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NOMINATION OF HON. PHILIP J. PERRY

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON THE

NOMINATION OF HON. PHILIP J. PERRY TO BE GENERAL COUNSEL OF U.S. DEPARTMENT OF HOMELAND SECURITY

MAY 19, 2005

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NOMINATION OF HON. PHILIP J. PERRY

THURSDAY, MAY 19, 2005

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:35 a.m. in room SD–562, Dirksen Senate Office Building, Hon. Susan M. Collins, Chairman of the Committee, presiding.

Present: Senators Collins and Warner.

OPENING STATEMENT OF CHAIRMAN COLLINS

Chairman COLLINS. The Committee will come to order. Good morning.

Mr. PERRY. Good morning.

Chairman COLLINS. This morning, the Committee will consider the nomination of Philip J. Perry to be General Counsel of the Department of Homeland Security. This is a vitally important position, and Mr. Perry brings impressive credentials to this post.

If confirmed, Mr. Perry will serve as the chief legal advisor to the Secretary of the Department of Homeland Security. As General Counsel, he and his staff will help to ensure that the Department's activities fully comply with all legal requirements and that the Department's efforts to secure America's safety also protect the civil liberties of the American people.

As the chief legal officer of the Department, the General Counsel oversees the legal work in virtually all DHS Directorates and component agencies, such as the Secret Service, the Coast Guard, Border and Transportation Security, Emergency Preparedness and Response, and the Bureau of Citizenship and Immigration Services. This is truly a formidable charge and a great deal of responsibility.

Mr. Perry has already demonstrated his commitment to public service, having served our Nation for nearly 3 years as General Counsel of the Office of Management and Budget.

In that role, Mr. Perry oversaw White House clearance of Federal regulations, addressed significant matters on the Justice Department's civil litigation docket, formulated Executive Orders, developed and implemented White House policy initiatives, and advised the President and the Director of OMB on regulatory and budget matters.

A key part of his job was to mediate interagency disputes. I believe that experience will serve him well in his new position because, as we all know, the agencies that comprise the Department of Homeland Security often have disputes with one another.

Prior to serving at the White House, Mr. Perry was Acting Associate Attorney General at the Department of Justice, the Department's third-ranking official.

While at Justice, Mr. Perry oversaw the Department's five civil litigation divisions, and had a supervisory role in important environmental, civil rights, and antitrust cases.

In the aftermath of September 11, 2001, Mr. Perry advised the Attorney General on legal issues arising from the attacks and the war on terrorism, including the 9/11 Victims Compensation Fund.

And, of course, we are very proud of the fact that Mr. Perry served this Committee in 1997 during our special investigation of campaign finance abuses during the 1996 presidential election. That was when I first had the opportunity to meet Mr. Perry for the first time.

So, Mr. Perry, we welcome you back to your old Committee and we look forward to working with you. As you know, this Committee's jurisdiction has been broadened since you worked here. It now has responsibility for the Department of Homeland Security, so we anticipate working very closely with you.

I know that Senator Warner is eager to introduce you. I am going to proceed and then when the Senator comes, we will break and have him introduce you and then resume the questioning.

Mr. Perry has filed responses to biographical and financial questionnaires, answered pre-hearing questions submitted by the Committee, and has had his financial statements reviewed by the Office of Government Ethics.

Without objection, this information will be made part of the hearing record with the exception of the financial data which are on file and available for public inspection in the Committee offices.[1]

I know, Mr. Perry, that you are blessed to have your family with you today and what a wonderful family it is indeed.

At this point, before I proceed to swear you in, I would like to give you the opportunity to introduce your family to the Committee.

Mr. PERRY. Thank you very much. I appreciate that.

My wife, Liz, is directly behind me and then our 5-year-old Grace beside her, our 7-year-old Elizabeth, and our nearly 11-year-old Kate is here. We also have a boy at home. He is 10 months. He is not quite ready for prime time.

Chairman COLLINS. Well, girls, we welcome you to this hearing today. I know you must be so proud of your dad. He has been nominated by the President for a very important position. So I am really happy that you have the opportunity to see him today. It is really nice to have you here. We also welcome your mom.

When your brother is a little bit older, you can tell him how exciting it was to watch your father go through his confirmation hearing. Will you remember this day so that you can describe it to your brother?

Mr. PERRY. Thank you.

Chairman COLLINS. Mr. Perry, all of the nominees that come before this Committee are required to give their testimony under

[1] The biographical and financial information appears in the Appendix on page 17.

oath, so we would ask that you please stand and raise your right hand.

Do you swear that the testimony you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. PERRY. I do.

Chairman COLLINS. I would now ask you to proceed with any remarks that you might have.

TESTIMONY OF PHILIP J. PERRY,[1] TO BE GENERAL COUNSEL, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. PERRY. Well, thank you very much, Chairman Collins. I am honored to appear before you today.

I also want to thank Secretary Chertoff and the Members of the Committee, and in advance thank Senator Warner who I know will be here in a little while.

I have known the Secretary for nearly 10 years. We are partners in the same law firm and we were both working in the Department of Justice on September 11. It would be my privilege, if confirmed, to work with him and the many thousands of other dedicated men and women in the Department to preserve an America that is safe, secure, and free.

I agree with both the President and the Secretary that winning the war on terror is the great calling of our generation. I know that an effective Department of Homeland Security is critical to that effort.

I had an opportunity first as Acting Associate Attorney General and later as General Counsel of OMB to address homeland security issues in the aftermath of September 11. I would be honored to rejoin the effort now to protect our Nation.

I also recognize the Department's obligation to preserve our freedom, to defend American liberty with courage and determination. If confirmed, I would commit myself to preserving our civil liberties while pursuing security and to helping the Department address important issues of privacy.

Although the General Counsel is the Department's chief legal officer, I believe that the role of General Counsel extends beyond merely interpreting and applying the law. The General Counsel must also create an effective and efficient mechanism for promulgating Department regulations, addressing bureaucratic hurdles, and speeding implementation of the Department's programs.

The Office of General Counsel has the ability and the obligation to pull separate Department components together to address shared problems and to forge Department-wide solutions that draw on the authorities and capabilities of each component. The office should be a tool for unifying the Department and for accomplishing its broad mission.

I am also committed to developing a close and cooperative working relationship with this Committee and with the Congress. As you mentioned, I had the privilege of serving as counsel to this Committee in 1997, and I think the perspective I gained from that

[1] The prepared statement of Mr. Perry appears in the Appendix on page 15.
Pre-hearing questionnare of Mr. Perry appears in the Appendix on page 23.
Post-hearing questions for Mr. Perry appears in the Appendix on page 67.

service should help me create a constructive and cooperative department approach to congressional oversight and to the types of issues that sometimes divide us.

Finally, I would like to thank Joe Whitley who has served since 2003 as the first General Counsel of the Department of Homeland Security. When he took the job, he found a newly minted Department with more than 1,400 lawyers spread out among 22 separate organizations. He has done admirable work in pulling those disparate pieces together and creating a cohesive legal organization.

If confirmed, I hope to build on the foundation he established. Although I cannot promise perfection, I promise to work tirelessly to help fulfill the Department's mission and to serve the Secretary, the President, and the American people.

I would be very pleased to answer any questions you have.

Chairman COLLINS. Thank you very much for your statement.

You mentioned in your testimony the importance of working closely with this Committee. And as I indicated to you, this Committee does have new jurisdiction over the Department of Homeland Security beyond what we had initially.

We have, however, had an uneven relationship with the Department with regard to the provision of information in response to the Committee's request.

Under what circumstances do you believe the Department of Homeland Security may withhold information from Congress when it is exercising its oversight functions?

Mr. PERRY. Well, thank you for that question, Chairman Collins, because it is an issue I want to address. I have given it some considerable degree of thought.

And aside from the executive privilege issues and similar issues, I think we ought to be able to cooperate and have a constructive relationship.

And as I mentioned a moment ago, the fact that I have served both with this Committee in its prior life in 1997 and served as an Executive Branch General Counsel, I think, gives me the perspective on how to accomplish an effective relationship between the Committee and the Department, how to work together to accomplish the ends that you are seeking to accomplish and at the same time address the Executive Branch concerns.

I have worked with your staff before and I think that we ought to be able to work many issues out that have previously been problems. And I hope to have an opportunity to do that.

Chairman COLLINS. It does give me a great deal of comfort that you have experienced the difficulties in getting information from the Executive Branch as a Member of this Committee's staff. And I know that my Chief Counsel and Staff Director, Michael Bopp, speaks very highly of you and has assured me that you will bring a different perspective.

Our Committee has been investigating the naturalization of suspected terrorists for about a year now. Yet, despite the importance of that subject, we have had an exceedingly difficult time in being allowed to interview DHS employees who worked on one of the particular cases that we are examining as a case study.

Do you believe that a Federal agency may refuse a congressional request to interview a Department employee solely on the grounds that the employee is, "a line employee?"

Mr. PERRY. Well, I am not familiar obviously since I have not been serving as the General Counsel of DHS with the policies DHS employs in that regard.

I can say that when I served at the Department of Justice, I had some basic familiarity with those policies and know that they principally relate to making sure that you do not have political influence, whether from the White House or from other Executive Branch agencies or even from Congress, in an ongoing criminal proceeding, whether it is a criminal investigation or prosecutorial proceeding.

I do not know exactly how that policy would translate to the Department yet because I have not gone and done a review of each of the Department's functions, CBP and ICE and so forth. And I think I would need to do a review like that to articulate a really clear answer to your question.

I think, though, calling back to my comments a moment ago, I think we can find ways to work through these issues. And given the fact that, as you mentioned, Mr. Bopp and I have some experience working together in the past, I believe that we can find some ways to address these things that are satisfactory both to the Committee and serve our needs in the Department.

Chairman COLLINS. You know, in many cases, it is a matter of just good will and negotiation. A lot of times, the issues can be worked out. The information requests can be more focused. Individuals can be provided who can give us the information we need.

My point to you is that this has been a lingering concern in this Committee, and I hope that you will take a close look at it.

Mr. PERRY. I certainly will.

Chairman COLLINS. We had another example just yesterday. The Committee held a hearing on FEMA's role in responding to hurricane damage in Florida last year, at which the DHS Office of Inspector General released a report on this issue.

I mention this to you because at the request of the General Counsel of DHS, the Inspector General redacted information concerning some important issues. The General Counsel cited executive privilege in requesting the redaction of the material.

I know you were not involved at all in this decision, and I am not asking your opinion on that or to comment on it specifically. Instead, I want to ask you about the larger issue which is of great concern to me, that the Department of Homeland Security would deny Congress and the public access to information ostensively on the basis of executive privilege when we have no reason to believe that the standards required to invoke privilege, namely invocation by the President directly, have been met.

Therefore, I would like to get a sense from you under what circumstances you think that executive privilege should be invoked to deny Congress access to the information it seeks.

Mr. PERRY. Well, I think you are right that the executive privilege is the President's to invoke and it should not be used in a liberal fashion. It should be used in a very careful way. And I am ob-

viously not familiar with the individual circumstances you are addressing here in the predicate to your question.

I would be very careful about making those types of claims. I do not think they should be made often. I think they should be made with great care. And as I mentioned a moment ago, absent that type of legitimate claim, I think we ought to be able to find solutions to many of those types of issues where you need documents or testimony or other types of assistance, and we have other collateral concerns that we can resolve with you.

Chairman COLLINS. Speaking of the Inspectors General, that is also part of this Committee's jurisdiction, to perform oversight on the Inspectors General themselves and the act. We work very closely with the Inspectors General of various departments. Not every Department and not every General Counsel's office welcomes the role of the Inspector General.

Could you tell us if you are confirmed what you will do as DHS's General Counsel to make sure that the Inspector General receives the support from the component agencies so that he or she can perform the vital functions that Congress expects?

Mr. PERRY. Sure. I have sat down with the Inspector General nominee who was actually also the acting Inspector General at that time, Mr. Skinner, and had a very nice chat. And I would anticipate if confirmed having an open relationship with him such that we share information and that I support his efforts.

To be more specific, it is my view that the Inspector General's authority is a very important piece of our tool box for managing problems in the Department and it allows you to see into different areas of the Department, whether the management structure, the Secretary, Deputy Secretary, and some of the under secretaries, would not normally have a view.

So if you fail as leadership in the Department to have a close working relationship, a cooperative relationship with the Inspector General, you are going to lose one of the tools that is necessary for managing the Department.

So to answer your question specifically, I would have an open channel of communication and hopefully a close working relationship with the Inspector General.

Chairman COLLINS. I am pleased to hear that.

Mr. Perry, earlier this year, the Committee began oversight hearings on the Department. Our goal ultimately is to do a reauthorization bill. I have had conversations with Secretary Chertoff, and am awaiting the results of his review. I know that he has already identified some issues that will require changes in the underlying law.

We heard from experts from the Heritage Foundation, the RAND Corporation, the Council on Foreign Relations, and The Brookings Institution with differing views on the Department and its performance today.

I think that even the Department's strongest critics would concede that the Department has accomplished a great deal since it was first operational 2 years ago. I think also, on the other hand, that the Department's staunchest defenders would concede that there have been some problems.

How do you plan as General Counsel to address the challenges facing the Department? What are some of your priorities as you take on this role?

Mr. PERRY. Well, I would certainly follow the Secretary's lead on many things. But personally I have three priorities that I have identified to date.

We need to speed up our regulatory review process. We need to get regulations out in a prompt way. We need to get the process moving that relies on those regulations. And so as an initial matter, there are a number of steps I think we could take to make that process work better.

Also it has certainly been in the press recently that we need, as a Department, to do a better job of responding to Congress generally and specifically to congressional oversight. There are reports that we need to be more prompt in delivering. We need to respond better to requests for information. We need to have more cooperative relationships. So that is item two.

Item three would be to improve the role of the General Counsel's Office in unifying the Department across different authorities and different components. Just in terms of serving as a consultant to the Department so far, I have already seen a couple occasions where an authority in one component could be of great use to another component, but the components are not speaking and have not begun to understand what could be done with their sister components.

I think the General Counsel's Office is one place where you could actually bring those types of unifying activities to bear and actually make some progress.

So those are the three initial thoughts I would have. And if confirmed, certainly I would study the office and the Department more generally and follow the Secretary's lead.

Chairman COLLINS. One of the issues that this Committee is focused on is the vulnerability of our Nation's chemical facilities. One of our witnesses who formerly worked at the White House said that this should be the No. 1 priority of the Department, and that there has not been enough done to protect chemical facilities.

Several witnesses testified at the first hearing that we had on chemical security that strong Federal legislation was needed to ensure security at chemical facilities nationwide. The industry has a lot of voluntary codes and it has made some great progress in some cases, but those codes are voluntary.

I want to ask you in your role as General Counsel whether you believe that DHS has sufficient statutory authority now to regulate the security of chemical facilities.

Mr. PERRY. I don't have a firm conclusion on that yet, but I can tell you what I would look at in order to reach a conclusion.

First, of course, there is the U.S. Coast Guard's authority under their MTSA which applies to certain plants located near waterways.

Second, there is the Department of Transportation and TSA's authority to regulate the transportation by rail or truck or by other means which could apply in some circumstances in a way that relates to chemical facilities.

And, third, there is, of course, EPA authority which has been in the press off and on to address accidental releases. And that might have some role to play in the broader picture, too.

But the fourth thing I think I would need to do is understand what progress we have made to date, meaning the Department and particularly the infrastructure protection people within the Department, to understand where industry has gone with the Department's direction and to make sure that if you were to proceed with a legislative package or even a regulatory package, you would be building on the progress that they have already made.

So those are the steps I would take. And I would have to run through those steps and complete that examination before reaching a conclusion.

Chairman COLLINS. This is an issue of great interest to this Committee, so we look forward to working with you on that. There are issues involving whether EPA has sufficient authority.

I personally believe that when we are talking about security that it is not a function that EPA should be involved in but rather is a more appropriate role for the Department of Homeland Security that does not ignore the important environmental safety role that the EPA places with regard to chemical security.

But we are talking about making these facilities safer from a terrorism attack perspective. So we look forward to working with you on that.

Mr. PERRY. I would be pleased to.

Chairman COLLINS. I now would like to turn to the issue of intelligence. As you know, Senator Lieberman and I authored an intelligence reform bill that makes the most sweeping reforms in our intelligence structures in more than 50 years. The President signed that into law last December.

The legislation designates a National Counter-Terrorism Center as the primary organization in the Executive Branch for analyzing and integrating all intelligence concerning counter-terrorism. As we all know, the 9/11 Commission identified several serious communication gaps. The concept behind the center is to bring together the expertise of 15 agencies to work together to make sure that information is pooled and expertise is shared.

