

[identical letter sent to Chairman/Ranking Member
of Senate Committee on the Judiciary]

September 5, 2003

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman and Congressman Conyers:

On June 2, 2003, the Office of the Inspector General (OIG) issued a report entitled, "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 762 aliens detained in connection with the Department of Justice's terrorism investigation.

In Chapter 9 of the report, the OIG made 21 recommendations to the Department of Justice (DOJ) and Department of Homeland Security (DHS) related to the issues discussed in the report. The OIG received written responses to these recommendations from the Deputy Attorney General on behalf of the DOJ and from Under Secretary for Border and Transportation Security Asa Hutchison on behalf of the DHS.

We are pleased that both agencies are taking the recommendations seriously and are taking steps to address many concerns raised by the OIG report. However, a number of the recommendations are not addressed with sufficient specificity, and significant work remains before the recommendations are fully implemented.

Enclosed for your information is our analysis of the DOJ and DHS responses. In addition, appended to this analysis are the DOJ and DHS submissions. We will continue to work closely with the DOJ to track the implementation of the recommendations that pertain to it. Since March 1, 2003, immigration enforcement responsibilities have transferred from the DOJ

to the DHS. Consequently, the DHS OIG will take responsibility from this point forward to monitor the DHS's implementation of the recommendations contained in our report that relate to DHS responsibilities.

Please let us know if you have any questions about these issues.

Sincerely,

Glenn A. Fine
Inspector General

Enclosures

cc: Members, House Committee on the Judiciary

OIG Analysis of Responses by the Department of Justice and the Department of Homeland Security to Recommendations in the OIG's June 2003 Report on the Treatment of September 11 Detainees

I. INTRODUCTION

On June 2, 2003, the Department of Justice (DOJ) Office of the Inspector General (OIG) issued a report entitled “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 examined aspects of the Department of Justice’s (DOJ) response to the September 11 attacks, including the investigation initiated by the Federal Bureau of Investigation (FBI) called “PENTTBOM,” to identify the terrorists who committed the attacks and anyone who knew about or aided their efforts. The OIG report focused on the 762 aliens detained on immigration charges by the Immigration and Naturalization Service (INS) in connection with the PENTTBOM investigation during the first 11 months after the attacks. At the time, the INS was part of the DOJ, but as of March 1, 2003, it was transferred to the Department of Homeland Security (DHS).

The OIG report described how the DOJ instituted a policy of opposing bond for all aliens arrested in connection with the September 11 investigation until they were cleared by the FBI, which became known as the “hold until cleared” policy. The OIG report examined various aspects of the detainees’ treatment, including the length of the detainees’ confinement, the process undertaken by the FBI to clear the detainees, bond determination decisions for the detainees, and the policies governing removal of the detainees from the United States.

The OIG report also examined in detail the September 11 detainees’ conditions of confinement. Overall, the Federal Bureau of Prisons (BOP) confined 184 of the detainees in its facilities nationwide, while the remainder of the detainees were held at INS detention centers or in state or local facilities under contract with the INS. Our report focused specifically on two facilities – the Metropolitan Detention Center (MDC) in Brooklyn, New York (a BOP facility), and the Passaic County Jail in Paterson, New Jersey (a county facility under contract to the INS to house immigration detainees).

In Chapter 9 of our report, we made 21 recommendations to address the issues examined in our review. The recommendations related to issues under the jurisdiction of the FBI, the BOP, leadership offices at the DOJ, and the DHS.

On July 21, 2003, in a memorandum from the Deputy Attorney General, Larry D. Thompson, the DOJ responded to the recommendations in the OIG report on behalf of the DOJ leadership offices, the FBI, and the BOP. In a memorandum dated August 4, 2002, Asa Hutchinson, the Under Secretary for Border and Transportation Security at the DHS, responded on behalf of the DHS to the recommendations in the OIG report concerning immigration issues that are now under the jurisdiction of the DHS.

In the analysis below, we reproduce the text of the OIG recommendations and the text of the corresponding DOJ and DHS responses before providing the OIG's analysis of each of these responses. We also attach the full memoranda from the DOJ and DHS as exhibits A and B to this report.

