response regarding the DOJ's willingness to consider taking additional measures and providing additional information to the DHS.

Finally, the DOJ's response states that "we disagree with the implied point made in the recommendation's preface, that the fact that an alien was arrested in connection with a PENTTBOM lead was not a sufficient basis for detention. Release on bond during removal proceedings is discretionary relief, not a right. The fact that an alien was encountered during a PENTTBOM lead and warranted further investigation by the FBI was a basis for the concern that the alien posed a danger and a risk of flight and was thus a proper basis for pursuing detention." This is similar to the statement in the second paragraph of the DOJ's response to the OIG recommendations, which states:

The OIG report implies that perhaps certain of the 762 aliens detained in connection with the September 11 investigation should not have been detained while the Federal Bureau of Investigation (FBI) continued to investigate their potential ties to terrorism. We believe that the Department made a sound policy decision immediately after the September 11 attacks to detain aliens present in the United States *who might have connections with or possess information pertaining to terrorism activities against the United States until they were cleared by the FBI*. These detentions were lawful and necessary to protect both the American people and the integrity of the largest criminal investigation in history, as we did not want to lose potential suspects or witnesses. While aliens in removal proceedings are not entitled to be released on bond, we agree that, if we were to face a similar situation in the future, efforts should be made to complete the investigations as quickly as possible. [Emphasis added.]

While we appreciate the DOJ's intention in the future to conduct clearance investigations more expeditiously, we believe the DOJ's response misperceives part of the OIG's recommendation. We did not criticize the decision to hold and investigate those aliens present in the United States who had violated immigration laws and who the DOJ believed had connections with or possessed information pertaining to terrorist activities. Rather, we criticized the haphazard and indiscriminate manner in which the FBI labeled many detainees as "of interest" because they potentially had connections to or information about terrorism. As we stated in the report, even in the hectic aftermath of the September 11 attacks, we believe the FBI should have taken more care to distinguish between those aliens *who it actually suspected of having a connection to terrorism* from those aliens who were simply encountered coincidental to a PENTTBOM lead. In New York, all illegal aliens encountered coincidental to a PENTTBOM lead were considered terrorism suspects and therefore subject to clearance investigations, while in other parts of the country the FBI made distinctions as to which aliens it considered terrorism suspects. We believe this determination should have been more considered and more uniform throughout the country, given the significant ramifications that flowed from this initial determination.

#### DOJ Response to OIG Analysis

As stated in the responses to Recommendations 1 and 2, DHS is working closely with the FBI through their participation in the Foreign Terrorist Tracking Task Force (FTTTF), established by Homeland Security Presidential Directive (HSPD)-2, dated October 29, 2001. Additionally, HSPD-6, dated September 16, 2003, established the Terrorist Screening Center (TSC) with specific DHS participation. The combination of these two entities establishes new information sharing capabilities. Specifically, the FTTTF maintains a data mart with DHS's immigration data and FBI's counter-terrorism data to identify common interests of the two agencies and assist in locating terrorists and their supporters. The TSC will maintain a

consolidated list of terrorists and those appropriately suspected to be or have been involved in activities constituting, in preparation for, in aid of, or related to terrorism. These capabilities enhance the government's ability to quickly locate and determine an individual's association with terrorists.

It is clear that, as a general matter, when an alien is arrested on immigration charges, the FBI will provide DHS with information; DHS will then make the determination whether a specific alien should be detained. We are currently exchanging views with DHS regarding the potential terms of a MOU that would address the detention of aliens following a future terrorist attack. We believe that we will need some time to complete these negotiations because it is necessary to preserve flexibility for handling national security-related cases and want to ensure that a potential MOU does not unduly constrain both Departments' ability to adjust readily to different conditions that we may not have contemplated. In the meantime, the mechanisms described in the responses to the first and second recommendations ensure that the FBI will provide appropriate information to DHS in relevant situations.

#### **Recommendation 5**

We believe it critical for the FBI to devote sufficient resources in its field offices and at Headquarters to conduct timely clearance investigations on immigration detainees, especially if the Department institutes a "hold until cleared" policy. The FBI should assign sufficient resources to conduct the clearance investigations in a reasonably expeditious manner, sufficient resources to provide timely information to other agencies (in this case, additional FBI agents to support the SIOC Working Group), and sufficient resources to review in a timely manner the results of inquiries of other agencies (in this case, completed CIA checks). In addition, FBI Headquarters officials who coordinated the detainee clearance process and FBI field office supervisors whose agents were conducting the investigations should impose deadlines on agents to complete background investigations or, in the alternative, reassign the cases to other agents.