How will you ensure that the Department provides the necessary intelligence and otherwise works to ensure that the National Counter-Terrorism Center fulfills its mandate under the Intelligence Reform Act?

Mr. PERRY. It is a fascinating topic. And I know the Secretary has been very clear with the Department so far that he is going to require strict adherence with his policy of cooperation with the DNI. He has been crystal clear on that. And part of my role would be to assist him in that effort.

I will note also that DHS is an interesting entity because it is a source, many of the components are sources of intelligence that are important, that as a member of the intelligence community, we have to make sure we can share with the intelligence community. And, of course, those include the Coast Guard and CBP, ICE, TSA, Secret Service, and CIS.

So there is a critical role to play for the Department in any intelligence effort. But I think it is critical to make sure that we obey the Secretary's dictate and cooperate with the DNI.

Chairman COLLINS. There has also been a lack of clarity about the role of the Information Analysis Office within the Department and how it relates as far as information sharing with the FBI, with State, local, and tribal governments.

How do you articulate the roles, missions, and authorities of the Information Analysis Office regarding other intelligence offices within DHS and across the Executive Branch?

Mr. PERRY. Well, there are two pieces, I think, to my answer. First, it is clear in the Homeland Security Act that the Secretary, and, therefore I, have the opportunity and the power to gather information from other entities within the government.

Now, focusing specifically within the Department, I think I ought to have a coordinating role among all the entities we mentioned a moment ago, Coast Guard, CBP, ICE, TSA, Secret Service, and CIS, to produce a product for the intelligence community generally, and for the DNI, that is helpful.

Chairman COLLINS. As we seek to expand information and intelligence gathering across the Federal Government, we must do so in a way that is ever mindful of civil liberties and privacy.

I was very pleased to see the answer to your written questions in which you indicated that vigilance in protecting Americans' fundamental liberties and privacy is a critical piece of the Department's mission.

In that regard, I want to bring to your attention that the intelligence bill set up a new Civil Liberties and Privacy Board, and we are having some difficulty in seeing that board get underway, get funded appropriately. The President has yet to appoint the chairman or vice chairman of that board.

How do you see the Department interacting with the new Civil Liberties and Privacy Board?

Mr. PERRY. Well, I am certainly not privy to how the White House is addressing that now, and I know that they are working on it. I am just not sure where it is in the process.

I have had some, I think, very productive conversations with Nuala O'Connor Kelly who is the privacy officer within the Department. And I think based on my understanding of how she has operated in her role, that may be a model for how the privacy operations generally across the government may work.

I would like to seek her counsel on how to deal with the board. I think she has got terrific expertise and knowledge in the privacy area. And so the first stop I would make if confirmed to address issues that come before the board is to talk to her.

Chairman COLLINS. I hope you will work closely because, for example, as the Department develops its passenger screening programs more, if you have the input from a civil liberties privacy perspective, I think it will save a lot of problems down the line.

I would now like to turn to two issues that are of particular importance to the State of Maine.

Last month the Department of Homeland Security announced plans to implement the Western Hemisphere Travel Initiative that requires DHS in consultation with the State Department to imple-

ment a plan requiring U.S. citizens and aliens to present a passport or document sufficient to denote citizenship and identity for travel into the United States from western hemisphere countries.

In developing this plan, it is absolutely critical that the Department strike the right balance. I am from northern Maine originally, so I know firsthand what this entails. Every single day in border communities in Maine, people cross over to Canada to shop, to work, and to visit families.

We even have situations in some parts of Maine where the Americans' houses are on obviously our side of the border, but all the services from hospitals to churches to grocery stores are on the Canadian side of the border.

I have a Canadian sister-in-law whose family still lives in Canada, and she takes her four children frequently to visit her mother.

Since September 11, those ordinary daily back and forth exchanges have become far more complicated for people living in border communities. There is a lot of concern that the Department is going to require passports for people who travel every day back and forth.

We have Canadian nurses, for example, who work on the American side in a Maine hospital who every single workday are crossing the border.

To address those concerns, I was very careful to include in the Intelligence Reform and Terrorism Prevention Act provisions directing the Department to take into account the interests and concerns of people living in border communities and also to expedite the travel of frequent travelers.

The Secretary has been given clear authority to develop procedures for alternatives to passports. Yet, the initial indications that we are getting from the Department suggest that very few documents would be deemed acceptable in lieu of a passport.

As you work toward implementation of this, I am going to ask you to keep in mind the practical realities and that we do not want to impede the legitimate flow of legitimate people and commerce by imposing a system that is going to be burdensome and costly.

Would you comment on that?

Mr. PERRY. Sure. I have not been involved in this to date, but I understand your point that we need to be sensitive to the needs of the cross-border communities. And that is indeed what I think the Department will have to do through its notice and comment process, through its consultations, and through all the other activities that it undertakes to evaluate what ought to be the alternative forms of identification to a passport that can be used.

I would commit to spending any time necessary to look at this issue if I am confirmed.

Chairman COLLINS. Thank you. I do want to work closely to come up with a practical solution, and I may drag you to northern Maine and show you the realities if we cannot come up with a good system. It is a lovely place to visit I hasten to say.

Mr. PERRY. I would be pleased to do that.

Chairman COLLINS. The second issue that is of great concern to my State involves the manufactured housing industry. The North American Free Trade Agreement, NAFTA, permits Canadian transportation operators to enter the United States as B–1 visitors in

order to transport and deliver what is known as international cargo such as manufactured or modular homes.

These workers are also permitted under Department policy to take part in activities that are necessary incidents in the term of this delivery. However, they are not supposed to be performing building and construction work while they are in the United States.

Now, what I am being told by the Maine manufacturing home industry is that some Canadian workers are routinely given the permit to enter as B–1 visitors, but then they are engaging in activities that really cross the line and are not really a function of delivery. They, in fact, qualify as construction.

That violates our immigration laws. It is unfair to workers in Maine. And it places them in direct competition with American workers.

My office has met with CBP officials many times about it. We have brought together industry representatives, and as a result, the agency has agreed to review its policy.

But this is an issue that I would again ask you to monitor and to seek to clarify the scope of permissible activity for Canadian workers who are coming in for this purpose.

Mr. PERRY. I will.

Chairman COLLINS. Thank you. Mr. Perry, I appreciate very much your being here today.

There will be some additional questions for the record from other Members of the Committee. And without objection, the record will be kept open until 5 p.m. today for the submission of any additional materials.

Let me conclude this hearing by thanking you for your willingness to once again step forward and serve your country. I have a great deal of admiration for people who make sacrifices and give up lucrative private sector work in order to serve their country.

As you said at the very beginning of your statement, there is no greater challenge that our country faces than the war on terrorism and strengthening the security of our homeland.

So I very much appreciate your willingness to once again step forward and serve, and I personally look forward to working very closely with you.

Mr. PERRY. Well, thank you very much. I am honored to be nominated by the President. I am honored to appear before you. I would be honored to work with you.

Chairman COLLINS. And, fortunately, Senator Warner has just arrived right at the moment.

So, Senator Warner, we are very pleased to have you here. I told Mr. Perry that your endorsement carries great weight with this Chairman and with this Committee and we very much appreciate it.

Senator WARNER. Well, maybe we better stop while we are ahead. [Laughter.]

But this is a pleasure for me. Sorry to be a little late, but I think you changed your time and one thing and another.

Chairman COLLINS. I do not believe so, but we are happy to have you here.

OPENING STATEMENT OF SENATOR WARNER

Senator WARNER. Again, Madam Chairman, this wonderful nominee has already served as General Counsel to the Office of Management and Budget and in numerous positions at the Department of Justice, including Principal Associate Attorney General.

Professional experience also includes service in the Executive Office of the President, as an attorney in private practice, and even time as counsel to this Committee. So he is a member of the Senate family and that is very important.

All of these roles have prepared him very well for the significant new challenge ahead providing an understanding of both the Executive Branch and the Legislative Branch.

The post-September 11 world has changed the way the Federal Government works. Mr. Perry's role both at the Department of Justice and OMB were both during the new period of homeland security we know so well.

I recently spent some time with Phil and we spoke about the difficulty of continuing to advance the missions of the DHS at a time when there will be some growing pains, particularly under the new management.

So I applaud his willingness and applaud the President for the nomination. I applaud his family most of all because we know the heavy burdens of office that he will have in this new position.

So I strongly urge that this Committee endorse him by unanimous consent, and send his name to the floor, and let him get to work.

PREPARED STATEMENT OF SENATOR WARNER

Thank you, Madam Chairman. One of our greatest responsibilities as Members of the U.S. Senate is to provide advice and consent regarding the President's nominees for Executive Branch positions. Already this year this Committee has seen two wonderful nominees to lead the Department of Homeland Security. Today, I have the pleasure to introduce the third.

The role of any agency's Counsel is to provide legal advice and counsel to the Secretary in order to further the mission of that Department. The nominee must be one with a strong legal background, the ability to manage staff and myriad priorities, and ultimately hold the agency accountable for responsible government. The challenge at the Department of Homeland Security is heightened by the fact that this Secretariat is still in its formative stages and the Congress continues to mold the laws governing our Nation in the post-September 11 world.

Today, I have the pleasure to introduce Philip Perry as the President's nominee to be the General Counsel of the Department of Homeland Security. Today he has with him his family who I would like to recognize at this time.

Wife: Elizabeth Cheney Perry, children: Katherine, 10; Elizabeth, 7; Grace, 5; and Philip, 9 months.

He has already served as General Counsel of the Office of Management and Budget and in numerous positions at the Department of Justice, including Principal Associate Attorney General. His professional experience also includes service in the Executive Office of the President, as an attorney in private practice, and even time as Counsel to this Committee. All of these roles have prepared him well for the significant new challenge ahead providing an understanding of both the Executive Branch and the Legislative Branch.

The post-September 11 world has changed the way the Federal Government works. Mr. Perry's roles at both the Department of Justice and OMB were both during the new paradigm of Homeland Security we now know so well. I recently spent some time with Phil and we spoke about the difficulty of continuing to advance the mission of DHS in a time where there will be some growing pains—New management, a new Congress, and the new laws and regulations that go along with those changes. He is ready, willing, and able to get to work. I applaud his willingness to serve this President, the Secretary of Homeland Security, and the American people

and urge the Committee to quickly report his nomination to the full Senate so that we are able to get him to work.

Chairman COLLINS. Thank you. And we very much appreciate your taking the time to be here today.

Senator WARNER. Certainly.

Chairman COLLINS. I want to thank our witness for appearing before us, and I want to thank his family for being here.

And this hearing is now adjourned.

Mr. PERRY. Thank you.

[Whereupon, at 10:13 a.m., the Committee was adjourned.]

APPENDIX

OPENING STATEMENT OF PHILIP PERRY
BEFORE THE SENATE COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
MAY 19, 2005

Chairman Collins, Senator Lieberman, and Distinguished Members of the Committee, I am honored to appear before you today. I am grateful to President Bush for nominating me to serve as General Counsel of the Department of Homeland Security. And I would like to thank Senator Warner for his very kind introduction this morning. I also want to thank Secretary Chertoff. I have known the Secretary for nearly 10 years -- we were partners in the same law firm, and were both working in the Department of Justice on 911. It would be my privilege, if confirmed, to work with him and the many thousands of other dedicated men and women in the Department to preserve an America that is safe, secure and free.

I would like to introduce my family, if I might. My wife Liz, our son Philip, and our three daughters, Kate, Elizabeth and Grace are here. I want to thank my wife for a million different things, but especially for her patience and support today and every other day.

I agree with both the President and Secretary that "[w]inning the war on terror is the great calling of our generation." I know that an effective Department of Homeland Security is critical to that effort. I had an opportunity first as Acting Associate Attorney General and later as General Counsel of OMB to address Homeland Security issues in the aftermath of 911. I would be honored to rejoin the effort now to protect our nation.

I also recognize the Department's obligation to preserve our freedom -- to defend American liberty with courage and determination. If confirmed, I would commit myself to preserving our civil liberties while pursuing security, and to helping the Department address important issues of privacy.

Although the General Counsel is the Department's chief legal officer, I believe that the role of the General Counsel extends beyond merely interpreting and applying the law. The General Counsel must also create an effective and efficient mechanism for promulgating Department regulations, addressing bureaucratic hurdles, and speeding implementation of the Department's programs. The Office of General Counsel has the ability and obligation to pull

separate Department components together to address shared problems, and to forge Department-wide solutions that draw on the authorities and capabilities of each component. The Office should be a tool for unifying the Department and for accomplishing its broad mission.

I am also committed to developing a close and cooperative working relationship with this Committee and the Congress. I believe my past experience as Counsel to this Committee's 1997 Special Investigation would be valuable in that task. The perspective I gained from that service should help me create a constructive cooperative Department approach to Congressional oversight and to the types of issues that sometimes divide us.

Finally, I would like to thank Joe Whitley, who has served since 2003 as the first General Counsel of the Department of Homeland Security. When he took the job, he found a newly-minted Department with more than 1400 lawyers spread out among 22 separate organizations. He has done admirable work in pulling those disparate pieces together and in creating a cohesive legal organization. If confirmed, I hope to build on the foundation he established. Although I cannot promise perfection, I can promise to work tirelessly to help fulfill the Department's mission, and to serve the Secretary, the President and the American people.

I would be pleased to answer any questions you may have.

PHILIP J. PERRY -- RESPONSE TO REQUESTS FOR
BIOGRAPHICAL AND FINANCIAL INFORMATION

A. BIOGRAPHICAL INFORMATION

1. **Name**: Philip J. Perry

2. **Position to which nominated**: General Counsel, Department of Homeland Security

3. **Date of Nomination**: April 4, 2005

4. **Address**:
   Office: 3801 Nebraska Avenue, NW Washington, D.C. 20528

5. **Date and place of birth**: 10/16/64, San Diego, CA.

6. **Marital status**: Married to Elizabeth Cheney Perry

7.

8. **Education**: Cornell Law School, 1987-90; J.D. May 1990
   Colorado College, 1982-86, B.A. May 1986
   Miramonte High School, 1978-82, graduated June 1982

9. **Employment Record:**

   a. Partner, Latham & Watkins LLP (law firm), Washington, D.C. 9/03-4/05

   b. General Counsel, Office of Management and Budget, Executive Office of the President, Washington D.C., 3/02-8/03

   c. Acting Associate Attorney General, Principal Deputy Associate Attorney General, Associate Deputy Attorney General, U.S. Department of Justice, Washington D.C., 1/01-2/02 (designated for "Acting" role as of Summer of 2001).

   d. Partner, Associate, Latham & Watkins, Washington, D.C. 1/98-1/01 (elected Partner in 2000).

   e. Counsel, U.S. Senate, Committee on Governmental Affairs, Special Investigation of Campaign Finance Abuses in 1996 Elections, 5/97-1/98

   f. Associate, Latham & Watkins, Washington, D.C. 8/96-5/97.

   g. Associate, Latham & Watkins, Chicago, IL, 8/93-8/96.

h. Associate, Squire Sanders & Dempsey, Washington, D.C., 1/91-7/93

i. Summer Associate, Squire Sanders & Dempsey, Washington, D.C., Summer 1989

j. Paralegal, law firm previously known as McCutchen Doyle Brown & Enersen, San Francisco, CA, Spring – Summer 1987

k. Various construction jobs and other part-time and seasonal employment for period after graduation from college in 1986.

10. **Government Experience**: Listed above.

11. **Business Relationships**: As noted above, I have been an equity partner in Latham & Watkins LLP, and have provided legal services to firm clients.

12. **Memberships:** Former member of American Bar Association; Current member of Federalist Society; Listed as Commercial Arbitrator on American Arbitration Association Roster of Neutrals (inactive status).

Membership in District of Columbia Bar, State Bar of California (inactive); State Bar of Illinois (inactive); Admitted to practice in various federal courts.

13. **Political affiliations and activities**:

a) & b) I have never run for public office. I served as a volunteer in various capacities in both the 2000 and 2004 Bush/Cheney campaigns, and in particular, was involved in debate preparation for the Vice Presidential debates in 2000 and 2004. I served as a Policy Coordinator in the 2000 Bush/Cheney Presidential Transition, and was on the legal staff assembled by the RNC to address possible litigation following the 2004 elections.

c) The following are, to the best of my knowledge, my political contributions over the past five years:

Maximum contributions to Bush/Cheney 2000, Bush/Cheney 2004.
Maximum contribution to Governor Bush's campaign in 1998.
$500 Contribution to Mitch Daniels' campaign for Governor of Indiana

14. **Honors and awards**: American Jurisprudence Award in Criminal Law, 1987-88; Various awards and certificates related to government service, including from the Department of Justice, OMB and EPA.