Where specific action has been taken on a recommendation that fully addresses the issue raised by the recommendation, consistent with our normal practice, we consider the recommendation to be "closed." Where the agencies have indicated a plan or an intention to implement measures in the future to address the recommendation, or where no action has been taken, we consider the recommendation to be "open."

In their responses, the DOJ has stated that the OIG report provides useful information and the DHS has indicated it is conducting a thorough review of the practices and policies that are discussed in the report. It also is apparent from the responses that both agencies are taking the OIG recommendations seriously and are taking steps to address many concerns raised by the report. However, as the following analysis indicates, a number of the recommendations are not addressed with sufficient specificity, and significant work remains before the recommendations are fully implemented and closed.

II. OIG ANALYSIS OF DOJ and DHS RESPONSES

Recommendation 1

Status: Open

OIG Recommendation

We believe the DOJ and the FBI should develop clearer and more objective criteria to guide their 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.

Department of Justice 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)."

Recommendation 2

Status: Open

OIG Recommendation

The FBI should provide immigration authorities (now part of the 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.

Department of Justice 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.

Department of Homeland Security Response

With regard to immigrants in detention, DHS will independently review the underlying facts in each case and make assessments as to both the necessity for detention and the appropriate detention facility in every case. In this way, the DHS can make the proper recommendations to the courts on bond, detention, and removal. This independent assessment is essential because DHS lawyers are officers of the court and must have confidence in the representations made to the court.

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.

Recommendation 3

Status: Open

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.

Department of Justice Response

We agree that an individual alien should be treated by DHS under DHS's routine procedures for handling detained aliens absent an expression of interest from the FBI within a short period of time. We believe, however, these "routine procedures" should include the detention of a greater number of aliens because the OIG's February 2003 report reflects that only 13 percent of non-detained aliens are actually removed from the United States. Failing to detain aliens commonly results in absconding. In addition, it should be noted that there is a statutory requirement to detain aliens with final orders of removal.

Department of Homeland Security Response

DHS concurs with the recommendation that new steps be taken to ensure that if another emergency occurs, there will be a clear and effective process in place to guide DHS and DOJ through the crisis. For example, DHS agrees that there should be clear post-arrest communication between the FBI and DHS regarding: an alien's likely association with terror; whether an alien detainee be labeled as a person "of interest" to an investigation; and, when an alien can be removed from the list of those who are "of interest." We will establish with the Justice Department an effective crisis management process.

OIG Analysis

The DOJ response states that an alien should be treated as a regular detainee according to the DHS's routine procedures absent an affirmative expression of interest by the FBI. The DHS also states that it will establish an effective crisis management process. In addition, both the DOJ and the DHS responses acknowledge that timely communication is essential to avoid unnecessarily prolonged treatment of an alien as an individual "of interest" in connection with an ongoing terrorism investigation.

To close this recommendation, we ask the DHS to provide by October 3, 2003, a copy of its crisis management process or the procedure it plans to use to notify the FBI of its intent to release or deport an alien held in connection with a terrorism investigation whom the FBI has deemed no longer "of interest" to its investigation.

Finally, the DOJ's response references the OIG's February 2003 inspection report entitled, "The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders." It is important to note that, in that report, the OIG examined how often the INS removed detained and non-detained aliens *after* they had been issued final orders of removal. Our February 2003 review did not examine issues related to aliens detained *before* being issued final removal orders. Moreover, our review found that the INS had taken few steps to attempt to find or remove non-detained aliens, and we recommended that the INS improve its efforts and ability to locate and remove aliens issued final orders of removal.

Recommendation 4

Status: Open

OIG Recommendation

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 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 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.

Department of Justice 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.

Recommendation 5

Status: Open

OIG Recommendation

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 [Strategic Information and Operations Center] 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.

Department of Justice 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.

Recommendation 6

Status: Open

OIG Recommendation

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.

Recommendations 7 and 8

Status: Open

OIG Recommendation 7

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 [Notices to Appear] on transferred detainees: either the District in which the detainee was arrested or the District where the detainee is transferred.

OIG 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 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.