#### DOJ Response

We agree that it is important for the FBI to devote sufficient resources to these cases. We would note, however, that the FBI was strapped in an unprecedented way in the aftermath of the September 11 attacks, particularly following the anthrax attacks.

In addition, the FBI will explore avenues to obtain additional investigative resources when a surge capacity is required during a crisis situation, perhaps based upon a declaration by the Director and/or the Attorney General. For example, the additional resources to address a shortfall of investigative resources could be obtained through mutual aid agreements with other federal law enforcement agencies and the contracting or rehiring of FBI annuitants.



### OIG Analysis

We believe the DOJ's response addresses the main part of our recommendation. However, it is important to note that the OIG report acknowledged that the FBI was challenged in unprecedented ways by the September 11 attacks and the numerous investigative leads it had to follow in the aftermath of the attacks. Yet, we believe it was an unwise investigative strategy to hold detainees who the FBI apparently suspected of having some connection to terrorism without conducting reasonably expeditious investigations of them. For example, if these detainees actually had knowledge about the terrorism attacks, the FBI's failure to investigate reasonably quickly their ties to terrorism potentially resulted in the loss of valuable investigative information. It also was unfair to allow the detainees who were labeled "of interest" to languish in highly restrictive detention without any clearance investigation being conducted. We believe that the FBI could have, and should have, reallocated some of its personnel that continued to work on non-terrorism related issues after September 11 to help with the clearance investigations of those detainees who the FBI had labeled "of interest" to the terrorism investigation. Alternatively, the FBI could have used the services of other federal, state, and local law enforcement personnel to help with the clearance investigations, many of whom had the necessary clearances and had volunteered to help the FBI in the aftermath of the September 11 attacks.

The OIG agrees that the FBI should explore developing agreements with other federal law enforcement agencies that could provide additional investigative assistance to complete clearance investigations of detained aliens in a crisis situation. However, we continue to recommend that the FBI develop a tiered approach to conducting its background investigations. The DOJ response does not address this issue.

We believe the FBI should develop criteria to help decide which investigations to conduct first, so that potentially time-sensitive intelligence possessed by detainees may be exploited as soon as possible. In addition, conducting timely background investigations may clear individual detainees of any connections to terrorism, thereby avoiding unnecessarily prolonged detention. We also note that the DOJ has not addressed specifically any of the areas cited in the OIG report that caused delays (pages 58-64), such as delays at FBI Headquarters in sending informational requests to the CIA and difficulties in getting personnel with the appropriate skills and access to the necessary computers to analyze the CIA responses.

To close this recommendation, the OIG requests more detailed information from the FBI by October 3, 2003, on its plans to address the resource and training deficiencies cited in the OIG report and on its efforts to explore cooperative agreements with other law enforcement agencies.

## DOJ Response to OIG Analysis

Today there are 56 FBI Joint Terrorism Task Forces (JTTF) and 28 annexes spread throughout the United States, with coverage to all states. The JTTFs are made up of over 25 different Federal agencies and hundreds of state and local law enforcement agencies. Every JTTF Officer, Agent, and Analyst has a Top Secret clearance which allows those members unfiltered access to all of the FBI's information. In addition to the local JTTFs spread across the country, the National Joint Terrorism Task Force is located at FBI Headquarters, where 35 different Federal agencies, with access to their respective databases, are represented. The FBI believes that the expansion of the JTTF program has addressed the OIG recommendation of adding outside personnel to assist in the sharing of information, and at the same time utilizing the services of these additional personnel in future investigations.

The FBI is of the opinion that with the creation, and participation in TTIC, the flow of information between not only the FBI and CIA will be completed in a more timely manner, but the exchange between the FBI and all members of the USIC will be enhanced. The FBI has enhanced the National Name Check Unit, within the Records Management Division, to where it stands today with 119 full time employees. The National Name Check Unit is now in a position to directly deal with the large amount of CIA cables being received by the FBI requesting name checks. TTIC will review, and subsequently nominate, the subjects of terrorist related investigations from various members of the intelligence community. After a review process, the subjects of investigative interest maybe referred to the Terrorist Screening Center (TSC).

The Terrorist Screening Center (TSC) will consolidate all existing terrorist watch lists currently being used by the United States Government into a single function to provide accurate information to terrorist screeners around the country on a 24/7, real-time basis. This function will consolidate into one central location information that law enforcement, the Intelligence Community, and the State Department already possess. This integration of existing watch list functions of a variety of agencies will enhance the coordination, consistency and accuracy of on-going efforts by creating a mechanism for one-stop shopping to be used by local, state, and Federal officers, as well as others who may have a need to receive this information.