15. **Published writings**: Recently Proposed Reforms to the Foreign Agents Registration Act, 23 Cornell Int'l L.J. 133 (1990).

16. **Speeches**: None.

17. **Selection**: I believe that the President and Secretary Chertoff selected me based on my experience as General Counsel of OMB; as Acting Associate Attorney General, Principal Deputy Attorney General, and Associate Deputy Attorney General at the Department of Justice; as an investigative counsel to this Committee; and based on my capabilities as a lawyer.

My prior roles in Government have given me extensive experience in federal regulatory matters, in resolution of interagency issues, and in the functioning of the Executive Branch. While at the Department of Justice, I supervised a broad range of litigation and oversaw the five civil litigating divisions. As General Counsel of OMB, I addressed a range of federal regulatory and budgetary issues, and also dealt with many of the issues and problems that confront an Executive Branch General Counsel. In addition, as an investigative counsel to this Committee, I became familiar with Congressional oversight and investigations. In each of these roles, I also gained management experience that would also qualify me to serve as General Counsel of the Department.

In addition, as noted more fully below, I have practiced law since 1991 principally as a litigator, but also in a number of federal regulatory areas.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. **Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?**

Answer: Yes, with one exception. I was an arbitrator listed on the American Arbitration Association's (AAA) National Roster of Arbitrators and Mediators. (The AAA is a nonprofit organization.) After consulting with the Department's Ethics Officer and OGE, I have requested that AAA place me on "inactive" status. I would be recused from any particular matter affecting the interests of AAA.

2. **Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government?**

Answer: No.

3. **Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?**

Answer: No.

4. **Has anybody made a commitment to employ your services in any capacity after you leave government service?**

Answer: No.

5. **If confirmed, do you expect to serve out your full term until the next Presidential election, whichever is applicable?**

Answer: Yes.

C. POTENTIAL CONFLICTS OF INTEREST

1. **Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.**

Answer: As noted, I have been an equity partner with Latham & Watkins LLP, and have provided legal services for the firm's clients. I have worked with the Department's Ethics Counsel and through OGE, and have signed an ethics agreement committing to strict adherence to ethics rules regarding recusal from matters in which Latham & Watkins or my former clients are involved. (A copy is attached.)

2. **Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy other than while in a federal government capacity.**

Answer: As indicated, I have been engaged in the private practice of law in Chicago and in Washington D.C. for more than five of the past ten years, and from 1991 through 1994. The majority of my practice has been as a litigator representing clients in civil litigation in federal and state courts. I have also represented clients in Congressional investigations, and in federal regulatory matters in a range of areas, including in matters before the International Trade Administration of the Department of Commerce, the International Trade Commission, the Department of Health and Human Services, the Department of Agriculture, the Consumer Products Safety Commission, and the Department of Homeland Security (addressed below).

In private practice, I have not been engaged in efforts "to influence the passage or defeat or modification of legislation." I have, however, been consulted by staff of the House of Representatives Committee on Homeland Security regarding the Department's implementation of the SAFETY Act, and have also represented clients in House and Senate investigations on Medicare issues. I have also represented clients in certain regulatory matters before the Executive Branch. In the past two years, I have represented HCA (Hospital Corporation of America) in on Medicare issues before the Department of Health and Human Services; I have filed comments on behalf of General Cigar before the Department of Agriculture. I have

represented Lockheed Martin Corporation and General Electric Company before the Department of Homeland Security. My work for both Lockheed and General Electric before the Department related to the SAFETY Act and Applications for Designations/Certifications of Qualified Antiterrorism technologies. (I have not represented either company before the Department on any government contracts or procurement matters.) As noted above, if confirmed, I would be recused from any particular matters before the Department involving these former clients in accordance with applicable regulations and policy. I have also represented Global Solutions Network on a government contracts issue involving the National Institutes of Health. In addition, I represented Corrections Corporation of America relating to Department of Justice issues primarily regarding legal/budgetary matters. I have also counseled other clients on healthcare, environmental, communications, labor and other federal regulatory matters. Prior to 2000, my federal regulatory matters also included work before the Consumer Products Safety Commission.

Although litigation can involve matters of "policy" (with the Government involved as a party or amicus), I do not construe the question as seeking a description of my many past civil litigation matters. None of my litigation matters involved the Department of Homeland Security. Again, if confirmed, I would be recused from any particular matter involving clients I served in the past year in accordance with applicable regulations and policy. (See attached ethics agreement.)

3. **Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position?**

   Answer: Yes.

D. LEGAL MATTERS

1. **Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of any complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group?**

   Answer: No.

2. **To your knowledge, have you ever been investigated, arrested, charged or convicted (including pleas of guilty or nolo contendere) by any federal, State or other law enforcement authority for violation of any federal, state, county or municipal law, other than a minor traffic offense?**

   Answer: No.

3. **Have you or any business of which you are or were an officer, director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation?**

Answer: I have not been involved as a party in interest in any administrative agency proceeding or litigation, and I am not aware of my former law firm (in which I held an equity stake) being a party in interest in any such matter.

E. FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

AFFADAVIT

I, Philip J. Perry, being duly sworn, hereby state that I have read and signed the foregoing Statement on Biographical and Financial Information and that the information provided herein is, to the best of my knowledge, current, accurate and complete.

Subscribed and sworn before me this 13th day of April, 2005

Notary Public

Michelle D. Parrish
Notary Public, District of Columbia
My Commission Expires 11-14-2007

Final Questionnaire

U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-hearing Questionnaire for the
Nomination of Philip J. Perry to be
General Counsel, Department of Homeland Security

I. Nomination Process and Conflicts of Interest

1. Why do you believe the President nominated you to serve as General Counsel of the Department of Homeland Security (the "Department" or "DHS")?

ANSWER: I believe that the President and Secretary Chertoff selected me based on my experience as General Counsel of OMB; as Acting Associate Attorney General, Principal Deputy Associate Attorney General, and Associate Deputy Attorney General at the Department of Justice; and based on my capabilities as a lawyer. My prior roles in government have given me extensive experience in federal regulatory matters, in resolution of interagency issues, and in the functioning of the Executive Branch. While at the Department of Justice, I supervised a broad range of litigation and oversaw the five civil litigating divisions. As General Counsel of OMB, I addressed a range of federal regulatory and budgetary issues, and also dealt with many of the issues and problems that confront an Executive Branch General Counsel. In addition, as an investigative counsel to this committee in 1997, I became familiar with Congressional oversight and investigations. In each of these roles, I also gained management experience that would qualify me to serve as General Counsel of the Department.

In addition, I have been a partner in a national law firm, Latham & Watkins LLP, and have litigated, arbitrated and mediated a wide range of disputes. I have also worked in a number of federal regulatory areas. Earlier this year, I was approved to be listed on the American Arbitration Association's National Roster of Arbitrators and Mediators.

2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

ANSWER: No.

3. What specific background and experience affirmatively qualifies you to be General Counsel of DHS?

ANSWER: As noted above, my experience in government and private practice has covered a broad range of topics. At the Department of Justice, I oversaw the five civil litigating divisions as well as other components of the Department. I represented the Department in interagency

matters for many issues and had special responsibility for certain projects, such as the 911 Victims' Compensation Fund. As General Counsel of OMB, I significantly broadened my experience in federal regulatory matters, budgetary matters, and was involved in the Administration's formulation of its legislative proposal establishing the Department of Homeland Security. I was also involved in the initial transitional effort, post enactment of the Homeland Security Act, to establish the Department, and addressed Homeland Security issues with HHS and other agencies.

4. Have you made any commitments with respect to the policies and principles you will attempt to implement as General Counsel? If so, what are they and to whom have the commitments been made?

ANSWER: No.

5. If confirmed, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.

ANSWER: I have consulted with the Department's Designated Agency Ethics Official (DAEO) and have signed an ethics agreement with recusal measures regarding my law firm and former clients that are acceptable to the U.S. Office of Government Ethics. (The formal agreement is attached hereto.) In accordance with that agreement, and with the assistance of the DAEO, I will recuse myself as appropriate under applicable law.

II. Role and Responsibilities of General Counsel of DHS

6. How do you view the role of General Counsel at DHS?

ANSWER: The General Counsel is the chief legal officer of the Department of Homeland Security. The position has been created by statute to unify and coordinate the diverse legal components throughout the Department that make up the DHS legal function, ensuring consistency of legal advice across the Department. The General Counsel is also responsible for providing advice to the Secretary and other senior DHS officials, representing the Department and for managing the Office of the General Counsel.

7. How do you plan to communicate to the staff at DHS and the Office of the General Counsel on efforts to address relevant issues?

ANSWER: If confirmed, I would take advantage of a number of means of communication. First, I would hold regular meetings with DHS leadership and the staff of the Office of the General Counsel, and would work closely with the Office's lawyers serving in DHS components

on relevant issues. I would use other means of communication, such as email, memoranda or written opinions as necessary.

8. What do you believe are the most important responsibilities of the position to which you are nominated and what challenges do you expect to face?

ANSWER: The Office has many critical responsibilities, including: (1) advising Department leadership and components on how to comply with the letter and spirit of the law; (2) helping the Department promulgate regulations, address bureaucratic problems and speed implementation of its programs; (3) preserving the civil rights and privacy of Americans who are involved in, or addressed by, the Department's programs and enforcement efforts;
(4) facilitating and accelerating Department responses to Congressional inquiries and investigations; (5) correcting inappropriate conduct within the Department; and (6) working with other Departments' legal authorities to ensure that the Executive Branch is functioning in a cooperative and appropriate fashion. I am not certain which issues will present the most significant challenges, but am determined, if confirmed, to drive the office to meet each of these responsibilities.

9. What objectives would you like to achieve in your tenure as General Counsel? Why do you believe these objectives are important to DHS and to the government?

ANSWER: If confirmed, I would strive to continue the effort of building and unifying the Office so that it can provide the highest quality legal services possible. I would like to speed the process for promulgating regulations, whenever appropriate, and provide more timely response to Congressional inquiries. The Office should be an agent for facilitating the Department's mission, and should help in fashioning legally appropriate options for overcoming obstacles. The Office of the General Counsel is a tool for accomplishing the broader goals of the Department. If the Office cannot perform in an effective manner, then the Department as a whole will have more difficulty accomplishing its ends.

III. Legal Background and Experience

10. List all bar associations, legal or judicial-related committees, conferences, or organizations of which you are or have ever been a member, and provide titles and dates of any offices which you have held in such groups.

ANSWER: As noted below, I have been admitted to practice law in California, the District of Columbia and Illinois. I have not been an active member of the various bar-related associations, committees and organizations in California or Illinois, but may still be enrolled in such organizations by virtue of having been admitted to the Bar to practice in those jurisdictions. I believe that I have been a member of the D.C. Bar Association since I was admitted to practice in D.C. I also believe that I was enrolled in the American Bar Association when I was a law student

in the 1980's. I am a member of the Federalist Society.

11. List all courts in which you have been admitted to practice, with dates of admission and lapses in admission if any such memberships have lapsed. Please explain the reason for any lapse in membership. Please provide the same information for any administrative bodies which require special admission to practice.

ANSWER: I was admitted to practice in California in 1990; in the District of Columbia in 1992; and in Illinois in 1994. I have been admitted to practice in a number of Federal Courts, including the Federal District Courts for the District of Columbia, the Northern District of Illinois, the Northern District of California, the U. S. Court of International Trade, and the Ninth Circuit Federal Appellate Courts. (I have also been admitted *pro hac vice* on many occasions in state and federal courts). As indicated in my response to my biographical information questionnaire, I have never been disciplined or cited for any ethics issue, nor, to the best of my knowledge, has any complaint been filed against me on any such issue in any court or other forum. I am in the process of renewing my membership in the Federal District Court in the District of Columbia (I believe that renewal is required every three years), and am requesting information on relevant dates of admission from the federal courts identified above. I do not recall being required to gain admission to practice before any administrative body, but am making inquiries about such requirements.

As noted in my response to the Committee's biographical information questionnaire, my wife and children are Secret Service protectees. We have experienced significant delays in delivery of mail since 2001 due to security screening processes implemented after 911 and the anthrax events. Since that time, mail to my home has been regularly delayed, often by a month and sometimes for a longer period. In addition, much of the mail sent to me at my former OMB office was either never delivered or delivered months or years after it was sent. As a consequence, I did not receive Bar notices for the Illinois or D.C. Bars during portions of 2002 and 2003. Due to these delays, I did not pay my 2002 Illinois Bar dues until approximately three months after the deadline. For the D.C. Bar, membership mail was directed to my OMB address, and I did not receive that mail for more than one year. In the summer of 2003, I realized that I had not received mail from the D.C. Bar in some time and called to see when my dues needed to be paid. It was at that point that I learned that my 2002 dues check for the D.C. Bar (dated 7/01/02) had not been received by the Bar. The Bar had apparently sent several delinquency notices to my OMB address, but none had been delivered. When I discovered the problem in 2003, I immediately paid the back dues but that payment came approximately 10 months after the 2002 deadline.

12. Please describe chronologically your law practice and experience after graduation from law school.

ANSWER: Since law school, I have held the following legal positions:

- Associate, Squire Sanders & Dempsey, Washington, D.C. 1/91- 7/93
- Associate, Latham & Watkins, Chicago, IL, 8/93 - 8/96
- Associate, Latham & Watkins, Washington, D.C., 9/96 – 5/97
- Counsel, U.S. Senate Committee on Governmental Affairs, Special Investigation of Campaign Finances in 1996 Elections, 5/97 - 1/98
- Partner / Associate, Latham & Watkins, Washington D.C., 1/98 – 1/01 (elected partner in 2000).
- Acting Associate Attorney General, Principal Deputy Associate Attorney General, Associate Deputy Attorney General, U.S. Department of Justice, Washington, D.C., 1/01 – 2/02 (designated for "Acting" role as of summer 2001).
- General Counsel, Office of Management & Budget, Executive Office of the President, Washington, D.C., 3/02 – 8/03.
- Partner, Latham & Watkins LLP, Washington, D.C., 9/03 - 4/05.

13. Describe the most significant legal activities you have pursued, including significant litigation which did not proceed to trial or legal matters that did not involve litigation. Describe the nature of your participation in each instance described.

ANSWER: Among the highlights of my career to date are the following:

- Served as General Counsel of the Office of Management & Budget, addressed myriad federal regulatory and budgetary issues, addressed interagency legal disputes, and participated in formulation of Administration legislative proposals.
- Served as Acting Associate Attorney General, Principal Deputy Associate Attorney General, and Associate Deputy Attorney General at the Department of Justice, oversaw significant litigation in the five civil litigating divisions, was responsible for implementation of the 911 Victims' Compensation Fund, and handled a diversity of legal issues.
- Served as Counsel to the 1997 Special Investigation of Campaign Finance Abuses conducted by this Committee.

- In private practice, represented clients in complex civil litigation, arbitration and mediation in a broad range of matters, including commercial disputes of various types, class action defense, litigation relating to government contracting, intellectual property issues, and litigation arising from federal regulatory issues.

14. The biographical information you completed for the Committee states that in your private practice you represented the Corrections Corporation of America, "relating to Department of Justice issues primarily regarding legal/budgetary matters." Please identify the matters for which you represented CCA and provide a description of the issues and controversies related to those matters.

ANSWER: Corrections Corporation of America (CCA) owns and/or operates prison facilities that house state and federal inmates. I advised CCA regarding the Department of Justice's legal/budgetary authorities relating to contracting for use of such services or facilities. I also provided advice on a dispute with a CCA competitor and on other matters.

15. Under political affiliations and activities, you indicate that you made "maximum contributions" to Bush/Cheney 2000, Bush/Cheney 2004, and Governor Bush's 1998 gubernatorial campaign. Please specify the precise amount of these contributions.

ANSWER: To the best of my knowledge, I contributed $1000 to the President's 2000 campaign in March 1999, and $2000 to the 2004 campaign in February 2004. Although I did not earlier recall it, publicly available records also suggest that I made a $250 contribution to Representative Davis in 2001. I have not located information on the 1998 contribution to then-Governor Bush's campaign. If I find additional responsive information on political contributions over the past 5 years, I will provide it to the Committee.

IV. Policy Questions

Organization and Management

16. Given the structural review initiated by Secretary Chertoff, you will have the opportunity to revisit the appropriate structure and role of the General Counsel's office, including its relationship to the agency counsel's offices.

    a. How many attorneys are currently employed in the General Counsel's Office? Is the General Counsel's office adequately staffed to service the Department's needs, particularly in relation to the size of the component entities' legal departments?