Department of Homeland Security Response

DHS agrees with the IG that we need to put in place comprehensive instructions to clarify and streamline the process for serving “notices to appear” on alien detainees.

OIG Analysis

While the DHS response suggests that it agrees with the recommendations, the response also suggests that the DHS has not yet taken any specific action to implement these recommendations. Given the serious deficiencies in serving NTAs on detainees outlined in our report, we believe the DHS should take prompt action on these recommendations.

To close these recommendations, we request that the DHS provide a copy of its new requirements for service of NTAs by October 3, 2003.

Recommendation 9

Status: Open

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.

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.

Recommendation 10

Status: Open

OIG Recommendation

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.

Recommendation 11

Status: Open

OIG Recommendation

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.

Recommendation 12

Status: Open

OIG Recommendation

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.

Recommendation 13

Status: Open

OIG Recommendation

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.

Recommendation 14

Status: Open

OIG Recommendation

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.

Recommendation 15

Status: Open

OIG Recommendation

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.

Recommendation 16

Status: Open

OIG Recommendation

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.

Recommendation 17

Status: Open

OIG Recommendation

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.

Recommendations 18 and 19

Status: Closed

OIG Recommendation 18

INS Newark District staff conducted insufficient and irregular visits to September 11 detainees held at Passaic. We also found that Passaic officials did not always inform Newark staff when detainees were placed in the SDU and that Newark officials did not always maintain required records for SDU detainees. Consequently, Newark staff was unable to consistently monitor detainee housing conditions, health issues, or resolve complaints. We recommend that the DHS amend its detention standards to mandate that District Detention and Removal personnel visit immigration detainees at contract facilities like Passaic frequently, with special emphasis on those detainees placed in SDUs, in order to monitor matters such as housing conditions, health concerns, and complaints of abuse. District visits should

include an interview of and a review of the records for detainees housed in SDUs. We further recommend that the DHS issue procedures to mandate that contract detention facilities transmit documentation to the appropriate DHS field office that describes the reasons why immigration detainees have been sent to SDUs.

OIG 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 and BOP classifications (or other appropriate facility classification systems). In addition, the DHS should ensure that the detainees have adequate access to counsel, legal telephone calls, and visitation privileges consistent with their classification.

Department of Homeland Security Response

[W]ith respect to recommendations 18 and 19, [DHS] attached a copy of a new “Detention Standard” established by the Immigration and Customs Enforcement’s (ICE) Deportations and Removals Office. This detention standard addresses the Inspector General’s findings with regard to the need for immigration officials to regularly visit aliens in detention, both at DHS-controlled facilities and facilities controlled by other entities. The new standard seeks to ensure that detainees have access to ICE personnel. The standard requires ICE personnel to visit weekly each detainee housed at an ICE personnel run Service Processing Center (SPC), contract facility, or BOP facility. [DHS] officers must also review the facility’s special management units to interview ICE detainees and monitor housing conditions. Finally, the standard includes specific time frames during which officers must respond to certain enumerated detainee requests. All detainees in DHS-controlled facilities are required to have access to counsel, telephone calls, and visitation privileges consistent with their classification. ICE has issued an operational order emphasizing the need for its employees to follow all applicable policies, procedures and regulations governing the detention of aliens. This order particularly noted the importance of detainees’ access to legal representation and consular officials.

OIG Analysis

The new ICE Detention Standard appears to be a detailed and specific response to our recommendations. The standard requires both regular and unscheduled weekly visits to DHS, contract, state, or local facilities used by the DHS to confine detainees. In addition, the standard provides for review of housing areas, food service, recreation areas, and segregation units in which detainees are held. The standard also requires interviews of detainees during

visits by DHS officials. Special provisions for detainees housed in BOP facilities require DHS to review the conditions under which detainees are held, the basis for their classification and placement in highly restrictive units, their access to counsel, and their legal telephone calls and visitation privileges. According to the Detention Standard, responses to certain requests submitted by detainees to the DHS “normally” will be made within 72 hours from the time received by the DHS.

In light of the new DHS standard, we consider these recommendations to be closed.

Recommendation 20

Status: Open

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 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.