FBIHQ has established a policy (effective 01/25/2002) which requires each field office to report, via "Urgent Reports", all significant events occurring within a Field Division's jurisdiction to the Strategic Information & Operations Center (SIOC) immediately. The "Urgent Report" from the field office serves as a notification process to FBIHQ of a detention (or event) and the proposed course of investigation. The "Urgent Report" comes from the respective field division and goes to the executive management of FBIHQ, in addition to the substantive unit having oversight of that particular terrorist group or region of the work where the subject is from. The detention of any alien on the grounds of suspected terrorism connections would require such a reporting to FBIHQ.

Priority criteria for FBI investigation has been developed. Threats reported to the FBI through the CT Watch receive the highest priority as the primary mission and focus of the FBI is to prevent, detect and deter terrorist attacks against the United States and its citizens both at home and abroad. Of the threats received, those dealing with weapons of mass destruction, including chemical, biological, radiological and nuclear threats are given the highest priority. Counterterrorism operations and investigations are prioritized based on the FBI's National Threat Assessment. This threat assessment identified the known, active, terrorist groups having a presence in the United States and ranked them into three tiers. Those that are prioritized in the first tier have high intentions to harm the homeland, moderate to strong links with Al-Qa'ida, and high capabilities to inflict harm. Those that are in the third tier may not have any perceived intention to harm the United States homeland, little or no link with Al-Qa'ida and a low capability to inflict harm today. The prioritization of groups does not mean that those lower tiered groups are necessarily less threatening. Each threat to the United States must be investigated and each is considered significant until proven otherwise. This same criteria will be used in any future major investigation where large numbers of individuals are subject to detention.

### **Recommendation 6**

We understand the resource constraints confronting the Department in the days and weeks immediately following the September 11 attacks. We also recognize that decisions needed to be made quickly and often without time to consider all the ramifications of these actions. However, within a few weeks of the terrorist attacks it became apparent to many Department officials that some of the early policies developed to support the PENTTBOM investigation were causing problems and should be revisited. Examples of areas of concern included the FBI's criteria for expressing interest in a detainee and the "hold until cleared" policy. We believe the Department should have, at some point earlier in the PENTTBOM investigation, taken a closer look at the policies it adopted and critically examined the ramifications of those policies in order to make appropriate adjustments. We recommend that the Department develop a process that forces it to reassess early decisions made during a crisis situation and consider any improvements to those policies.

#### Department of Justice Response

We agree that policy decisions must always be subject to reassessment but do not agree that any new process for doing so should be created. There are already ample processes in place for the Department to reassess its practices and policies. For example, the Department's senior national security team convenes for regular bi-weekly meetings with the Deputy Attorney General and the Attorney General's Chief of Staff. There are also regular component head meetings with the Deputy Attorney General as well as numerous other formal and informal opportunities for raising policy issues with the Department's senior leadership. Of course, the success of any such process depends on the components involved to provide, through the

components' leadership, ongoing advice and concrete recommendations through appropriate means. Such advice and recommendations allow for a meaningful assessment by the Department's policy makers. The Department's leadership must be informed of the issues by communications from the highest levels of the components, particularly during a crisis situation. The Attorney General and the Deputy Attorney General always are and always have been available if any Department component head wants to discuss an issue or raise a concern.

#### OIG Analysis

This recommendation did not suggest that the DOJ lacks feedback mechanisms to reassess its activities under normal conditions. However, the September 11 attacks were an unusual event and our report found that the DOJ failed to reassess critical legal issues, such as its "hold until cleared" policy, in a timely manner. We continue to believe that the DOJ should develop a process - outside its normal processes - that would require a rigorous re-evaluation of policies and operations implemented during a national crisis.

#### DOJ Response to OIG Analysis

While we appreciate the views of the OIG, we respectfully disagree. In fact, former Deputy Attorney General Larry Thompson explicitly indicated in our July 21 response: "[w]e agree that policy decisions must always be subject to reassessment but do not agree that any new process for doing so should be created." The Department is continually reassessing policy decisions in an attempt to improve our performance, and the Office of the Inspector General plays an important role in that process. The fact that policies implemented since September 11, 2001, have evolved illustrate that we are willing and able to make changes to our policies through established processes. Accordingly, the Department has concluded that it is not necessary and that it might even be counterproductive to establish a new and separate bureaucratic process to evaluate policy decisions during a period of national crisis.