ANSWER: I am informed that there are over 1400 attorneys throughout the Department, with over 70 attorneys at the Headquarters level. The members of the legal staff within the components are considered part of the Office of the General Counsel and report to the General

Counsel. The President's Budget for the Department of Homeland Security maintains the current staffing and adds sufficient funding for two additional FTEs for an Office of Professional Responsibility. If confirmed as the General Counsel, I will personally assess the size and organization of the legal operations within the Department and determine what, if any, changes should be made.

b. Do you intend to make any changes to the size, structure, and responsibilities of the component legal departments?

ANSWER: As noted above, my desire is to take whatever steps are necessary to make the Office perform its functions in a manner that facilitates the mission of the Department. If confirmed, I would carefully evaluate the Office's capabilities and performance to determine what changes might improve its function.

c. What steps will you take to assure the consistency of legal positions across the Department?

ANSWER: I agree that components within the Department should not take inconsistent legal positions. To ensure consistency, I would coordinate through the Deputy General Counsel and Associate General Counsels. If confirmed, I will also evaluate whether the current Office structure and processes are effective in addressing consistency issues.

Congressional Oversight

17. Because of the critical nature of DHS's mission, Congressional oversight will be considerable and an important means of guiding and reporting on the department's performance. Please describe your general approach to responding to information requests from Congressional committees and GAO, and explain what steps you would take to ensure that Congress has timely and full access to agency records, personnel, and other information sources in order to fulfill its oversight functions.

ANSWER: I would insist on timely and cooperative responses to Congressional inquiries. I would examine ways to address the significant backlog of reports. I would streamline internal review processes, and utilize an electronic system for tracking the timeliness of responses. I would seek cooperative and, if need be, creative solutions to requests for documents and information that address both Legislative and Executive Branch concerns.

18. On what basis do you believe the Department may decline to comply with Congressional or GAO requests for information or documents from the Department? Please explain the legal grounds for your views.

ANSWER: Absent a claim of Executive Privilege, it should be possible to find a cooperative solution that meets both Legislative and Executive Branch needs. I understand that the Department of Homeland Security has established an official policy of cooperation with GAO, and that the Secretary has committed to taking a cooperative approach. If I am confirmed, I will provide appropriate legal guidance to Department leadership, and seek appropriate and cooperative solutions in responding to Congressional requests.

19. DHS officials have in the past denied congressional and GAO requests for access to documents or other information by claiming that the requested material is "pre-decisional," even though in many of these cases, the decisions had already been finalized. Do you believe that congressional or GAO requests for information may be denied on the grounds that the requested material is pre-decisional or relates to a deliberative process? If so, please explain the basis for that belief.

ANSWER: If confirmed, I would strive to find cooperative solutions to Congressional requests. I understand that the Department of Homeland Security has established an official policy of cooperation with GAO, and also know that the Secretary has committed to cooperate with GAO. While it is difficult to address "deliberative process" issues in the abstract, if confirmed, I will enforce the Secretary's commitment and will work to find solutions to such issues satisfactory to GAO.

20. During the course of this Committee's investigation of terrorist naturalizations, we have had discussions with both the Department of Justice and the Department of Homeland Security about interviewing employees who participated in a particular naturalization. The employees included line agents assigned to the Joint Terrorism Task Force who attempted to stop the naturalization of an individual who was under investigation, and the line employees who adjudicated and approved the individual's naturalization. Initially, both the Department of Justice and the Department of Homeland Security declined to permit the interviews on the grounds of a policy against allowing congressional interviews of line agents or line employees. More recently, the Department of Justice agreed to allow one of the line agents assigned to the JTTF to be interviewed as a fact witness regarding his participation in the naturalization matter.

    a. Do you believe a federal agency may refuse a Congressional request to interview a Department employee on the ground that that employee is a "line employee?" If so, under what circumstances and please describe the legal basis for that belief. Do you intend to advise the Department to adhere to such a policy?

ANSWER: I believe that a federal agency should be cooperative and seek solutions to Congressional information requests that address both Legislative and Executive Branch concerns. I am not familiar with the JTTF issue addressed above but, if confirmed, would be pleased to review the matter.

b. What is your understanding of the "line agent" or "line employee" policy as developed by the Department of Justice? What is your understanding of whether and how this policy is followed by the Department of Homeland Security? Is there a "fact witness" exception to the policy and, if so, what is your understanding of the exception?

ANSWER: I believe that the Department of Justice has a policy designed to protect ongoing criminal investigations and prosecutions from political influence. I am not certain precisely how any such policy is applied within DHS. If confirmed, I will review any DHS "line employee" policies. I do not know how the Department of Justice addresses "fact witnesses" in all circumstances, but would be pleased to review that issue.

c. Section 618 of the Transportation-Treasury Appropriations Act, which was enacted as part of the Consolidated Appropriations Act of 2005, seeks to restrict certain actions limiting communication between federal employees and Congress (*see* Cong. Record, Nov. 19, 2004, H10361). Does this provision place any legal limits on the application of the line agent/line employee policy? If not, why not? If so, what are those limits?

ANSWER: I am informed that the Office of Legal Counsel in the Department of Justice has issued an opinion on this provision which is binding on Executive Branch agencies. That opinion is titled "Authority of Agency Officials to Prohibit Employees from Providing Information to Congress" and is available at http://www.usdoj.gov/olc/crsmemoresponsese.htm.

d. Will you commit to working with GAO in a timely and constructive manner to address the oversight and other needs of the Congress, and will you encourage others within the Department to do so?

ANSWER: Yes.

Inspector General

21. In January 2004, the DHS Office of Inspector General (OIG) initiated an investigation into the removal of a naturalized Canadian citizen to Syria – Mr. Maher Arar. According to the OIG, the OIG has had great difficulty accessing the information and documents it believes it needs to conduct this investigation. Among the obstacles the OIG faced was the assertion by the Office of the General Counsel that the protection of the Department's litigation privileges required denying the OIG access to requested information. According to the OIG, the Office of the General Counsel had raised the same concern in previous investigations. On December 10, 2004, after many months of negotiations, the Office of the General Counsel and the OIG entered into a memorandum of understanding

allowing the IG access to these sources in the Arar matter ("Joint Memorandum Regarding Treatment of Privileged Information in Arar v. Ashcroft, et. al.") (ATTACHED). Notwithstanding this agreement, the OIG informs us that to date it still has not been granted full access to these sources and as a result has had difficulty proceeding with its investigation.

While the Committee understands the need for the Department to legally defend itself, it does not believe the concerns expressed provide a legitimate basis for withholding information or documents from the Department's own IG.

a. Do you agree that a desire to preserve litigation privileges does not provide an appropriate basis for denying the OIG access to information and material sought in the course of an IG investigation or audit? If you do not agree, please explain the statutory basis for your position.

ANSWER: I am informed that the Office of the General Counsel and the Inspector General's Office have entered into an agreement to provide access to the relevant documents while preserving any privileges that may be asserted in the course of civil litigation. If confirmed, I will promptly review this matter and will work with the Inspector General's Office to ensure that the agreement is honored.

b. What grounds would provide a sufficient basis for withholding information and material from the OIG?

ANSWER: If confirmed, I would maintain and open cooperative channels of communications with the IG's office. I anticipate working cooperatively with the IG to address any issues that arise.

c. If confirmed, will you ensure that the December 10, 2004 Memorandum of Understanding allowing the OIG access to Department sources regarding the Arar case is fully implemented?

ANSWER: Yes.

d. Do you commit that, if confirmed, you will cooperate and advise the Department to cooperate fully with Inspector General investigations and audits?

ANSWER: Yes.

Critical Infrastructure

22. The Critical Infrastructure Information Act of 2002 (CIIA) (Sections 211-215 of the Homeland Security Act) contains a number of protections for critical infrastructure information that is voluntarily submitted to the Department of Homeland Security.

    a. What is your understanding regarding the circumstances under which information voluntarily submitted to DHS under the CIIA can be shared with other federal or state agencies? What should DHS's policy be in this regard?

ANSWER: I am informed that the Department's CIIA regulations would allow for the sharing of Protected Critical Infrastructure Information (PCII), *e.g.*, information that has been validated as satisfying the applicable statutory and procedural requirements, with other Federal or with State agencies for those purposes identified by the CIIA. Thus, any persons receiving such information would be required to comply with handling and training requirements for PCII.

    b. If a whistleblower wants to make a disclosure of information protected under the CIIA, to whom can the whistleblower make an authorized disclosure?

ANSWER: I believe that disclosure may be made to any appropriate government official, including the Inspector General.

    c. What role does the DHS General Counsel's Office have in determining whether submissions of critical infrastructure information to DHS are accepted by DHS and receive the full protections of the CIIA?

ANSWER: I have not addressed any issues regarding specific PCII as a consultant in the Department (since April). I would not do so unless confirmed. I am informed that the General Counsel's Office currently provides legal support to the PCII Program, including on the PCII regulation. If confirmed as General Counsel, I would be pleased to review the Office's role in this program.

23. During Congressional deliberations over the Homeland Security Act, concerns were expressed that the Critical Infrastructure Information Act of 2002 might have the effect of bringing under a veil of secrecy some information that would otherwise be publicly available, such as information related to environmental, health and safety risks, and regulatory compliance, thereby inappropriately compromising public access to information. For example, there was concern that some submitters of information would make overbroad claims of protection under the CIIA for information that does not meet the statutory criteria, and that members of the public who wish access to the information would not have an adequate opportunity to present arguments to the Department explaining why particular information should be released. Concern was also expressed that a submitter might first "voluntarily" submit information to a critical infrastructure protection program, and then submit the same information, bearing the same express

statement that the information is voluntarily submitted, to another program or agency for a purpose unrelated to critical infrastructure security (for example, perhaps to satisfy a requirement or to gain some permission or forbearance under an environmental regulatory program), and that the other agency would then inappropriately shield the information from disclosure.

a. How would you, as General Counsel, help ensure that the CIIA does not result in the withholding of information that should, under FOIA's statutory criteria, be available to the public?

ANSWER: The Department has repeatedly stated that the Critical Infrastructure Information Act of 2002 will not be used to conceal wrongdoing or impede access to information that should be disclosed under FOIA's statutory criteria. If confirmed, I will learn more about the Department's implementation of the Act and ensure that the Act does not have these unintended consequences.

b. Will you take steps to determine whether critical infrastructure information is being submitted to DHS in bad faith in an attempt to improperly obtain the protections of the CIIA? If DHS makes such a determination, what action would you advise DHS to take?

ANSWER: As I understand it, information submitted in bad faith would not qualify for protection under the CIIA. If confirmed, I would ensure that the Office provides any necessary legal guidance for the proper administration of this program.

24. What role does DHS have in promoting by regulation the security of the Nation's chemical facilities? Does DHS currently have the authority to regulate the physical security of chemical facilities?

ANSWER: I am informed that the Maritime Transportation Security Act of 2002 provides the Department with regulatory authority regarding certain facilities in connection with port security. If confirmed, I will conduct a complete review of the authorities at issue and would be pleased to address chemical facility security with the Committee.

25. In the Homeland Security Act (HSA), companies sought and received a broad exemption from the requirements of the Freedom of Information Act (FOIA). The HSA provides that information that is furnished to the Department of Homeland Security and labeled "voluntarily submitted critical infrastructure information" cannot be disclosed or used by government officials or private citizens, except for certain very narrow purposes. Critical infrastructure includes many types of facilities and structures essential to the functioning of our society, including roads, telephone lines, computer networks, water treatment facilities, and chemical plants.

Some have interpreted the HSA as prohibiting disclosure of critical infrastructure information even to enforce laws protecting public health and safety. Suppose the following facts:

> A large Midwest utility decides to replace an old coal burning electric generation unit with a new one. The new unit, much larger than the first, will produce significantly greater air pollution emissions. The company could mitigate these increases by installing additional pollution control equipment, but decides it does not wish to incur the expense. It begins construction and simultaneously reports its plans to the DHS as "critical infrastructure information," so federal security experts will know about its increased capacity to generate electricity.
>
> A Department of Homeland Security employee, visiting the plant to consult on government purchases of power during emergency situations, notices readings on internal gauges reflecting the dramatically increased emissions. She telephones EPA to report the situation. EPA issues a Notice of Violation to the company, and threatens to bring an action for civil penalties, but is instructed to desist by DHS officials who inform EPA that the HSA prohibits disclosing the information provided to the agency in court and that DHS wants to list the company as an emergency supplier capable of providing expanded electricity production in an upcoming report to Congress. EPA drops its enforcement action, and the DHS employee not only loses her job but also is prosecuted criminally.

With regards to the scenario described above:

a. Could the critical infrastructure information from the above scenario properly be disclosed by a DHS employee? If the answer is yes, please describe how and to whom the DHS employee could disclose the information.

ANSWER: It is my understanding that under this scenario, this information would not qualify as Protected Critical Infrastructure Information and accordingly, would not be exempt from disclosure under the Freedom of Information Act (FOIA). In order to be exempt from disclosure, the critical infrastructure information must be deemed Protected Critical Infrastructure Information (PCII), which occurs only if the information satisfies the procedural requirements established in both the Homeland Security Act and the "Procedures for Handling Critical Infrastructure Information." In addition, the submitted information must fall within the definition of PCII as defined in the Homeland Security Act and the accompanying regulation.

b. In the above scenario, could a DHS employee disclose this critical infrastructure information to another federal agency such as EPA? If the answer is yes, please

describe the proper manner in which the DHS employee could disclose the information to EPA or another federal agency.

ANSWER: It is my understanding that this information is not protected critical infrastructure information. Accordingly, a DHS employee could disclose it to another federal agency subject to all applicable laws and other protections.

c. In your view, should the DHS refer the type of DHS "whistleblower" described in the above scenario to the Department of Justice for criminal prosecution? Has the DHS ever done so? If the DHS has referred a whistleblower for criminal prosecution, please provide the name(s) of the whistleblower(s) and reason(s) for the referral(s).

ANSWER: It is my understanding that the applicable regulations for Protected Critical Infrastructure Information specifically address the concern raised in this question. Section 29.8(f)(3) provides whistleblower protection subject to the limitations of the Whistleblower Protection Act. I am not yet familiar with the Department's activities to date concerning whistleblowers.

d. On January 17, 2003 at his confirmation hearing before this Committee, Governor Ridge was asked about problems with the current wording of the HSA related to critical infrastructure information and FOIA. He was asked whether the provision could have the unintended consequence of shielding wrongdoing while impeding access to information to protect public health and safety. Governor Ridge replied: "[T]hat certainly wasn't the intent, I am sure, of those who advocated the Freedom of Information Act exemption, to give wrongdoers protection or to protect illegal activity, and I will certainly work with you to clarify that language." In your view, could the critical infrastructure information section of the Homeland Security Act, as currently worded, be used to conceal wrongdoing and impede access to information to protect public health and safety? If so, what steps could be taken to prevent this unintended consequence of this provision?

ANSWER: The Department has stated that the Critical Infrastructure Information Act of 2002 will not be used to conceal wrongdoing and impede access to information to protect public health and safety. I look forward to learning more about the Department's implementation of this Act to ensuring that this is not an unintended consequence of the provision, if I am confirmed.

e. In March, Senators Leahy, Lieberman, Levin, and others introduced S. 622, the Restore FOIA Act, to remedy the FOIA problem in HSA, using bipartisan language developed by this Committee. Among other provisions, the bill would make it clear that the HSA does not forbid the use of critical infrastructure information in civil court cases. Would you support enactment of this legislation?

ANSWER: If confirmed, I would be pleased to review this proposal and to discuss the proposed reforms with the Committee.

Intelligence

26. The Homeland Security Act of 2002 created the Information Analysis and Infrastructure Protection Directorate with responsibilities regarding intelligence, law enforcement, and other information related to terrorism. P.L. No. 107-296, § 201 (2002). The Committee has been informed that DHS officials have had trouble obtaining certain information they believe they are entitled to receive under the law. What is your view of the Information Analysis Office's authorities: (1) to obtain information from other Executive Branch departments and agencies; (2) both to obtain information and to levy collection and analytic requirements on other components of DHS; and (3) to share information with State, local, and tribal governments and the private sector?

ANSWER: The authority of the Secretary of Homeland Security to obtain information is substantial and broadly defined in the Homeland Security Act of 2002.[1] Similarly, the Office of Information Analysis has substantial authority[2] to access, receive, and analyze law enforcement information, intelligence information, and other information from agencies of the Federal Government, State and local government agencies (including law enforcement agencies), and private sector entities. IA has both the responsibility to ensure timely and efficient access by DHS to all information necessary to discharge its responsibilities[3] and to disseminate[4] to agencies of State and local governments and private sector entities with responsibilities relating to homeland security in order to assist in the deterrence, prevention, preemption of, or response to, terrorist attacks against the United States.