Recommendation 21

Status: Open

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.

Department of Homeland Security Response

DHS will ensure that immigration officials in the field consistently conduct "post-order custody reviews" for all detainees who remain in custody after the typical 90-day removal period. Over the past several months, we have established a new field structure for the Bureau of Immigration and Customs Enforcement (ICE). Under the new structure, ICE has established a clear chain of command and new field office structure that will enable field offices to consistently conduct post-order custody reviews for all detainees who remain in

custody after the 90-day removal period. This new structure, coupled with improved coordination between the Department of Justice and DHS as well as ongoing training for our field personnel, should ensure that post-order custody reviews are completed in a timely manner in the future.

OIG Analysis

While the DHS has provided a general description of the measures it has taken in response to this recommendation, it has not provided specific information about its actions to ensure that its field offices consistently conduct post-order custody reviews. To close this recommendation, we request that the DHS provide by October 3, 2003, a copy of its post-order custody review monitoring plan and the revisions to its chain of command and field structure that are relevant to this issue.

EXHIBIT A



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

July 21, 2003

MEMORANDUM FOR THE INSPECTOR GENERAL

FROM: Larry D. Thompson
Deputy Attorney General

A handwritten signature in black ink, appearing to be "L. D. Thompson", written over a horizontal line.

SUBJECT: Response to Recommendations Regarding September 11 Immigration Detainees

The Department of Justice has continued its review of the recent report of the Office of the Inspector General (OIG) related to the September 11 immigration detainees. This report has provided the Department with useful information to be considered in reviewing our past policies and operations, as well as in planning for similar operations in the future. As requested, we are providing a formal response to the recommendations made in the report.

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 in violation of the immigration laws 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.

The OIG report raises significant concerns about the treatment and conditions of confinement of certain detainees. The Department of Justice abhors the mistreatment of any detainee and will take appropriate action after the completion of ongoing investigations. We would note that we specifically requested interim recommendations from the OIG in order to address such issues before the completion of the overall report. The interim recommendations we received on July 11, 2002, related to conditions of confinement at the Metropolitan Detention Center (MDC) in Brooklyn. These written recommendations were useful and we took steps to implement them, but we were not provided with information related to allegations of abuse at that time.

I would note that I will require that the Bureau of Prisons (BOP) and the FBI provide me in 60 days progress reports regarding implementation of the recommendations.

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.

Response: In September 2002, the Department imposed a requirement that the Office of the Deputy Attorney General approve the addition of any 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 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.

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.

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.

Recommendation #3: 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.

Response: We agree that an individual alien should be treated by DHS under DHS's routine procedures for handling detained aliens absent an expression of interest from the FBI within a short period of time. We believe, however, these "routine procedures" should include the detention of a greater number of aliens because the OIG's February 2003 report reflects that only 13% of non-detained aliens are actually removed from the United States. Failing to detain aliens commonly results in absconding. In addition, it should be noted that there is a statutory requirement to detain aliens with final orders of removal.

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.

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.

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.

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 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.

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. FBI should assign sufficient resources to conduct clearance investigations and provide information to other agencies in reasonably expeditious manner, including imposing deadlines on FBI field offices.

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.

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. Offices of General Counsel through DOJ should establish formal processes for identifying

legal issues of concern in writing to senior DOJ officials.

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.

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.

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.

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.

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.

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.

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.

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.

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, that 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.

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.

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.

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.

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.

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.

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).

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.

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.

Recommendation #20: DOJ should carefully examine, at an early stage, the limits on legal authority to detain aliens when policies that are implemented result in their prolonged detention.