#### **Recommendation 9**

We recommend that Offices of General Counsel throughout the Department establish formal processes for identifying legal issues of concern - like the perceived conflict between the Department's "hold until cleared" policy and immigration laws and regulations - and formally raise significant concerns, in writing, to agency senior management and eventually Department senior management for resolution. Such processes will be even more important now that immigration responsibilities have transferred from the Department to the DHS.

#### Department of Justice Response

We agree with this recommendation. Department of Justice components should already

be aware that, throughout the Department, components have an obligation to raise significant legal or policy concerns through the chain of command to component heads and agency leadership by appropriate means. The Department's leadership should be informed of such issues by communications from the highest levels of the components. With either policy or legal issues of great import, it may not be adequate to simply raise them in passing. Rather, it may be appropriate to raise them in writing, with a clear identification of the issues and an analysis of potential alternatives.

The Department's Office of Legal Counsel (OLC) has always been and remains available to provide legal advice to components, as OLC considers and sets forth the definitive legal position of the Department and the Executive Branch. The new Department of Homeland Security (DHS) may avail itself of OLC's services in the event DHS believes it needs further guidance on legal issues.

#### OIG Analysis

As we noted in our analysis of Recommendation 6, normal processes often break down in a crisis situation, and we continue to believe that development of a formal process to raise significant legal issues for resolution by senior management would be useful. For example, as discussed in our report, high-level DOJ officials responsible for coordinating immigration issues should have considered the legal ramifications of the DOJ's "hold until cleared" policy well before the end of January 2002 when the policy was changed.

While we recognize that DOJ leaders and OLC are available for consultation with regard to all legal issues, we believe a more formal mechanism should be established to ensure that significant legal and policy concerns are considered and addressed in crisis situations.

#### DOJ Response to OIG Analysis

Although we agree with the recommendation that legal and policy issues should be raised in writing to senior Department leadership, we again respectfully disagree that a new process should be established to raise such issues during a time of national crisis. In fact, during a crisis situation, we believe that it is even more critical to use the already established lines of communication, through the chain of command to component heads and agency leadership to the Department's leadership, to ensure that all of the relevant officials are aware of issues of concern that need to be addressed. We have, therefore, concluded that agency leadership will notify the Department's leadership through existing processes and will provide concrete advice as to how to resolve the issue.

#### **Recommendation 10**

We recommend that the BOP establish a unique Special Management Category other than

WITSEC for aliens arrested on immigration charges who are suspected of having ties to terrorism. 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.

#### Department of Justice Response

We concur with this recommendation. The BOP originally believed the new Management Interest Group 155 category that was implemented in late October 2001 would correct the problems the initial WITSEC assignment had created with regard to the September 11 immigration detainees. Upon further review, the BOP believes that this new category continued to cause similar confusion, as the procedures lacked specificity. Accordingly, new procedures will be established for the use of the Management Interest Group 155 category that provide clear and specific guidance. Training will then be provided to appropriate staff, which we believe will prevent any potential misunderstandings about the category.

#### OIG Analysis

To close this recommendation, please provide us by October 3, 2003, with a copy of the BOP's new procedures and information about its completed or planned training.

#### DOJ Response to OIG's Analysis

The Bureau of Prisons (BOP) has developed a new policy to address many of the OIG's recommendations. The creation of this policy is an important task that the BOP has taken seriously in order to ensure the policy addresses as many issues as possible regarding the housing of detainees during a crisis situation. While the BOP has completed the review of the policy within the BOP management structure, BOP procedures require management to provide the Union with an opportunity to review all new and/or modified policies. Based on the BOP's contract, the Union has the right to invoke negotiations within 30 days of receipt. Should the Union choose to invoke negotiations on this policy, the possibility does exist for revision. Therefore, although this policy has been signed, it has not yet been implemented. A copy of the new policy is attached at Tab 1. It has been identified as "Limited Official Use - Staff Access Only" because the BOP believes that the release of this information outside the Federal law enforcement community could compromise the security of the BOP's institutions and the safety of BOP staff and the general public.

The new BOP policy, entitled "Management of Select Inmates During National Security

Emergency Situations," provides clear and specific procedures, to include telephone access for inmates classified as Category I Management Interest Inmates. The BOP will incorporate training on this policy into the BOP's FY 2005 annual training requirement. Annual training is a mandatory training requirement for all BOP staff and is completed during the first 4 months of the calendar year. In addition, training will be provided during the National Captains' and Associate Wardens' Training in FY 2004, as well as during the BOP Wardens' Training in FY 2005.