27. Reform and Terrorism Prevention Act of 2004 implements the 9/11 Commission's recommendation to create a Director of National Intelligence (DNI) with significant authorities in order to integrate the Intelligence Community into a single enterprise. P.L.

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[1] HSA. Section 202 (a)(1) ..., the Secretary shall have such access as the Secretary considers necessary to all information, including reports, assessments, analyses, and unevaluated intelligence relating to threats of terrorism against the United States and to other areas of responsibility assigned by the Secretary, and to all information concerning infrastructure or other vulnerabilities of the United States to terrorism, whether or not such information has been analyzed, that may be collected, possessed, or prepared by any agency of the Federal Government.

(2) OTHER INFORMATION- The Secretary shall also have access to other information relating to matters under the responsibility of the Secretary that may be collected, possessed, or prepared by an agency of the Federal Government as the President may further provide.

[2] HSA Section 201(d)(1)
[3] HSA Section 201(d)(4)
[4] HAS Section 201(d)(9)

No. 108-458, § 1011 (2004). How do the DNI's authorities over the resources, security, personnel, information technology, foreign relations, and other aspects of the Intelligence Community relate to DHS?

ANSWER: The Intelligence Reform and Terrorism Prevention Act of 2004 gives the Director of National Intelligence significant oversight of the Intelligence Community, including the DHS IC components. For example, Section 1014 of the Act requires DNI concurrence before appointing an individual to fill a vacancy or recommending the President nominate an individual to the position of Assistant Secretary of Homeland Security for Information Analysis. It also requires consultation with DNI before appointing an individual to be the Assistant Commandant of the Coast Guard for Intelligence. DHS will cooperate fully with the DNI in his role to provide guidance, develop and present the National Intelligence Program budget; with his role to determine requirements and priorities for, and direct the tasking of, collection, analysis, production and dissemination of national intelligence; and his other responsibilities.

Coast Guard

28. The President's FY2006 budget proposes moving the headquarters of the Coast Guard to the West Campus of St. Elizabeths in Washington, DC. To this end, the budget proposal for the General Services Administration (GSA) includes $24.9 million for Coast Guard Consolidation and $13 million for St. Elizabeths West Campus Infrastructure. In 2003, the Committee conducted an investigation into the management of federal real property. The St. Elizabeths West Campus was used as a case study during this investigation and it was highlighted in a Committee hearing held on October 1, 2003. The West Campus of St. Elizabeths contains 182 acres of land, 61 buildings, and 1.1 million square feet of space. It has been designated as a historic landmark. Unfortunately, lack of proper maintenance and management of this large parcel of property has resulted in the advanced decay of the property and, according to GSA estimates, it would take between $440 and $495 million to restore.

    a. What role, if any, will the Office of the General Counsel have in lease negotiations with GSA on behalf of the Coast Guard? What are your views as to the proper allocation of renovation and construction costs of this new facility?

ANSWER: I am not familiar with these issues but, if confirmed, would be happy to study them. I am informed that GSA typically bears the costs of development. The Office of the General Counsel will provide all appropriate legal expertise and guidance in the lease negotiations with GSA.

    b. Does DHS have current cost estimates of renovating and preparing the property for use by the Coast Guard in comparison to continuing current Coast Guard

leases in DC and VA. or improving the buildings they currently occupy? If not, do you believe that it would be wise to conduct such an analysis?

ANSWER: I am informed that GSA is responsible for the renovations of the site and development of the property. I am informed that costs to the Coast Guard should be similar to current occupancy costs. However, the Coast Guard has been in the same location for some time with no upgrades to its building.

c. What role, if any, will the DHS Office of the General Counsel have in navigating the re-use of the property through relevant Federal and local environmental and historic preservation laws?

ANSWER: If confirmed, I will ensure that the Office provides appropriate legal guidance to the Department leadership in working with GSA on this issue.

d. If confirmed, would you be involved as General Counsel in evaluating the impact of this move on the use of local public transportation systems and infrastructure and the impact of the move on relevant federal workers?

ANSWER: It is my understanding that GSA is planning transportation studies as part of the USCG project design effort. If confirmed, I will ensure that the Office provides appropriate legal guidance to the Department leadership in ensuring that the needs of USCG personnel are taken into account.

29. Homeland Security Presidential Directive 5 (HSPD-5) specifically requires the Attorney General and DHS Secretary to "establish appropriate relationships and mechanisms for cooperation between their two departments" Also in HSPD-5 is a requirement for all federal agencies to adopt and utilize the National Incident Management System (NIMS) including the concept of the Unified Command. Currently the Department of Justice is funding "Project Seahawk" in Charleston, SC where the Assistant United States Attorney is the Project Director, but operates in a Unified Command with many DHS agencies including CBP, ICE, and the Coast Guard, as well as other Federal State and local agencies.

As General Counsel what would you do to facilitate this innovative project that integrates the efforts of not just DHS and DOJ in compliance with HSPD-5, but also brings together many other Federal, State, and local agencies in a Unified Command to protect the homeland?

ANSWER: I agree that the Department should embrace a Unified Command concept whenever feasible and appropriate. If confirmed, I would work within DHS and with General Counsels in

other Departments to attempt to overcome any legal hurdles that might obstruct such operations. My past experience at OMB makes me particularly interested in fostering interagency cooperation such that federal resources and expertise can be combined in the most effective manner possible. I have not yet been briefed on "Project Seahawk."

Civil Liberties and Privacy

30. During Congressional consideration of the legislation creating the Department concerns were raised about the impact of DHS programs on civil rights and civil liberties. For that reason, Congress included in the Department an Officer for Civil Rights and Civil Liberties, charged with reviewing and assessing information alleging abuses of civil rights, civil liberties, and racial and ethnic profiling by employees and officials of the Department. In the recently enacted IRTP Act, Congress made even clearer its view of the necessity to respect civil rights and civil liberties, when it added to the Department's statutory missions the requirement to "ensure that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland." (P.L. 108-458 § 8302). Because the General Counsel is the chief legal officer of the Department, he also plays a role in ensuring that Department policies and programs are carried out in a lawful and constitutional manner that protect civil rights and liberties.

    a. What are your views on achieving the balance between liberty and security? If confirmed, what role would you and the OGC play in ensuring that the Department protects civil rights and civil liberties of individuals?

ANSWER: Secretary Chertoff has insisted that the Department be vigilant in protecting Americans' fundamental liberties and privacy, and I feel strongly that this is a critical piece of the Department's mission. If confirmed, I would ensure that the Office thoroughly reviews the legal implications of any issue under consideration with an eye to civil rights and liberties.

    b. If confirmed, how would you and your office work with and support the mission of the Officer for Civil Rights and Civil Liberties?

ANSWER: I believe that all components of the Department have a duty to preserve civil rights and civil liberties, and that the leadership of the Department must unite behind this charge. If confirmed, I would work in close partnership with the Officer for Civil Rights and Civil Liberties as well as other senior leadership offices to ensure full cooperation in this mission.

    c. Do you intend to make it a priority of the General Counsel's office to advise DHS' component parts of their legal obligations to respect the civil rights and civil liberties of those with whom they come in contact?

ANSWER: Yes. I believe the General Counsel, as the chief legal officer in the Department,

should advise the Secretary, the Deputy, and Department components of their obligations under the Constitution, including the obligation to protect Americans' civil rights and civil liberties.

d. In what areas do you believe DHS needs to take additional steps in order to ensure the protection of privacy and fundamental liberties? What specific actions would you recommend be taken?

ANSWER: My sense is that the most pressing privacy issues will relate to the development, configuration and use of new antiterrorism technologies. I believe that the Department must carefully evaluate the uses and impacts of this technology before implementation. These are questions that require significant study to address properly, and if confirmed, I will devote substantial time and thought to them.

31. Section 222 of the Homeland Security Act directs the Department's Privacy Officer to "assume primary responsibility for privacy policy," including overseeing compliance with the Privacy Act and "assuring that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection and disclosure of personal information."

a. What role do you envision for yourself, as General Counsel, in overseeing compliance with privacy laws?

ANSWER: The General Counsel's Office would assist the Office of the Privacy Officer in any way appropriate to its missions. I have spoken with the Privacy Officer and anticipate a strong and effective working relationship on privacy issues.

b. How will you work with the Privacy Officer to ensure she is able to perform her duties?

ANSWER: I would have a close working relationship with the Privacy Officer, supporting her efforts to ensure appropriate privacy protections.

32. Many privacy experts have suggested that the Privacy Act of 1974 no longer sufficiently addresses the potential of new technologies to infringe personal privacy.

a. Do you interpret Section 222 as requiring that the Department protect personal privacy above and beyond the requirements of the Privacy Act?

ANSWER: Yes, the responsibilities of the Privacy Officer under that provision are broader than simply Privacy Act compliance. Section 222(4), for instance, instructs that the privacy officer "conduct a privacy impact analysis of proposed rules."

b. How should the Department interpret and apply its mandate to ensure that technologies do not erode privacy protections?

ANSWER: The Department should apply its mandate broadly and consider privacy issues and principles in developing or selecting technology solutions. I am particularly concerned about privacy in this context and would be pleased, if confirmed, to work with the Committee on this issue.

c. What would be your role in assessing the privacy implications of both information sharing efforts, such as with air passenger name records, and any efforts the Department would undertake involving the use of commercial data?

ANSWER: The Office of the General Counsel would provide legal advice and work closely with the Privacy Office.

33. The Intelligence Reform and Terrorism Prevention Act of 2004 created a Privacy and Civil Liberties Oversight Board within the Executive Office of the President. Following the 9/11 Commission's recommendations, the Act charged the Board with looking across the federal government and ensuring that liberty concerns are appropriately considered in the implementation of all laws, regulations, and policies that are related to efforts to protect the Nation against terrorism. The Board is empowered to carry out its mission in two equally important ways. First, the Board is to advise policy makers at the front end, to ensure that when executive branch officials are proposing, making, or implementing policy, they appropriately consider and protect privacy and civil liberties. Second, the Board is to conduct oversight, by investigating and reviewing government actions at the back end, reviewing the implementation of particular government policies to see whether the government is acting with appropriate respect for privacy and civil liberties and adhering to applicable rules.

a. If confirmed as General Counsel, what would you see as your relationship with the Board? How would you advise the Department regarding its relationship with the Board? How would you view the role of the Board in DHS' development of policies and practices?

ANSWER: The Privacy and Civil Liberties Board that is authorized by the Intelligence Reform and Terrorism Prevention Act (IRTPA) will review regulations and programs of Federal agencies that are concerned with combating terrorism and provide advice to the President and Executive Department heads to ensure that privacy and civil liberties are appropriately considered in the development of any such regulations and programs. Because DHS is the first agency to have statutorily required Privacy and Civil Rights and Civil Liberties Officers, whose roles are precisely to ensure that privacy concerns and civil liberties are addressed in the course of developing DHS programs and policies, I envision that the Board may look to DHS as a model

for implementing its own mandate. I anticipate that the Board will work cooperatively with DHS and, particularly, with our statutory officers who have specifically assigned duties in these important areas. If confirmed, I look forward to supporting DHS leadership in this important initiative.

b. Will you commit to working with the Privacy and Civil Liberties Oversight Board as the Department develops and implements its policies? What measures will you take to ensure that the Department and its employees regularly consult with the Board in the development and implementation of Department policies related to efforts to secure the American homeland?

ANSWER: Yes, if confirmed I will work with the Privacy and Civil Liberties Oversight Board as provided in IRTPA in order to assist it in fulfilling its statutory missions. I would also work with the Department's Officer for Civil Rights and Civil Liberties and the Office he supervises, along with the Department's Privacy Officer, who also sits on the President's Board.

c. Are there specific issues with regard to which you intend to seek the views of the Privacy and Civil Liberties Oversight Board?

ANSWER: If confirmed, I look forward to determining those areas in which the Department should confer with the Board.

34. There have been reports that the United States has detained or seized foreign nationals suspected of terrorism and rendered them to foreign countries where they have been imprisoned and tortured. U.S. Immigration and Customs Enforcement officials reportedly have assisted in some of these renditions.

a. Do you believe it is lawful to render foreign nationals to countries where there is reason to believe they will be tortured?

ANSWER: DHS engages in the removal of aliens from the United States pursuant to its enforcement of the U.S. immigration laws. The immigration laws prohibit DHS from removing an alien from the United States where it is shown that the alien would more likely than not be tortured in the proposed country of removal. If confirmed, I will ensure that DHS continues to abide by all applicable laws. As the President has remarked, "America stands against and will not tolerate torture . . . and the United States will continue to lead the fight to eliminate it everywhere" (President's Statement on the U.N. International Day in Support of Victims of Torture available at http://www.whitehouse.gov/news/releases/2004/06/20040626-19.html).

b. What factors would you advise be considered by Department officials seeking to determine whether a proposed rendition is lawful? Would you advise them to consider the human rights record of the nation to which the suspect is proposed to

be rendered?

ANSWER: In determining whether an alien facing removal from the United States under U.S. immigration laws would more likely than not face torture in the proposed country of removal, the immigration laws require all relevant information to be considered, including the human rights record of the proposed country of removal.

c. Would you advise Department personnel that, before they agree to participate in a rendition, they first determine the likelihood that the suspect to be rendered would be tortured? If so, how would you advise them to make that determination? Do you believe it is sufficient to make a rendition lawful if a country that has a known history of torturing its detainees tells the US that it will not torture the person subject to the rendition?

ANSWER: DHS is responsible for enforcing the immigration laws of the United States. Under the immigration laws, an alien who fears that he or she would more likely than not be tortured in a proposed country of removal may, during the course of removal proceedings, apply for and receive protection against removal. Each case requires individual consideration. In certain circumstances, it may be appropriate to consider assurances from a country of proposed removal that the alien will not be tortured if removed there. I am informed that the Department reserves the use of assurances for a very small number of the most sensitive of cases where it believes it can reasonably rely on such assurances that the individuals would not be tortured, such that removal would be consistent with U.S. law.

35. Last year TSA scrapped its plans for CAPPS II, a commercial aviation passenger prescreening system, amidst questions about the effectiveness of CAPPS II and whether the privacy of passenger records would be safeguarded. TSA's planned use of commercial databases was particularly controversial. In developing plans for a new prescreening system, Secure Flight, TSA is still considering and testing the value of using data from commercial databases. Last month the Government Accountability Office found that it could not determine the privacy impact Secure Flight would have on passengers, and it could not determine whether the system would comply with the Privacy Act. The GAO also could not determine the accuracy and effectiveness of the proposed system because TSA had not yet completed and released test results.

a. What role would you take as General Counsel to help ensure that Secure Flight complies with privacy laws?

ANSWER: As the chief legal officer for the Department of Homeland Security, the General Counsel must make sure that any DHS program, including Secure Flight, is legally sound. This, of course, includes compliance with privacy laws, particularly the Privacy Act of 1974, which governs the collection, use and maintenance of personally identifiable information.

b. Do you believe use by the government of commercial databases in prescreening systems such as Secure Flight raises any special privacy concerns? Please explain your answer.

ANSWER: Yes, and I would be committed to ensuring that the Department takes a very careful look at privacy issues in this area. I am informed that the Secure Flight program is testing the use of commercial databases to ascertain whether such information can be useful to identify individuals who pose a risk to airline security. I further understand that these databases will not be used unless substantial protections for the data can be put in place that satisfy privacy and civil liberties concerns.

c. Do you believe the Privacy Act of 1974 adequately addresses government use of commercial databases containing personal information? Should our privacy laws be updated to reflect new realities, such as the application of commercial databases to screening? Please explain your answers.

ANSWER: If confirmed, I would evaluate whether the Privacy Act, coupled with Section 208 of the E-Government Act, are adequate to address privacy issues arising in this context. If confirmed, would work with the DHS Chief Privacy Officer to help implement the security mission of the Department in ways that enhance personal privacy.

SAFETY Act

36. The implementation of the SAFETY Act by the Department of Homeland Security has been criticized extensively by private industry. Further, until recently very few applications for designation or certification have been approved, heightening concern that the Act may not be accomplishing its objective of encouraging the development of new technologies and the adoption of existing technologies for new purposes.

a. What is the role of the General Counsel in implementing and interpreting the SAFETY Act?

ANSWER: The role of the General Counsel is to provide legal review of all issues to be addressed by the Department. This role includes statutory interpretation and the implementation by regulation of statutory requirements, including those required by the SAFETY Act.

b. Please advise us whether, in your view:

- The Act needs to be revised;
- The Department's interpretation as expressed in its regulations properly reflects the statute's text; and

- Changes in the regulations ought to be made in order to enhance the statute's viability.