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 final 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.

cc: Robert S. Mueller
Director, Federal Bureau of Investigations

Harley Lappin
Director, Bureau of Prisons

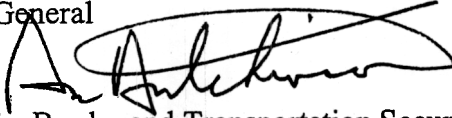
EXHIBIT B

U.S. Department of Homeland Security

August 4, 2003

MEMORANDUM

To: Clark Kent Ervin
Acting Inspector General

From: Asa Hutchinson 
Under Secretary for Border and Transportation Security

Subject: Border and Transportation Security's Responses to the Department of Justice Inspector General's report on the detention of immigrants after September 11

On June 2, 2003, the Department of Justice Inspector General 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." While the Department of Homeland Security did not exist at the time of the events described in the report, its findings and recommendations are relevant to the Department since we have assumed much of the responsibility for the enforcement and administration of the nation's immigration laws. On June 17, 2003, you sent me a memorandum asking for responses to a number of recommendations made in that report.

The Department of Homeland Security is carefully studying the report, and takes the findings and recommendations very seriously. I am conducting a thorough review of the practices and policies that are discussed in the report and am meeting with key staff to develop complete and thorough responses to the recommendations. Moreover, I have met with a coalition of civil rights and civil liberties advocacy groups to get their thoughts on the report and on how DHS should implement the recommendations. I am also working with the Attorney General and the FBI to coordinate our work on this matter.

While the Department has already taken several steps to address the concerns raised in the report, we have a great deal more work to complete. I have attached a copy of the written testimony that I provided to the Senate Judiciary Committee on July 23, 2003. The Judiciary Committee asked me to testify, along with FBI Director Mueller, regarding the Department of Justice Inspector General's report. As you will see, my testimony addresses several of the IG's recommendations, for example:

- DHS concurs with the recommendation that new steps be taken to ensure that if another emergency occurs, there will be a clear and effective

process in place to guide DHS and DOJ through the crisis. For example, DHS agrees that there should be clear post-arrest communication between the FBI and DHS regarding: an alien's likely association with terror; whether an alien detainee be labeled as a person "of interest" to an investigation; and, when an alien can be removed from the list of those that are "of interest." We will establish with the Justice Department an effective crisis management process. (Recommendations 1, 2, 3 and 4.)

With regard to immigrants in detention, DHS will independently review the underlying facts in each case and make assessments as to both the necessity for detention and the appropriate detention facility in every case. In this way, the DHS can make the proper recommendations to the courts on bond, detention and removal. This independent assessment is essential because DHS lawyers are officers of the court and must have confidence in the representations made to the court. (Recommendation 2.)

- DHS agrees with the IG that we need to put in place comprehensive instructions to clarify and streamline the process for serving "notices to appear" on alien detainees. (Recommendation 7.)

DHS will ensure that immigration officials in the field consistently conduct "post-order custody reviews" for all detainees who remain in custody after the typical 90-day removal period. Over the past several months, we have established a new field structure for the Bureau of Immigration and Customs Enforcement ("ICE"). Under the new structure, ICE has established a clear chain of command and new field office structure that will enable the field offices to consistently conduct post-order custody reviews for all detainees who remain in custody after the 90-day removal period. This new structure, coupled with improved coordination between the Department of Justice and DHS as well as ongoing training for our field personnel, should ensure that post-order custody reviews are completed in a timely manner in the future. (Recommendation 21.)

Moreover, with respect to recommendations 18 and 19, I have attached a copy of a new "Detention Standard" established by ICE's Deportations and Removals Office. This detention standard addresses the Inspector General's findings with regard to the need for immigration officials to regularly visit aliens in detention, both at DHS-controlled facilities and at facilities controlled by other entities. The new standard seeks to ensure that detainees have access to ICE personnel. The standard requires that ICE personnel visit weekly each detainee housed at an ICE personnel run Service Processing Center (SPCs), contract facility, or Bureau of Prisons facility. Officers must also review the facility's special management units to interview ICE detainees and monitor housing conditions. Finally, the standard includes specific timeframes during which officers must respond to certain enumerated detainee requests. All detainees in DHS controlled facilities are required to have access to counsel, telephone calls, and visitation privileges

consistent with their classification. ICE has issued an operational order emphasizing the need for its employees to follow all applicable policies, procedures and regulations governing the detention of aliens. This order particularly noted the importance of detainees' access to legal representation and consular officials.

I will provide you with further information as we continue to review the Department's policies and practices and expect to report back to you within sixty days with regard to this review.