#### **Recommendation 11**

Given the highly restrictive conditions under which the MDC housed September 11 detainees, and the slow pace of the FBI's clearance process, we believe the BOP should consider requiring written assessments from immigration authorities and the FBI prior to placing aliens arrested solely on immigration charges into highly restrictive conditions, such as disciplinary segregation in its ADMAX SHU. Absent such a particularized assessment from the FBI and immigration authorities, the BOP should consider applying its traditional inmate classification procedures to determine the level of secure confinement required by each detainee.

#### Department of Justice Response

We agree the FBI should provide the BOP with a statement (verbal or written) as to the FBI's interest in the alien but the BOP does not believe that a detailed assessment should be required. The BOP and FBI will discuss whether to implement a system to review the level of security for immigration detainees at regular intervals.

#### OIG Analysis

We continue to believe, as we stated in the discussion of Recommendation 2, that FBI statements provided to the BOP and DHS regarding its interest in specific detainees normally should be in writing and be placed in the detainee's case file. The information provided by the FBI to the DHS also should be sufficiently detailed to justify the detainees' continued detention, whether the detainee should be released on bond, and other related issues. Further, the information provided to the BOP should be sufficient to allow it to make an assessment of the detainees' potential security risks and justify confinement under highly restrictive conditions, such as disciplinary segregation in an Administrative Maximum Special Housing Unit, or ADMAX SHU. Absent such a particularized assessment from the FBI and immigration authorities, the BOP should consider applying its traditional inmate classification procedures to determine the level of secure confinement required by each detainee.

To close this recommendation, we request that the DOJ provide, by October 3, 2003, the results of discussions between the FBI and the BOP about whether to implement a system to review periodically the security level of immigration detainees. Specifically, we request that the

DOJ's response address whether the BOP plans to use its inmate classification procedures to determine an appropriate level of confinement in cases where no information is forthcoming from the FBI about the security risk posed by individual immigration detainees.

#### DOJ Response to OIG's Analysis

The FBI will provide either a verbal or written statement to the BOP and DHS as to their interest in a detainee. If a written statement is received from the FBI, the BOP will place the information in the inmate's central file. If only a verbal statement is provided, this information will be documented by BOP staff in the inmate's central file. Along with, or in the absence of this statement the BOP will apply its traditional inmate classification procedures to determine the level of secure confinement required by each detainee. Additionally, on a monthly basis the BOP will request and receive a status update from the FBI for each Category I Management Interest Inmate, to determine if continuation in highly restrictive conditions of confinement is still warranted. All information used to support the inmate's classification as a Category I Management Interest Inmate will be documented in the inmate's central file.

#### **Recommendation 12**

We found delays of days and sometimes weeks between when the FBI notified the BOP that a September 11 detainee had been cleared of ties to terrorism and when the BOP notified the MDC that the detainee could be transferred from its ADMAX SHU to the facility's general population, where conditions were decidedly less severe. We recommend that BOP Headquarters develop procedures to improve the timeliness by which it informs local BOP facilities when the detention conditions of immigration detainees can be normalized.

#### Department of Justice Response

We also believe it is important that timely notifications are made. The BOP will develop written procedures regarding the timeliness by which we inform local BOP facilities when the detention conditions of detainees can be normalized.

#### OIG Analysis

To close this recommendation, the OIG requests by October 3, 2003, a copy of the written procedures for informing local BOP facilities when a detainee's detention conditions can be normalized.

#### DOJ Response to OIG's Analysis

A time frame of 2 business days has been established regarding the timeliness by which



local facilities are informed the detention conditions of detainees can be normalized. This time frame is contained in the BOP's new policy described in the response to Recommendation 10, which is attached at Tab 1 and marked as "Limited Official Use - Staff Access Only."

### **Recommendation 13**

We found evidence indicating a pattern of physical and verbal abuse by some MDC corrections staff against some September 11 detainees. While the OIG is continuing its administrative investigation into these matters, we believe MDC and BOP management should take aggressive and proactive steps to educate its staff on proper methods of handling detainees (and inmates) confined in highly restrictive conditions of confinement, such as the ADMAX SHU. The BOP must be vigilant to ensure that individuals in its custody are not subjected to harassment or more force than necessary to accomplish appropriate correctional objectives.

#### Department of Justice Response

We agree the BOP must remain vigilant to ensure individuals in our custody are not subjected to harassment or more force than necessary. The BOP will develop a new policy outlining specific procedures for highly restrictive conditions of confinement for detainees. This new policy will encompass procedures for implementing many of the recommendations made by the OIG. Once the policy is published, training will be scheduled to familiarize staff. In the view of the BOP, however, the OIG's finding that there was a "pattern of physical and verbal abuse" by MDC staff is premature in that there is a continuing investigation into this matter. To date, the BOP has not received any investigative reports from the OIG sustaining misconduct against staff which would support this conclusion.