ANSWER: I have not been involved in any SAFETY Act issues since joining the Department as a consultant in April. Prior to joining the Department in April, my practice of law included representation of two clients on SAFETY Act applications. Accordingly, I would be recused from any role in any SAFETY Act applications filed by such clients (*see* Ethics agreement).

c. Is the Department's implementation of the SAFETY Act part of the current review being conducted by Secretary Chertoff?

ANSWER: As explained above, I have not been involved in SAFETY Act issues since joining the Department as a consultant in April. The Secretary has, however, publicly stated that he is reviewing the operation of the SAFETY Act office, and has indicated that he believes the Act can be used more effectively by the Department.

d. As part of their criticism of DHS' performance regarding the SAFETY Act, these private industry groups have expressed concerns that the Science and Technology Directorate has not placed sufficient priority on timely and effective implementation of the Act. What is your assessment of the Science and Technology Directorate's performance in implementing the SAFETY Act?

ANSWER: The Secretary has made public statements identifying his concern with the Department's implementation of the Act to date. As explained above, I have not been involved in SAFETY Act issues since joining the Department as a consultant in April.

37. Currently, when a request for proposal (RFP) is issued, companies submit their bids, selections are made and a contract is awarded. At this point, the winning bid must then apply for SAFETY Act coverage. Some argue that requiring the SAFETY Act certification process to wait until the contract is awarded needlessly delays the introduction of homeland security technology, products, or services that the government has said it needs to meet an immediate need. Should the procurement and the SAFETY Act process run concurrently?

ANSWER: I certainly understand the concern identified above, but I have not been involved in SAFETY Act issues since joining the Department as a consultant in April.

38. You served at OMB from March 2002 until August 2003. During your tenure at OMB, did you work on, either directly or indirectly, or have a hand in creating or implementing the SAFETY Act? If so, please describe your involvement. Did you agree that such legislation was needed? Please explain why or why not, and give your assessment of whether the provision is working as intended.

ANSWER: I believe the SAFETY Act was negotiated as part of the House of Representatives' Homeland Security bill. I did not negotiate or draft language for the provisions of that bill that ultimately became the SAFETY Act. I did agree with the notion that the nation should take measures necessary to accelerate the development and deployment of antiterrorism technologies, and had input in an early draft of implementing regulations.

39. You were a partner at Latham and Watkins from September 2003 until April 2005. According to your biographical statement, during this time you did work for Lockheed Martin on the SAFETY Act. On June 18, 2004, DHS announced that Lockheed and three other companies were granted Designation and Certification for anti-terrorism technologies under the SAFETY Act. Until recently, DHS had only granted those four approvals.

    Please describe the work you did for Lockheed Martin as it relates to Lockheed's SAFETY Act application, including who you contacted both inside DHS and outside the Department on Lockheed's behalf.

    Please indicate if you will recuse yourself from any matters that might come before you at DHS that are related to the Lockheed Martin SAFETY Act application.

ANSWER: I provided advice to Lockheed Martin in formulating SAFETY Act applications. In representing Lockheed Martin on SAFETY Act applications, I met with personnel working on the SAFETY Act in the Department's Science and Technology Directorate and with members of the General Counsel's Office responsible for the legal application of the Act. As indicated in my Ethics Agreement, I have recused myself from any SAFETY Act applications filed by Lockheed Martin.

Immigration

40. What is your understanding of the respective jurisdictions, responsibilities of, and relationship between DHS and Department of Justice with respect to implementation of the nation's immigration laws? Is it your view that the Department of Justice can set immigration policy outside of matters before the immigration courts?

ANSWER: I understand that the immigration enforcement and benefits functions of the former INS were transferred from the Department of Justice to the Department of Homeland Security under the Homeland Security Act. I understand, however, that the Department of Justice still retains authority in certain areas of the immigration laws. Under the Homeland Security Act the Executive Office for Immigration Review, containing the immigration judges and the Board of Immigration Appeals remains within the Department of Justice. As provided in section 103(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1103(a)(1), the Department of Justice retains

adjudicatory authority over deportation and removal cases, including the authority to issue binding precedent decisions, although the primary authority for administering and enforcing the immigration laws, including the setting of immigration policy has transferred to the Department of Homeland Security.

41. Functions that were previously consolidated in the Immigration and Naturalization Service are now divided among three DHS bureaus – Immigration and Customs Enforcement, Citizenship and Immigration Services, and Customs and Border Protection. Officers in all of these bureaus are responsible for applying the provisions of the Immigration and Nationality Act.

    a. How will you ensure that there is uniform interpretation and application of the complex body of immigration law implemented by DHS?

ANSWER: Ensuring the uniform interpretation and application of the immigration laws is an important responsibility of the Office of the General Counsel. All of the lawyers, including the immigration attorneys in Immigration and Customs Enforcement, Citizenship and Immigration Services, and Customs and Border Protection all ultimately report to the General Counsel of the Department. If confirmed, I will expect that the lawyers in the Department will work closely together to coordinate legal interpretations on immigration issues. If confirmed, I will study this issue and will work closely with the relevant policy and operational leadership in the Department to further develop methods of coordination and cooperation on immigration matters within DHS.

    b. Do you believe DHS is currently interpreting and applying immigration law consistently across the three bureaus? Please explain your answer.

ANSWER: Without more personal experience evaluating these entities, I cannot reach an informed opinion. If I am confirmed, I will review this issue.

42. In 1996, the Department of Justice's Office of Legal Counsel ruled in a published opinion that state and local police lack legal authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to a criminal violation of the immigration laws or other laws; that ruling was reiterated in November 2001. (Assistance by State and Local Police in Apprehending Illegal Aliens, February 5, 1996, Office of Legal Counsel, http://www.usdoj.gov/olc/immstopo1a.htm) In 2002, then Attorney General John Ashcroft asked his Office of Legal Counsel to look into the matter again, and OLC reportedly opined in the spring of 2002 that state and local police do have this "inherent authority."

    Secretary Chertoff has stated that state and local law enforcement play a critical role in our homeland security mission, and are likely to encounter foreign-born criminals and immigration violators in the course of their duties. He also acknowledged that the

Department needs to look carefully at the issue of whether and how local police should be involved in immigration matters.

a. What are your views on the expanded involvement of local police in immigration matters?

ANSWER: I agree with Secretary Chertoff's position on this issue. State and local law enforcement play a critical role in the homeland security mission. In the normal course of events, State and local law enforcement officials are the first responders to any incident or attack against the United States. They are also likely to encounter foreign-born criminals and immigration violators during the course of their daily duties. I am advised that the Department makes immigration status information available to State and local law enforcement through the ICE Law Enforcement Support Center (LESC) within minutes of a query and that ICE encourages its officers at all levels to engage in partnerships with State and local law enforcement agencies through a variety of partnership arrangements because this is the best way to increase the effectiveness of our organizations. I agree with the Secretary's position that we need to look carefully at whether and how local police are involved in immigration matters and would want to further review this matter if I am confirmed.

b. During his confirmation proceedings before this Committee, Secretary Chertoff acknowledged the "legitimate concerns" of security experts and law enforcement personnel who are opposed to involving local law enforcement in policing immigration violations. Among these concerns is that undocumented aliens might be reluctant to report crimes or come forward with important information. Please describe your own views of these concerns.

ANSWER: I agree with Secretary Chertoff that these are legitimate concerns and warrant further examination and study. If I am confirmed, I will review this issue.

c. Which Department has the authority to set policy on the arrest of violators of civil immigration laws? Do you consider the legal opinion of the Department of Justice's Office of Legal Counsel binding on the Department of Homeland Security? Please explain your answer.

ANSWER: Both the Department of Justice and the Department of Homeland Security have important roles in the enforcement of the nation's immigration laws, and coordination is important to both Departments. It is my understanding that with the transfer of the immigration enforcement functions of the former INS to the Department of Homeland Security the setting of immigration policy, and thus arrest policy, now lies primarily with DHS. Like other legal opinions from the Office of Legal Counsel, the opinion is binding on DHS and throughout the Executive Branch.

43. Unaccompanied alien children arriving in the United States are transferred by DHS to the custody of the Office of Refugee Resettlement in HHS, while DHS maintains responsibility for their immigration proceedings, including seeking their deportation. Alien children are not provided with legal representation or guardians *ad litem* by the government, although they may receive pro bono legal assistance.

    a. Do you believe it is appropriate that many young alien children have to go through deportation proceedings without the assistance of a lawyer or a guardian *ad litem*? Please explain your answer.

ANSWER: I am very concerned by the notion that children are appearing without any assistance in such proceedings. I have not personally had sufficient opportunity to study this issue, but would be pleased to do so if confirmed.

    b. Do you believe unrepresented young alien children can adequately represent themselves and present asylum claims or other defenses against deportation? Please explain your answer.

ANSWER: As noted, I am very concerned by this prospect. I have not personally had sufficient opportunity to study this issue, but would be pleased to do so if confirmed.

44. On February 8, 2005, the US Commission on International Religious Freedom released a Congressionally authorized report on how expedited removal procedures were affecting asylum seekers. Among its findings, the Commission reported:

    - In approximately half of observed inspections, inspectors failed to inform aliens subject to expedited removal that they may ask for protection if they have a fear of returning home. DHS regulations required that this information be read to the aliens.

    - In 15% of observed cases where an alien expressed a fear of return, the DHS Inspector failed to refer the alien for a credible fear interview; instead the aliens were returned, in spite of the fact that they may have had a legitimate claim for asylum.

    - In one port of entry, immigration officers were observed improperly encouraging asylum seekers to withdraw their applications for asylum.

    - Asylum seekers are detained by DHS in harsh maximum security correctional facilities, and are often housed in the same cellblocks or in the same cells as convicted criminals. Many of the detainees, who often had been tortured or persecuted in their home countries, were further traumatized by the conditions of

confinement, and some said that the conditions were one of the factors that led them to terminate their applications for asylum.

a. Do you view the Commission's findings as representing serious problems and serious violations of the rights of asylum seekers?

ANSWER: I believe that the U.S. should adhere to treaty obligations and other legal obligations in the treatment of asylum seekers, and if confirmed, will look into this matter and will help the Department address any inadequacies that may exist in training, policies, and procedures.

b. What, if anything, would you do to help the Department address these problems?

ANSWER: If confirmed, I intend to study the Commission's recommendations and work closely with the relevant policy and operational leaders within DHS to determine how DHS should best address these problems. I am informed that the Department has formed a working group involving a number of different DHS components, including the Office of the General Counsel that will carefully consider the Commission's findings and recommendations.

45. The Commission determined that in over 25% of the examined immigration judge decisions where relief was denied, the judge cited that the applicant had "added detail" to the asylum claim compared to earlier statements made to inspectors or asylum officers. The Commission report noted, however, that such negative credibility findings fail to take into account that the records of these prior statements are often unreliable and incomplete.

a. In your view, how serious a problem is it that, according to the Commission report, asylum claims are being rejected because DHS officers documented earlier statements poorly?

ANSWER: If confirmed, I will review the Commission's recommendations and will assist the Department's development of a considered response.

b. What, if anything, should be done to address these problems?

ANSWER: As indicated above, I am informed that the Department is carefully studying and considering the Commission's findings and recommendations to develop a considered and comprehensive response.

46. During the Committee's consideration of the nomination of Michael Jackson to be Deputy Secretary of DHS, Mr. Jackson promised to review the recommendations of the US Commission on International Religious Freedom and to develop "a considered Departmental response."

a. Has DHS developed a response that comprehensively addresses the Commission's findings? Please provide details of any Department actions taken in response to the Commission's report.

ANSWER: I am informed that the Department is still reviewing and considering the Commission's findings and recommendations.

b. Will you commit to helping ensure that the Department does develop a Departmental response that addresses the problems documented by the Commission?

ANSWER: If confirmed, I will examine the Commission's report and commit to assisting the Department to address these important issues.

c. Will you commit to ensuring that DHS informs this Committee of its response to the Commission's report, including all actions taken to address problems documented by the Commission?

ANSWER: If confirmed I will ensure that DHS keeps the Committee fully informed of all Departmental responses to the Commission's report.

Procurement

47. Are there continuing challenges that the Department of Homeland Security is facing in its integration of the component agencies' procurement departments? If so what are they and what steps are being taken to address them?

ANSWER: When the Department was created, 22 existing organizations were combined. I understand that of those 22 organizations, only seven brought a procurement office and personnel with them and those offices were staffed for their pre-9/11 activities, not for the complexity and amount of procurement activity that the Department now requires. If I am confirmed, I will further review this issue and determine if the appropriate legal support and guidance is being provided.

48. The Homeland Security Act gives DHS special streamlined acquisition authority through September 30, 2007. However, DHS may not depart from existing acquisition rules absent a determination that the Department's mission would be "seriously impaired" without the use of such special authorities. Your predecessor in his confirmation responses said that he would "work with [DHS] senior management to ensure that the Department's mission is aggressively pursued without undermining or abusing these special authorities."

a. Are you aware whether the special authorities have been used to date? What criteria are in place to determine that the special acquisition authorities are needed, and who is making the determinations?

ANSWER: I am informed that this authority has not been used by the Department. I would work with the Department procurement personnel and the Office's legal staff to address any such issues that arise.

b. Under the Homeland Security Act, the Comptroller General is required to submit a report in fiscal year 2006 on DHS's use of its special streamlined acquisition authority. What is your view as to the Department's responsibilities in assisting the Comptroller General in carrying out this oversight function?

ANSWER: As indicated above, I would take a cooperative approach to working with GAO.

49. Many experts say that the Federal government is engaging in too much contract bundling because current laws and regulations are all too often ignored in the procurement process. It is also important that small businesses are able to participate in the procurement process. Your predecessor in his confirmation responses said the following: "If confirmed I will work with the Under Secretary for Management, the chief Procurement Officer, and the head of OSDBU [Office of Small and Disadvantaged Business Utilization] to ensure that DHS acquisition policies promote the utilization of small businesses and that actions are taken to combat inappropriate contract bundling." Will you make a similar commitment? What is your personal view of DHS's record to date on procuring goods and services from small business? Has there been any inappropriate contract bundling that you are aware of?

ANSWER: If confirmed, I will fully support the commitment made by Mr. Whitley. I am not yet familiar with DHS' record to date on procuring goods and services from small business and issues related to contract bundling. I will further review this issue if I am confirmed.

Environmental Impacts

50. 42 U.S.C.§ 4332 requires Federal agencies to develop an environmental impact statement (EIS) regarding major Federal actions significantly affecting the quality of the human environment. It also requires that such documents be made available to the public. In a recent incident, involving the border infrastructure system south of San Diego, an EIS for a project with controversial environmental impacts was not available for public review in DHS offices and was obtained by the Congressional Research Service only after some considerable difficulty. In fact, the only official guidance a requester received about

obtaining the EIS was that the document could be obtained through a private contractor at a cost estimated to be $1,000.

a. If you are confirmed, what steps will you take to ensure that such documents are readily available to Congress and the public?

ANSWER: While I am not familiar with this matter in particular, if confirmed I would be happy to look into this situation, address it, and advise the Committee as appropriate.

b. What steps will you take to ensure that members of the public can review an EIS without being required to expend $1,000?

ANSWER: If confirmed, I would ensure that the Department complies with the law.

51. Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act (NEPA) establish the circumstances under which a formal environmental evaluation is not required for a Federal activity. These categorical exclusions are "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations." (40 CFR 1508.4). Because categorical exclusions eliminate public disclosure and participation in the NEPA process, federal agencies are to use categorical exclusions in a only narrow set of circumstances.

The creation of DHS involved consolidating many separate agencies into one Department responsible for a large array of activities and operations. These separate agencies previously had promulgated agency specific NEPA regulations, including categorical exclusions. Now DHS is promulgating its own NEPA regulations. Categorical exclusions which were once appropriate for a single agency may not be appropriate for all of DHS's components because of DHS's responsibilities for such a wide range of activities and operations.

At an October 12, 2004, public meeting to discuss issues raised in public comments on the draft NEPA regulations, some participants stated that some of the proposed categorical exclusions were not supported by the administrative record and objected to the draft's treatment of "extraordinary circumstances" in connection with the categorical exclusions. Some participants also expressed dissatisfaction with the draft's treatment of non-classified information. The draft states that in addition to FOIA-exempt information, DHS will not disclose Critical Infrastructure Information (CII), Sensitive Security Information (SSI), and Sensitive But Unclassified Information. Some participants at the meeting recommended that the final draft simply exempt from disclosure only information that is otherwise exempt under the Freedom of Information Act.

a. If you are confirmed, what measures will you take to ensure that the categorical exclusions adopted by DHS are appropriate?