I appreciate your office's willingness to work with us as we work to effectively implement the Inspector General's recommendations.

Attachments

DRAFT

STATEMENT OF THE HONORABLE ASA HUTCHINSON
UNDER SECRETARY FOR BORDER AND TRANSPORTATION
SECURITY

Mr. Chairman, Senator Leahy, and distinguished members of the Committee, thank you for inviting me to testify before you today. It is also a privilege to appear along with my friend and colleague, Bob Mueller.

I welcome the opportunity to appear before you at this important hearing on the Department of Justice 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*.

I want to assure the Committee that the Department of Homeland Security is appreciative of the report and takes the findings and recommendations very seriously. In addition to our internal discussions, I have met with a coalition of civil rights and civil liberties advocacy groups to get their thoughts on the report and on how DHS should implement it. I want to also

assure the Committee that we will be working closely with FBI Director Muller and the entire Department of Justice to coordinate our work on this matter.

Before I go into more specifics about the Inspector General's report, I would like to lay the foundation for my subsequent discussion by providing you with the perspective of the Department of Homeland Security on the topic for today's hearing. This Committee has for many years provided oversight to the Department of Justice with regard to civil rights and civil liberties issues. The Department of Homeland Security does not have a long history with this Committee, and therefore I would like to outline our general perspective on the protections of civil rights and civil liberties. Then I will specifically address the Inspector General's report.

When mass terrorism struck our nation on September 11, 2001, our country's priorities changed. We all became determined to bring the terrorists to justice and work harder than ever to protect our country from future attacks. Nearly two years after the terrorist attacks, the Department of Homeland Security is coordinating a comprehensive national strategy to strengthen the security of our country. We are working to strengthen security

at airports; to realign our intelligence-gathering functions; to improve the enforcement of our nation's immigration laws; to better protect our critical infrastructure; and a host of other important security measures

From the very beginning of the homeland security effort, President Bush has emphasized the need to protect and cherish our civil rights and civil liberties. In November 2001, just weeks after the terrorist attacks, President Bush reminded a conference of federal prosecutors that, "[W]e have a huge responsibility, and that's to defend America while protecting our great liberties." In a Presidential proclamation on December 9, 2001, President Bush wrote, "Americans stand united with those who love democracy, justice and individual liberty. We are committed to upholding these principles, embodied in our Constitution's Bill of Rights, that have safeguarded us throughout our history and continue to provide the foundation of our strength and prosperity."

Our core mission at the Department of Homeland Security is not just to protect America's tangible assets – our buildings and airports and power plants - but to protect the intangible qualities that make America great – our liberties and our way of life

We must protect those things that make us a “shining city on a hill,” like freedom of speech, freedom of worship, the right to dissent, and our personal privacy. Secretary Ridge has pledged that “our strategy and our actions [will be] consistent with the individual rights and civil liberties protected by the Constitution.”

The measures we put in place as part of our strategy to improve security must be effective. But, we will also keep clearly in our minds that we must implement those measures in ways that respect and enhance our civil rights and civil liberties. Through open communication with the American people, and in particular with communities that have been most directly affected by the post-September 11 detentions, we will strive to protect America by taking the steps that will be effective in diminishing the security threats we face without sacrificing core American principles.

With regard to the Inspector General’s report, a starting point is obvious: the Department of Homeland Security took responsibility for 22 agencies in March of this year; we did not exist in September 2001. Nevertheless, the Department of Justice Inspector General’s report is relevant to our work. As you know, the Department of Homeland Security assumed many of the

immigration functions that were, during that critical time period, part of the Justice Department. As Under Secretary for Border and Transportation Security, I have responsibility for the operations of several agencies, including two that are most applicable to the subject at hand today – the Bureau of Customs and Border Protection and the Bureau of Immigration and Customs Enforcement. Under the Bureau of Immigration and Customs Enforcement, the focus is on criminal investigations and enforcement of the nation's immigration and customs laws. The Bureau of Customs and Border Protection focuses on securing our borders and facilitating the movement of legitimate trade and travelers. These two organizations now perform many of the functions that were once the responsibility of the Immigration and Naturalization Service. It is our intention that this reorganization will help streamline communications between the agencies and the senior leadership, which will help address one of the Inspector General's main recommendations.