#### OIG Analysis

As discussed in the 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 MDC in Brooklyn, New York. In June 2003, we provided an interim briefing to the BOP about our investigation and our findings. The OIG has continued its investigation into these issues and has found additional evidence to support this finding. We are now in the process of concluding our investigation into these issues, and we plan to submit a detailed report to the BOP in the near future that contains findings and recommendations with regard to individual BOP correctional officers, as well as systemic issues that the follow-up investigation has identified. We also intend to release publicly the general findings of that report.

To close this recommendation, the OIG requests a copy by October 3, 2003, of the new BOP policies to address procedures for handling detainees in highly-restrictive conditions of confinement and a schedule for BOP employee training on these new policies.

#### DOJ Response to OIG's Analysis

The new BOP policy, described in the response to Recommendation 10 and attached at Tab 1 marked as "Limited Official Use - Staff Access Only," outlines specific procedures for highly restrictive conditions of confinement for detainees, including a section which specifically addresses the professionalism of staff. The BOP will incorporate training in this regard into the BOP's FY 2005 annual training requirement. The training regarding employee code of conduct and treatment of inmates will be facilitated by the warden or associate warden at each institution. In addition, training will be provided during the National Captains' and Associate Wardens' Training in FY 2004, as well as during the BOP Wardens' Training in FY 2005.

#### **Recommendation 14**

BOP and MDC officials anticipated that some September 11 detainees might allege they were subject to abuse during their confinement. Consequently, they took steps to help prevent or refute such allegations by installing cameras in each ADMAX SHU cell and requiring staff to videotape all detainees' movements outside their cells. Unfortunately, the MDC destroyed the tapes after 30 days. We recommend that the BOP issue new procedures requiring that videotapes of detainees with alleged ties to terrorism housed in ADMAX SHU units be retained for at least 60 days.

#### Department of Justice Response

We agree with the principle behind this recommendation but are unsure as to whether the recommended 60 days will be adequate to address the issue. The BOP will further study the length of time videotapes should be maintained in these circumstances and develop policy to implement.

#### OIG Analysis

As we discussed in the report, the BOP's decision to allow MDC staff to destroy or reuse videotapes after 30 days hampered the usefulness of the BOP's videotape system to prove or disprove allegations of abuse raised by individual detainees. We agree that retaining the videotapes for 60 days may not be adequate to address this issue - our recommendation was that 60 days was the minimum retention period that the BOP should consider. For example, the BOP may determine that it should retain all videotapes related to a detainee for one year after the alien is released or removed from BOP custody.

To close this recommendation, we request a copy of the BOP's new videotape retention policy by October 3, 2003.

#### DOJ Response to OIG's Analysis

The BOP has conducted a review regarding the length of time videotapes should be maintained in these circumstances. The attached new BOP policy, which is described in the response to Recommendation 10, attached at Tab 1 and marked as "Limited Official Use - Staff Access Only," indicates there may be times when it is deemed necessary to videotape the inmate(s) routine movement outside his/her cells, and the staff entrances into the inmate's cell. The decision to record this activity will be determined on a case-by-case basis and approved only by the Assistant Director, Correctional Programs Division. The specific time frame for retention of videotapes will be 6 months and has been incorporated into the new policy.

#### **Recommendation 15**

We recommend that the BOP ensure that all immigration detainees housed in a BOP facility receive full and timely written notice of the facility's policies, including procedures for filing complaints. We found that the MDC failed to consistently provide September 11 detainees with details about its Administrative Remedy Program, the formal process for filing complaints of abuse.

#### Department of Justice Response

We agree with this recommendation. BOP policy requires each inmate acknowledge receipt of the rules and regulations of confinement, including procedures for filing complaints. We will take the necessary steps to reinforce this policy and ensure the notice is provided in a clear and consistent manner.

#### OIG Analysis

As discussed in our report, an MDC official told the OIG that all September 11 detainees received a facility handbook when they were processed into the MDC. However, MDC staff apparently confiscated the handbooks as unacceptable items for the detainees to retain in their ADMAX SHU cells and, instead, provided many of the detainees with a 2-page summary of MDC policies that did not contain information about procedures for filing a formal complaint. We believe that if the BOP ultimately decides for security reasons that detainees should not be permitted to keep the full facility handbook in their cells, any summary of these policies must contain information describing the process for filing a formal complaint.

To close this recommendation, we request by October 3, 2003, a copy of the specific actions the BOP will take to reinforce its policies and to ensure that detainees are informed about the rules and regulations of BOP detention facilities in which they are confined.