ANSWER: I am not yet familiar with the Department's approach to NEPA or categorical exclusions. I would be concerned, however, if the Department is not properly applying CEQ regulations regarding categorical exclusions. If I am confirmed, I will review the Department's work on this issue and determine what measures may be appropriate to ensure that the Department does not misuse categorical exclusions.

b. When considering what activities are appropriate for categorical exclusions will you apply the criteria published by CEQ at 40 C.F.R. 1508.4? If so, how will you assure that any activities proposed for categorical exclusion satisfy those criteria?

ANSWER: Again, I am not yet fully familiar with these specifics, but will ensure that DHS does not misuse its authorities.

c. What actions will you take to pay close attention to ensure that regulations proposed by DHS and actions taken by DHS conform to NEPA requirements?

ANSWER: If confirmed, I will instruct the Office to ensure that the Department is properly applying relevant authorities in this area.

d. What is your response to the concerns raised about what materials will be omitted or redacted from an EIS?

ANSWER: I am not familiar with the underlying document and did not attend the meeting. If confirmed, I will study this issue.

Protection of Information

52. DHS Management Directive 11042 issued last year, regarding the safeguarding of Sensitive But Unclassified Information, and the accompanying Non-Disclosure Agreement were criticized by some DHS employees and outside groups for their breadth. On January 6, 2005, DHS issued a revised Directive, designated 11042.1, and has discontinued the use of the Non-Disclosure Agreement in favor of a training program for DHS employees regarding the handling of protected information. However, some continue to express concern that the Directive covers an overly broad and vaguely defined universe of information. See "Homeland Security reversed secrecy policy, but protests persist," Govexec.com Daily Briefing, January 12, 2005.

a. The management directive indicates that any DHS employee, detailee, or contractor, can designate information as "For Official Use Only," but it does not describe any process by which the designation can be lifted or challenged. Do you believe that such a process needs to be established in the directive?

ANSWER: Although I have not been involved in these issues, I understand that DHS is working to improve its process for handling sensitive-but-unclassified information. I am informed that each DHS employee, detailee, and contractor is responsible for the designation of information as "For Official Use Only" (FOUO). I understand that the DHS Management Directive provides clear guidance as to what constitutes FOUO information and what does not. If, at some later date, the reason(s) for marking a document as FOUO is no longer valid, then such designation should not be used. As the Management Directive indicates, the FOUO designation does not automatically exempt information from release under the Freedom of Information Act (FOIA). Therefore, if an individual makes such a request for Department information, the request will be reviewed and considered on a case-by-case basis. DHS also advises that there is a process whereby a designation may be reviewed. If there is a disagreement as to the proper marking of a document, then the relevant parties will work collaboratively to reach a consensus solution as to the appropriate level of protection afforded a particular document.

b. The directive describes a number of categories of information that can be designated as "For Official Use Only," including any information "that could constitute an indicator of U.S. government intentions, capabilities, operations, or activities or otherwise threaten operations security." Do you believe that this definition is appropriately tailored?

ANSWER: If confirmed, I would review this Directive. I am informed that DHS continues to examine the appropriate parameters of FOUO materials. As I understand it, the definition must be broad enough to cover the wide variety of sensitive information handled by the Department, and it also must be specific enough to properly instruct DHS personnel on the designation. I am informed that the above-referenced excerpt aims to protect and safeguard important information about the Department's enforcement and security functions and operations, so that terrorist or criminal organizations may not gain advantage from such advance knowledge of DHS activities.

c. How do you believe the need to keep sensitive information protected and the need to keep the public informed should be balanced?

ANSWER: If confirmed, I will review this issue to assess how the balance is being struck and if changes should be made.

d. In what ways do you believe that DHS sharing information with other federal agencies, state and local governments, and the private sector serves to further the Department's mission? Are you concerned that excessive classification or

excessive designation of information as protected could interfere with DHS's mandate to share information with other federal entities and appropriate state, local, tribal and the private entities as well as with the new government-wide mandate to create an Information Sharing Environment?

ANSWER: The Department of Homeland Security is committed to sharing sensitive information with appropriate State, local, and tribal government officials and private-sector individuals. Indeed, the sharing of information is a cornerstone of the DHS approach to protecting the homeland. I am informed that DHS policies are designed to promote the legitimate flow of information to those who require it and that DHS fully supports the mandate to create an Information Sharing Environment. If confirmed, I will review these issues.

e. Section K of the Management Directive describes the obligations of DHS employees, detailees and contractors with respect to the destruction of FOUO material. Do you believe the directive is consistent with the obligations to maintain records under the Federal Records Act? If not, how should the directive be modified?

ANSWER: The Federal Records Act governs the retention of records that document an agency's policies and transactions. It establishes procedures for the orderly destruction of records pursuant to procedures approved by the National Archives and Records Administration. To the extent that the Management Directive could be construed as inconsistent with the Federal Records Act, the Act, of course, controls. I am informed that any ambiguity in the Directive can be clarified with a subsequent issuance. If confirmed, I will further review this issue.

53. The Freedom of Information Act (FOIA) plays a critical role in ensuring the integrity of our government and the vitality of our democracy. As the Supreme Court put it in NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978), "the basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." The Act therefore provides the public with a right of access to federal agency records, unless the records fall within a statutory exceptions or exclusion.

a. What was your involvement in FOIA issues during your tenure at the Justice Department and OMB? Did you issue any guidance or provide any advice regarding compliance with FOIA? If so, what was that guidance or advice?

ANSWER: The Office of Information and Privacy (OIP) at the Department of Justice addresses FOIA response issues for the Department, while the Civil Division, Federal Programs Branch handles FOIA-related litigation for the Government. I served as the Acting Associate Attorney General for portions of 2001 and both entities reported to me. While at Justice, I did not issue any FOIA guidance and did not have extensive involvement with OIP. I believe that the

Attorney General issued guidance on FOIA in October 2001, with input from OIP and other entities in the Department. I do not recall what, if any, input I had in that process. I did occasionally address FOIA-related litigation in the Civil Division. To the extent that I provided advice with respect to such litigation, it would have been to defend Government decisions that abide by the letter and spirit of the law. At OMB, my staff was occasionally involved in FOIA responses. I do not recall issuing any FOIA guidance. If I gave advice regarding FOIA compliance, it would have been to comply with the letter and spirit of the law.

b. What role do you envision the General Counsel's office having in monitoring and ensuring the Department's compliance with FOIA?

ANSWER: The Office should ensure that the Department abides by the letter and spirit of the law. If confirmed, I would work cooperatively with the Chief Privacy Officer.

c. If confirmed, what would you do to ensure that the Department and all of its component agencies properly and efficiently comply with FOIA?

ANSWER: I intend to establish a collaborative relationship with the Chief Privacy Officer for DHS, and also to work with attorneys in the Office and FOIA officers throughout the Department to ensure that FOIA compliance is given a high priority.

54. In response to a request by two Committee members, the Justice Department recently provided a document that had been redacted by the FBI prior to providing it to a private group under FOIA. One set of redactions had redacted from an email the names of high level Department employees mentioned as having attended particular meetings on issues of concern to DOJ. When the Justice Department provided the document, it asserted that the redaction of the names was required pursuant to the Privacy Act. After members of this Committee challenged that assertion, the Department relented and provided a new version of the document with those employees' names unredacted.

Do you agree that the Privacy Act was designed primarily to prevent the government from disclosing personal information about private individuals without their consent and was not intended to be used to conceal information about how public officials conduct government business?

ANSWER: I am not familiar with the FBI document at issue. The Privacy Act is intended to regulate the collection, use, maintenance and disclosure of personally identifiable information. The Privacy Act, however, is not limited only to private individuals; federal employees are also covered by its terms. The Freedom of Information Act is, of course, the primary legislative vehicle through which the public becomes informed about how public officials conduct government business, and I am committed to full compliance with the requirements of that statute. There may nevertheless be times when release of information about federal employees

would violate their privacy and I am equally committed to ensuring that the Department does not violate privacy when attempting to make its actions transparent.

Human Capital Management

55. One of the principal challenges facing the Department is personnel management. In addition to the implementation of a new Human Resources Management System, the Department must continue the integration of the diverse organizational cultures of approximately 180,000 employees from 22 agencies into a cohesive department. What do you believe should be the role of the General Counsel in addressing these challenges, and what specifically do you intend to do in this area if confirmed?

ANSWER: The General Counsel's Office advises the Department as to labor and employment law issues related to the ongoing melding of diverse organizational cultures into the Department. The Department and its employees look to the Office of the General Counsel for advice as to how legacy statutory and regulatory requirements apply in the new DHS environment and count upon the Office as a resource for clarifying and interpreting the complex array of labor and employment laws inherited by the Department.

56. What actions in your past experiences demonstrate your style and approach in dealings between management and employee representatives? If confirmed, what steps will you take to achieve the kind of labor-management relationships you want?

ANSWER: I have not practiced labor law, and have not previously been involved in labor/management disputes. If confirmed, I would seek the advice of those with appropriate expertise in the Office to find solutions that harmonize the needs of employees with the missions of the Department.

57. The Homeland Security Act requires that the human resources management system for the Department must "ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions that affect them," subject to certain exceptions. (6 U.S.C. § 9701(b)(4)).

    a. Do you believe that protection of the right of employees to organize and bargain collectively generally contributes to the effective fulfillment of the mission of the Department?

ANSWER: Yes.

    b. What is your opinion of the value of collective bargaining for the effective conduct of public business at the Department of Homeland Security?

ANSWER: DHS is required by law to ensure employees' collective bargaining rights in a flexible and contemporary human resources management system that also recognizes and accommodates the Department's priority homeland security mission.

c. Under what circumstances do you believe the right of federal employees to bargain collectively is advantageous to the ability of the Department to fulfill its mission, and under what circumstances do you believe it is detrimental?

ANSWER: Collective bargaining rights can provide the Department with advantageous employee input, comment and feedback to the extent that those same rights do not interfere with accomplishing the Department's core homeland security missions.

d. What do you envision to be the role of unions and other employee organizations at DHS? Could you be specific as to what kind of negotiation, consultation, collaboration, and information sharing you see as appropriate and beneficial to DHS's mission?

ANSWER: I believe that labor organizations and other employee organizations will play a significant role in collaborating with the Department as to implementation of management directives and other policies that affect the employees' conditions of work. I would expect that DHS will negotiate, consult, collaborate and share information with the labor organizations and other employee organizations as required by the Homeland Security Act of 2002, and other laws and regulations.

58. As the Department develops pay and performance components of its new human resources management system, what do you believe the Department can do to make the system as fair, credible, and transparent as possible, and the guard against politicization and other abuse in performance management?

ANSWER: I am informed that DHS has made a number of efforts to disseminate information with regard to pay for performance, including on its internal and external web sites, in employee messages, through focus groups and surveys, as well as in weekly continuing collaboration meetings with the federal labor organizations. I would expect that the Department would continue these practices as well as undertake a comprehensive training effort aimed at training managers and supervisors as to the new human resources management system and their important role in that system.

59. As part of its new human resources management system, the Department will establish internal boards to resolve disputes involving collective bargaining and to hear certain

individual employee appeals. What do you believe the Department can and should do to help ensure that these boards win the trust of Department employees as being fair and independent adjudicators?

ANSWER: I support the independence of the Homeland Security Labor Relations Board and the DHS Mandatory Removal Panel and believe that DHS employees will recognize the independence of these boards once they are operative. I believe that the more DHS does to ensure the independence of these boards the more confidence employees will have in their fair and independent adjudication of cases. These boards, whose members the Secretary will chose based in part upon lists of candidates submitted by the federal labor unions, should issue their own operating procedures, create their own case precedent and adjudicate cases independent of Department management.

Perchlorate

60. According to certain documents, during your tenure at OMB, you were involved in regulatory efforts regarding ammonium perchlorate, a toxic chemical used in munitions and rocket fuel that has been detected in the groundwater and some drinking water supplies in certain areas. In early 2002, the Environnmental Protection Agency issued a draft risk assessment for perchlorate as part of the process to set a standard for the safe or allowable level of perchlorate in drinking water and to govern environmental cleanup of perchlorate. However, the Department of Defense, defense contractors and others objected to aspects of EPA's work. Perchlorate is primarily used in defense and aerospace work, and these entities are facing environmental cleanup costs that will fluctuate dramatically depending on the standard set by EPA, should it establish one. According to news accounts, OMB or some other White House entity moved to convene a panel of the National Academies of Science to review the perchlorate issue. This panel eventually recommended a looser exposure standard than that initially proposed by EPA, and EPA has since indicated that it will endorse a standard allowing for significantly more perchlorate exposure than its initial 2002 assessment would have allowed.

    Some environmental groups have complained of irregularities in the regulatory process regarding perchlorate. In particular, they allege there was undue and unprecedented intervention by White House entities, including OMB, to shape the NAS panel and the scope of its review. In addition, the National Resources Defense Council sought documents from several agencies (including OMB) regarding the issue, and sued under FOIA to obtain documents it claims were improperly withheld. Based on an index of some of the disputed documents, it appears you were involved with OMB's work on the perchlorate issue.

    a. Please describe your involvement in the perchlorate issue

ANSWER: OMB is often involved in addressing interagency disputes, and any involvement I had as General Counsel in perchlorate issues would have been in the context of attempting to resolve a dispute between EPA, DOD and NASA. I recall that the underlying scientific issue in dispute was referred to the National Academy of Sciences, but the initial decision to make such a referral may have been reached before I personally became aware of the issue. I do not have any relevant scientific training, and do not recall having a significant role in the underlying scientific issue. I did attend at least one meeting where the referral to NAS was discussed, and probably had other meetings, telephone calls, or discussions, either with OMB personnel or with the Offices of General Counsel in the agencies at issue.

b. To the extent not addressed in your answer to the previous question, please describe your role in:

i. The decision to convene an NAS panel to review EPA's work on perchlorate

ANSWER: I do not recall precisely how or when a decision was reached to seek NAS review. As noted above, the decision to refer the matter to NAS may have been made before I became aware of the issue.

ii. The selection of NAS panel members

ANSWER: I do not know how NAS selects panel members and do not recall having any involvement in that issue.

iii. The drafting of the "charge questions" laying out the panel's mandate

ANSWER: I was aware that EPA, DOD and NASA had disagreements regarding the nature of the charge. I may have participated in discussions about the language of the charge but do not recall personally drafting charge questions for the science panel to address.

iv. The response to any FOIA requests regarding this matter

ANSWER: I left OMB in August of 2003 and do not recall being involved in any response to FOIA requests on this issue.

c. Please indicate whether, while at OMB, you were involved in any other regulatory matters that involved an NAS review and, if so, please describe your involvement in setting up or directing the panel.

ANSWER: While it is possible that other regulatory issues at OMB during my tenure involved NAS review, I don't recall any such issues.

Health Authority

61. Title V of the Homeland Security Act authorizes the Secretary, acting through the Under Secretary for Emergency Preparedness and Response to provide the Federal Government's response to terrorist attacks and natural disasters. To carry out this responsibility, Sec. 503 transferred several emergency health response authorities to the Department of Homeland Security (DHS) from the Department of Health and Human Services (HHS). Specifically, the Act transferred to "(t)he Office of Emergency Preparedness, the National Disaster Medical System, the Metropolitan Medical Response System of the Department of Health and Human Services, including the functions of the Secretary of Health and Human Services and the Assistant Secretary of Public Health Emergency Preparedness relating thereto." However, the former Medical Advisor to the Secretary of DHS has said not all of the assets intended to be transferred to the Department actually were transferred, leaving some key capabilities at HHS. In addition, the recently released National Response Plan designates HHS as the lead agency for coordinating federal response to public health and medical disasters, including deployment of the same assets transferred to DHS, e.g. the National Disaster Medical System. Based on this apportionment of responsibilities it appears that the statutorily-required transfer of these functions from HHS to DHS may not have truly occurred. At a minimum, there appears to be confusion and overlap concerning the division of responsibility for a public health emergency. Please describe your understanding of the statutory authority and responsibilities of DHS to provide emergency medical services and functions as well as to those of HHS. Will you commit to reviewing this issue to ensure that statutorily-required transfers have, in fact, occurred?

ANSWER: I will review this authority and address the issue with relevant personnel, if confirmed, and reach a conclusion. I am informed that the following was the legal analysis of the Department during the relevant period.

Section 503 transferred to the Secretary of DHS the functions, personnel, assets and liabilities of, among other things, "The Office of Emergency Preparedness [OEP], the National Disaster Medical System, and the Metropolitan Medical Response System of the Department of Health and Human Services [HHS], including the functions of the Secretary of Health and Human Services and the Assistant Secretary for Public Health Emergency Preparedness [ASPHEP] relating thereto." I am informed that in order for DHS to determine which functions (defined by Section 2 of the HSA to include "authorities, powers, rights, privileges, immunities, programs, projects, activities, duties, and responsibilities") were to transfer to DHS/FEMA, it was necessary to examine the functions of OEP and NDMS at the time of HSA's enactment in November 2002.