The IG Report examines the immediate actions of the FBI and INS and the arrest and detention of 762 individuals. Noting the tremendous challenges the agencies faced as they responded to the September 11 attacks during this chaotic period, the Inspector General urges us to learn from the experience

and take specific steps that will prepare us for another national emergency.

At the Department of Homeland Security, we are prepared to do this.

Let me give you some specific comments on the recommendations made in the Inspector General's report.

The IG recommends that new steps be taken to ensure that if another emergency such as September 11 happens again, a clear and effective process be in place to guide DHS and DOJ through the crisis. We completely concur with this recommendation. We agree, for example, that there should be clear post-arrest communication between the FBI and DHS regarding: an immigrant's likely association with terror; regarding whether an immigrant detainee be labeled as a person "of interest" to an investigation; and, regarding when an immigrant can be removed from the list of those that are "of interest." We will establish with the Justice Department an effective crisis management process.

I want to assure this Committee and the country that should we ever find ourselves in another national emergency involving terrorism, we will have

mechanisms in place to work cooperatively with the FBI and to ensure that individuals detained pursuant to our laws are treated fairly. Although we will work cooperatively, it is imperative that the Department of Homeland Security independently review the underlying facts and assess the proper recommendations to the Court on bond, detention and removal [Cerda, Victor X] determination . This independent assessment is essential because DHS lawyers are officers of the court and must have confidence in the representations made to the court.

The IG asserts in its report that many detainees were held for a lengthy period of time without having charges filed against them. We agree that we need to put in place comprehensive instructions to clarify and streamline the process for serving charges – what are called “notices to appear” in the immigration context – on immigrant detainees.

The IG concluded that the conditions some immigrant detainees faced were unsatisfactory. The IG therefore recommended that DHS amend its detention standards to mandate that detention and removal personnel frequently visit immigrant detainees held at facilities not owned by DHS, and that poor conditions of confinement be addressed. I am pleased to

report that last week ICE issued a new detention standard that addresses these issues. The new standard covers communications between Bureau staff and facility staff and detainees. This standard requires that Detention and Removal personnel within the Bureau visit on a weekly basis each detainee housed at a Service Processing Center, contract facility, or Bureau of Prisons facility. Officers must also review any and all special housing arrangements affecting immigration detainees within these facilities. The central goal of this new standard is to ensure detainees are housed in accordance with applicable classification standards. Finally, the standards include specific timeframes during which officers must respond to certain enumerated detainee requests. All detainees in DHS controlled facilities are required to have access to counsel, telephone calls, and visitation privileges consistent with their classification. The Bureau has issued an operational order emphasizing the need for its employees to follow all applicable policies, procedures and regulations governing the detention of aliens. This order particularly noted the importance of detainees' access to legal representation and consular officials.

I also want to assure the Committee that ICE's detention and removal office has in place a set of standards that set a high standard with regard to

immigration detention facilities. Moreover, it has instituted a vigorous program “jail inspections program.” In the past two years, ICE’s detention and removal office has trained over 350 agents to serve as “reviewers” of immigration detention facilities. I am going to revisit that program to ensure that it sufficiently strong to meet our objectives.

Finally, the IG concluded that DHS needs to ensure that immigration officials in the field need to consistently conduct “post-order custody reviews” for all detainees who remain in custody after the typical 90 day removal period. As the ICE organization has been created, we have established a new ICE field structure. Under the new structure, the Bureau of Immigration and Customs Enforcement has established a clear chain of command and new field office structure that will enable the field offices to consistently conduct post-order custody reviews for all detainees who remain in custody after the 90-day removal period.

Although we have taken some steps to address the concerns raised by the Inspector General, we clearly need to accomplish much more. With Director Mueller, we will establish mechanisms to appropriately process aliens who

may have a connection to terrorism in the event of another national emergency that involves alien detainees. I would be pleased to present further testimony on this issue to this Committee as DHS fully implements all of its policy and procedural changes.

Thank you. I am happy to answer your questions at this time.