#### DOJ Response to OIG Analysis

The importance of all detainees receiving full and timely notice of BOP's policies,

including procedures for filing complaints, has been reiterated to all Chief Executive Officers (CEOs) in the attached memorandum from the Director dated October 30, 2003 (see Tab 2).

#### **Recommendation 16**

Some MDC correctional staff asked detainees "are you okay" as a way to inquire whether they wanted their once-a-week legal telephone call. Detainees told the OIG that they misunderstood this question and, consequently, unknowingly waived their opportunity to place a legal call. We recommend that the BOP develop a national policy requiring detainees housed in SHUs to affirm their request for or refusal of a legal telephone call, and that such affirmation or refusal be recorded in the facility's Legal Call Log.

#### Department of Justice Response

We will incorporate into the policy described in the response to Recommendation 13 the need to allow detainees held in highly restrictive conditions of confinement an appropriate level of communication with counsel. This policy will include the requirement that staff ensure detainees gain initial access to an attorney and that staff document such access (or refusal by the inmate). This policy will be helpful for immigration detainees who have the right to counsel at no expense to the government.

We would note that we have become increasingly aware that with respect to certain pretrial inmates legal phone calls may present substantial opportunities for the transmission of information that could threaten national security and/or public safety. These calls are unmonitored and the staff cannot verify or control who is a party to the call. Accordingly, we intend to carefully review our policy on legal phone calls for pretrial inmates.

Once detainees have obtained counsel, we believe our current policies and procedures provide sufficient opportunities for pretrial inmates (defined in 28 C.F.R. § 551.101(a)(1) to include detainees) to communicate with legal counsel. Detainees have access to unmonitored inmate-attorney correspondence, an opportunity for private legal visits on a daily basis, and the ability to make unmonitored calls to their attorney upon the inmate's request, as often as resources of the institution allow. 28 C.F.R. § 551.117. This access is available to all detainees and other pretrial inmates including those assigned to Special Housing Units (SHU).

#### OIG Analysis

The BOP agrees in principle with our recommendation to revise its policies to facilitate detainees' ability to obtain legal representation when they first arrive at a BOP facility, and the DOJ response states that the BOP will incorporate policy changes in this area.

However, the response does not clearly address the situation we found in which an MDC

unit counselor used the phrase, "are you okay," to ask September 11 detainees if they wanted their weekly legal telephone call. The OIG report determined that the use of this shorthand statement unduly hindered detainees' ability to consult with legal counsel. We therefore believe the new policy should require the BOP to have detainees housed in SHUs state clearly their request or refusal to make a legal telephone call, and that this request or refusal be recorded in the facility's Legal Call Log.

To close this recommendation, we request by October 3, 2003, a copy of the BOP's policy implementing this recommendation.

#### DOJ Response to OIG's Analysis

BOP staff are required to make routine rounds through the Special Housing Unit. In doing so, staff routinely ask inmates "are you okay" or other similar questions to inquire about their general well-being and any issues or concerns they need to address. Asking "are you okay" was not intended to be a proxy for asking a detainee whether they would like a legal phone call.

The BOP reviewed current policy regarding telephone access for pretrial detainees and determined changes are not necessary. However, specific guidance regarding telephone access for Category I Management Interest Inmates is outlined in the new BOP policy, which is described in the response to Recommendation 10, attached at Tab 1 and marked as "Limited Official Use – Staff Access Only." This policy includes the requirement that staff ensure detainees gain initial access to an attorney and document in a legal call logbook such access or refusal by the inmate.

#### **Recommendation 17**

We recommend that the MDC examine its ADMAX SHU policies and practices in light of the September 11 detainees' experiences to ensure their appropriateness and necessity. For example, we found that while the MDC offered September 11 detainees exercise time in the facility's open-air recreation cell, they failed to provide suitable clothing during the winter months that would enable the detainees to take advantage of this opportunity. In addition, we found that the MDC kept both lights on in the detainees' cells 24 hours a day for several months after they had the ability to turn off at least one of the cell lights.

#### Department of Justice Response

We concur with this recommendation. The BOP will review the MDC's housing unit policies and conditions to ensure they are appropriate and that detainees with suspected ties to terrorism are detained in conditions with the appropriate level of security.

#### OIG Analysis

To close this recommendation, we request by October 3, 2003, a copy of the BOP's review of the MDC's housing unit policies that address the specific issues raised in the recommendation. We also believe that any policy revisions that result from this review should be implemented throughout the BOP, and not solely at the MDC.

#### DOJ Response to OIG's Analysis

The BOP conducted a review of the MDC's Special Housing Unit policies and made recommendations for change. The MDC revised its policies based on this review and recommendations. The BOP reviewed and approved the revised policies. A copy of the BOP's reviews and MDC's policies are attached at Tab 3. These documents are also marked as "Sensitive Limited Official Use Only" due to our belief that release of these documents outside the Federal law enforcement community could compromise the security of our institutions and the safety of our staffs and the general public.

It was determined national policy did not require a revision, as the problems noted at the MDC were local. The Director has however, addressed these issues in a memorandum to all Chief Executive Officers (see Tab 2).

#### **Recommendation 20**

How long the INS legally could hold September 11 detainees after they have received final orders of removal or voluntary departure orders in order to conduct FBI clearance checks was the subject of differing opinions within the INS and the Department. A February 2003 opinion by the Department's Office of Legal Counsel concluded, however, that the INS could hold a detainee beyond the normal removal time for this purpose. That issue also is a subject in an ongoing lawsuit.

Regardless of the outcome of the court case, we concluded that the Department failed to turn its attention in a timely manner to the question of its authority to detain such individuals. Where policies are implemented that could result in the prolonged confinement of illegal aliens, we recommend that the Department carefully examine, at an early stage, the limits on its legal authority to detain these individuals.

#### Department of Justice Response

We agree with this recommendation. Because the initial detention authority for aliens in immigration proceedings is now with the Department of Homeland Security, however, we believe that this recommendation is primarily applicable to that Department. This recommendation also is addressed in part by our response to Recommendation 9. And, as the Inspector General's report notes, the February 2003 legal opinion issued by the Office of Legal

Counsel addresses the legal issues presented by the detention of the September 11 detainees. That opinion makes clear that the Department of Homeland Security may detain illegal aliens during their removal proceedings and after a formal order of removal for the purpose of investigating their possible ties to terrorism, at least for the six months deemed presumptively reasonable by the Supreme Court in Zadvydas v. Davis.

#### OIG Analysis

The DOJ's response does not explain how it plans to address, in a timelier manner, legal questions regarding the federal government's authority to detain such individuals. The OLC opinion mentioned in both the OIG recommendation and the DOJ's response was not issued until February 2003 - one year after the DOJ changed its policy and began releasing individual detainees without completing an FBI clearance investigation related to their potential connections to terrorism.

While the majority of aliens will be confined under the jurisdiction of the DHS in the future, legal issues relating to detainee confinement are likely to remain within the jurisdiction of the DOJ. Given the situation the DOJ encountered in identifying and resolving issues related to its legal detention authority in a timely manner after the September 11 attacks, we continue to believe that the DOJ, along with the DHS, should adopt a mechanism to carefully examine, at an early stage, the parameters of the legal authority for confining immigration detainees for an extended period of time.

#### DOJ Response to OIG's Analysis

Our responses to the OIG's analyses for the first, second, fourth and fifth recommendations describe the new terrorist-related entities that have been established since September 11, 2001, such as the FTTTF and TTIC, as well as the augmentation of counterterrorism resources within the FBI. With these enhancements, we believe that, in the event of another large-scale terrorist attack, we will have a much-improved flow of information related to aliens encountered during the investigation of that attack. Consequently, the FBI will be able to provide DHS with information expeditiously about aliens whom the FBI believes may pose national security concerns. Also, as noted in our response to the fourth recommendation, DHS, not the Department of Justice or the FBI, will make the initial determination whether aliens will be maintained in custody. The Department of Justice's role will be limited to the FBI's providing information to DHS and to the immigration judges and the Board of Immigration Appeals (part of the Executive Office for Immigration Review) conducting bond redetermination hearings and deciding bond appeals.

In addition to being able to provide information to DHS on a more targeted basis, we believe that OLC's February 2003 legal opinion and other legal research on detention issues that has been conducted since September 11, 2001, both the Department of Justice and DHS already

have knowledge concerning the federal government's legal authority for detaining aliens who are present in the United States in violation of law. Also, the Civil Division and the Offices of Legal Counsel and Solicitor General are constantly monitoring new developments in case law, and the Office of Legislative Affairs monitors Congressional consideration of new legislation. By copying the heads of these components on this memorandum, I am instructing these offices to pay special attention to immigration detention-related issues and to provide immediate notice to OLC and DHS of developments that would affect the existing legal opinions on the issue. We have concluded that providing this instruction to these Department components and making OLC available to provide prompt advice to DHS during a crisis situation is the best way to "carefully examine, at an early stage, the limits" on legal authority to detain aliens encountered during a future investigation resulting from a terrorist attack.

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