The responsibilities of OEP, since renamed the Office of Emergency Response (OER), were articulated in a July 2002 Federal Register notice describing a reorganization within HHS, which included the creation of the Office of the ASPHEP (OASPHEP). 67 Fed. Reg. 48903 (July 26,

2002). Under that reorganization, OASPHEP was responsible for directing and coordinating HHS efforts related to "preparedness for and response to bioterrorism and other public health emergencies." The regulation provided that OASPHEP was to direct NDMS and any other emergency response activities within HHS related to bioterrorism and other public health emergencies. The Federal Register notice established that OEP/OER was to be the operational arm of OASPHEP and the lead in OASPHEP for "emergency actions." Finally, NDMS was, by statute, responsible for providing "health services, health-related social services, other appropriate human services, and appropriate auxiliary services to respond to the needs of victims of a public health emergency." 42 U.S.C. § 300hh-11.

In sum, OEP/OER, including NDMS, was responsible for preparing for and responding to major disasters, emergencies and public health emergencies. Consequently, under the HSA, the responsibility for these response activities was to transfer to DHS/FEMA. Although there were questions about whether all assets transferred from HHS, NDMS was incorporated into DHS/FEMA in March 2003.

Federal Air Marshal Service

62. Recent news articles have revealed policies of the Federal Air Marshal Service (FAMS) that allegedly limit employees' ability to reveal mismanagement and other problems at their agency. Specifically, it has been reported that "[a] 2002 employee policy statement says they may not 'criticize or ridicule' the agency 'by speech, writing or other expression,' and they may not 'address public gatherings, appear on radio or television, prepare any articles for publication' or release any information about the agency unless explicitly authorized to do so by management." Eric Lipton, "Some U.S. Security Agents Chafe Under Speech Limits," New York Times (April 26, 2005); see also Greg Krikorian, "Air Marshal Seeks Right to Speak Out," LA Times (April 22, 2005). While agencies have legitimate needs to protect classified and other sensitive information, this Committee has consistently supported the right of federal employees to make disclosures protected under the Whistleblower Protection Act, as such disclosures can enable the remedying of problems at an agency that can waste public resources and compromise the agency's mission.

    a. If you are personally familiar with current FAMS policy, is it your understanding that these news articles accurately reflect the FAMS policy? Do you believe that this policy could unlawfully restrain employees from making disclosures protected under the Whistleblower Protection Act?

ANSWER: I am not yet familiar with this policy, but would be pleased, if confirmed, to review it.

b. If you are not personally familiar with current FAMS policy, do you believe that the FAMS policy as described in these news articles could unlawfully restrain employees from making disclosures protected under the Whistleblower Protection Act?

ANSWER: I am concerned that the Department carefully protect the rights of Whistleblowers under applicable law. As I am not yet confirmed, I have not been involved in the particular incident or policy identified above. If I am confirmed, I will further review this issue.

V. Relations with Congress

63. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed?

ANSWER: I do so agree.

64. Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress if you are confirmed?

ANSWER: I do so agree.

VI. Assistance

65. Are these answers your own? Have you consulted with DHS or any interested parties? If so, please indicate which entities.

ANSWER Many of the questions posed in this questionnaire go to a level of specific detail about Department programs, DHS sub-components, or draft proposals for regulations or other efforts about which I have relatively little in the way of current, firsthand, personal or definitive knowledge. That said, I have endeavored to identify as much information as possible so as to be as responsive as possible to the Committee. This has entailed normal pre-confirmation and departmental orientation consultations with the White House personnel office and related staff, the Office of Government Ethics, DHS Counsel, and staff. That said, these answers are my own, and are based upon my understanding of the information provided to me.

AFFIDAVIT

I, Philip J. Perry, being duly sworn, hereby state that I have read and signed the foregoing Statement on Pre-hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Subscribed and sworn before me this 4 day of May, 2005.

Deana H. Amendolia
Notary Public

Embossed Hereon is My
Commonwealth of Virginia Notary Public Seal
My Commission Expires April 30, 2007
DEANA H. AMENDOLIA

Responses of Philip J. Perry, Nominee for the Office of General Counsel of the Department of Homeland Security, To Post-Hearing Questions Submitted by Senator Daniel K. Akaka May 19, 2005

1. In response to your pre-hearing questions, you referred the Committee to the opinion of the Department of Justice Office of Legal Counsel of May 21, 2004, that concluded that section 618 of the annual Transportation, Treasury, and Independent Agencies Appropriations Act is unconstitutional. Section 618 states that no funds shall be used to pay the salary of any officer or employee of the Federal Government who prohibits or prevents any other officer or employee from communicating with Congress.

   Yet, no federal court has concluded that section 618 or similar statutes are unconstitutional and the Office of Legal Counsel has not challenged the constitutionality of this or related statutes in court. Under such circumstances, shouldn't agencies presume that legislation passed by Congress and signed by the President is constitutional?

ANSWER: Like other Departments, the Department of Homeland Security is bound by the legal opinions issued by the Office of Legal Counsel. The May 21, 2004 OLC letter opinion cites similar prior OLC opinions from the 1980s and 1990s, and reflects the OLC position that Section 618 and two similar provisions are not binding on the Executive Branch. Please note that the OLC opinion at issue does not instruct any agency not to cooperate with Congress. It addresses the facial constitutionality of three legislative provisions.

2. The Supreme Court begins with the presumption that a statute is constitutional. See, e.g., *United States v. Morrison*, 529 U.S. 598, 607 (2000). It also construes statutes to avoid constitutional doubts. See, e.g., *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Will you likewise apply section 618 at the Department, especially given the fact that, "Congress has important oversight responsibilities and a corollary interest in receiving information that enables it to carry out those responsibilities" (O.L.C. Opinion, May 20, 1998)?

ANSWER: As indicated in earlier responses to the Committee's questions and during the hearing, I believe that the Department should take a constructive and cooperative approach to Congressional oversight and should find cooperative solutions to Congressional requests. As stated, that the OLC opinion at issue does not instruct any agency not to cooperate with Congress in any particular circumstance. It addresses the facial constitutionality of three legislative provisions.

3. The Office of Legal Counsel raised constitutional concerns about section 618 with regard to three types of information: classified and national security information, privileged information, and legislative recommendations. Would you agree that outside of these three categories of information, section 618 is constitutional and would apply to the Department?

ANSWER: OLC addressed the scope of its constitutional concerns on pages 2-3 of the opinion. As indicated previously, that opinion does not instruct an agency to withhold any particular information from Congress. If confirmed, I would take a cooperative and constructive approach to Congressional Oversight and would attempt to address Congressional requests in a manner that would provide necessary information while taking account of Executive Branch concerns.

4. In response to question 22 of your pre-hearing questions, you said that whistleblowers could make disclosures of information protected under the Critical Infrastructure Information Act of 2002 (CIIA) to "any appropriate government official, including the Inspector General." Unless information is classified, however, federal employees covered under the Whistleblower Protection Act are permitted to make disclosures of waste, fraud, and abuse to individuals outside the federal government, including the press. How do you reconcile your response with the provisions of the Whistleblower Protection Act in 5 U.S.C. § 2302(b)(8)? Is all information protected by the CIIA classified, or can it be disclosed to individuals outside the agency, including the press?

ANSWER: As indicated previously, my view is that information provided by whistleblowers can be a very valuable tool in identifying problems that should be addressed by the leadership of the Department. It is also my view that the CIIA was not intended to prevent disclosure of criminal acts or other improper conduct. Indeed, such information should not qualify as PCII. If confirmed, I would be pleased to review the statutory section identified above, along with the Department's policies, regulations and the CIIA, to ensure that the Department is properly protecting whistleblower rights consistent with the Whistleblower Act.

Responses of Philip J. Perry, Nominee for
General Counsel of the Department of Homeland Security
To Post-Hearing Questions Submitted by
Senator Frank R. Lautenberg
May 19, 2005

1. It's been reported that you helped spearhead the effort to kill the Chemical Security Bill in 2002, when you were at OMB. It has been three years and the country still has no program in place to protect Americans from a catastrophic attack on a chemical plant. Did you stop that bill? If you did help stop that bill, why?

ANSWER: My recollection is that there were two pieces of proposed legislation addressing chemical facility security pending in 2002 and/or 2003, one introduced by Senator Corzine and another introduced by Senator Inhofe. Both would have created regulatory authority for chemical facilities. As General Counsel of OMB, I supported the Administration's position that a legislative approach was appropriate to establish regulatory authority within the Department of Homeland Security. When I left OMB and returned to the private sector in 2003, I believe that both of the bills were still pending in Committee. I had no involvement in this issue while in the private sector. I am informed that a compromise was ultimately reached in Committee combining elements of each of the bills in the Inhofe bill.

2. What is your view on how homeland security funding should be distributed? Should distribution be strictly risk-based?

ANSWER: If confirmed, I would support Secretary Chertoff's position on the issue. He has said that: "[w]e need to be risk-based, and that means looking at threats, consequences and vulnerabilities. And those characteristics do not necessarily arise in large or small states per se. The issue is not where state lines are drawn, the issue is where our vulnerabilities lie. We are trying to maximize the way we use resources to get the most effective deployment and again to always be focused on where the greatest potential negative consequences may arise."

3. A GAO report came out in March 2005 stating that in a five-month period in 2004 (February 3 – June 20), at least 35 known or suspected terrorists bought guns in our country. Mr. Perry, do you think we should allow suspected terrorists to buy firearms?

ANSWER: Terrorists should not be permitted to buy guns. I am informed that the Department of Justice is currently reviewing this GAO report and its recommendations. If confirmed, I would be pleased to address these issues with the Department of Justice.

4. We're currently destroying records of suspected terrorists who purchased firearms within 24 hours. Should we change the law so that records of gun purchases by suspected terrorists are kept longer?

ANSWER: I am informed that the Department of Justice is currently reviewing these issues. If confirmed, I would be pleased to address these issues with the Department of Justice.

Responses of Philip J. Perry, Nominee for
General Counsel for the Department of Homeland Security,
To Post-Hearing Questions Submitted by
Senator Joe Lieberman
May 19, 2005

Privacy/Civil Rights and Civil Liberties

1. I would expect the Office of General Counsel to play a significant role, in conjunction with the Department's Privacy and Civil Rights and Civil Liberties Officers, in advising the Department and its constituent agencies on how to ensure that their policies and programs appropriately respect privacy, civil rights and civil liberties.

   What role do you intend to play in these issues and how you intend to recommend balancing the need to protect security with the need to respect liberty? Specifically, how would you envision your relationship with the Department's Officers for Privacy and for Civil Rights and Civil Liberties, and with the newly authorized, government-wide Privacy and Civil Liberties Board?

ANSWER: Secretary Chertoff has insisted that the Department be vigilant in protecting Americans' fundamental liberties and privacy, and I feel strongly that this is a critical piece of the Department's mission. If confirmed, I would ensure that the Office reviews the legal implications of any issue under consideration with an eye to privacy, civil rights and civil liberties. I should have a very positive and close working relationship with the Privacy Officer, particularly on issues relating to technology, and would work closely with her on issues relating to the Privacy and Civil Liberties Board. Likewise, I would also ensure that we are cooperating closely with the Civil Rights Officer, and that the legal staff therein is effective in protecting Americans' civil rights throughout other components in the Department. Success in these missions depends not only on cooperation with the Officers for Privacy and Civil Rights, but also on the active and coordinated pursuit of these principles by OGC attorneys throughout all of the Department's components.

Congressional Oversight

2. One of the recurring complaints we have had about this Department is its failure to respond appropriately and quickly to Congressional requests for information. I am encouraged by your responses indicating that you would work to improve this situation.

   Please elaborate further: What is your view of Congressional oversight and the Department's obligation to cooperate with Congressional information requests? On what bases do you believe the Department is entitled to withhold material from Congress?

ANSWER: As indicated previously, my view is that the Department can improve its approach to Congressional oversight, both by responding more promptly to Congressional requests and by taking a more proactive and constructive approach. If confirmed, I would work toward solutions to the types of issues that have apparently arisen in the past between the Committee and the Department. As indicated in my testimony, I believe that executive privilege claims should only be made sparingly and with great care.

Inspector General

3. We have heard concerns expressed by the IG's office that the General Counsel's office in the past has denied the IG access to Department information on the ground that sharing the information with the IG would risk waiving the Department's litigation privileges. It sounds as though the issue was eventually resolved in individual instances, but the fact that it has come up more than once greatly concerns me. The IG Act is clear that, unless the Secretary invokes an exception the Secretary never has invoked, the IG is entitled to access to all Department records. In other words, the IG Act recognizes no "litigation privileges" exception.

   Do you agree that there is no "litigation privilege" limitation to the IG's proper access to information? Do you agree that the only bases for withholding information from the IG are the ones articulated in the IG Act? Do you pledge that if you are confirmed, you will cooperate fully, and direct Department personnel to cooperate fully, with the IG?

ANSWER: I am not familiar with the history of the disputes you identify, but I have met with the Acting Inspector General and have committed to having an open and cooperative relationship. As indicated in my testimony, I believe that the IG's authorities and resources provide a critical tool for managing the Department, and that the Department leadership should have an open, cooperative and effective working relationship with the IG. I also believe it is clearly in the interest of the Department's many programs and offices to cooperate with the IG.

I also understand that the Inspector General is part of the Department. Thus, disclosure of litigation-privileged material to the Inspector General need not constitute a waiver of that privilege. If confirmed, I would be pleased to review these issues further.

Legal Authorities in Real ID

4. The Real ID Act, which was enacted last week, appears to give the DHS Secretary the authority to waive all laws to expedite the construction of barriers and roads in the vicinity of the U.S. border. The Act states that the Secretary's decisions to waive laws are not subject to judicial review, except for claims alleging violations of the Constitution. This law sets a disturbing precedent, as it seems to give the Secretary astonishingly broad powers. We are a nation of laws, but the Real ID Act allows the Secretary unfettered authority to waive any laws, as he wishes, without constraints. I believe that in this case the better part of valor is discretion, and I hope that the

Department approaches this new authority with the utmost caution. As General Counsel, you would be required to provide the Secretary with legal advice as to how to interpret and use this new power to waive all laws.

a. What are your views on this provision?

ANSWER: I agree that the Secretary should take great care in how he exercises any such discretionary authority. I am not yet sufficiently familiar with the particular circumstances in which such a provision could or would be employed, but I would be pleased to review this issue if confirmed.

b. Can you imagine circumstances in which you would advise the Secretary to waive laws so that he could more quickly build barriers and roads near the border? What are those circumstances?

ANSWER: As indicated, my inclination would be to use any such authority in a careful and limited fashion. I am not sufficiently familiar with the border measures at issue to offer a hypothetical opinion on circumstances in which the authority could or should be utilized. I would be pleased to review this issue further if confirmed.

c. What do you see as possible negative consequences from waiving environmental laws? Labor laws? Workplace safety laws? Laws protecting public safety? Are there laws you believe can be waived without causing adverse consequences?

ANSWER: The negative consequences of waiving the types of laws at issue would depend on the nature and scope of the particular waiver. It is difficult to imagine any proposed use of this authority that would be as comprehensive as the question suggests. If any waiver authority of this type is utilized, it should only be utilized in a manner that takes careful stock of the adverse or unintended consequences of the waiver. As indicated above, I believe that discretionary authority of this type should only be employed in a very careful fashion.

Treatment of Asylum Seekers

5. In February of this year, the U.S. Commission on International Religious Freedom reported on disturbing breakdowns in the Department's processes for considering asylum claims. The Commission observed that individuals who had expressed a fear of returning to their home countries were often deported without their asylum cases being properly considered. The procedures described in the report violated Department regulations and U.S. and international law. Department officials have promised the Committee that the Department is reviewing the report and intends to address its findings and recommendations. More than three months after the release of the report, I am unaware of any specific action taken by the Department to correct the deficiencies cited in the report, or even to explain to Congress and the public whether it agrees with the findings and intends to correct the problems.

Can you give us specific assurances that you will work with other Department officials to address the Report's findings and recommendations within a reasonable time frame, that you will work to correct the problems that do exist, and that you will ensure that Congress is provided with timely reports of Department actions?

ANSWER: I have not been involved in the Department's evaluation of this report. I have been informed that the Department has created a working group to address the issues raised by the report. If confirmed, I would examine these issues, identify what actions the Department is or should be taking on the issue, and ensure that an appropriate response is provided to the Committee.

Intelligence and Information Sharing

6. The Homeland Security Act created the Information Analysis and Infrastructure Protection Directorate with responsibilities regarding intelligence, law enforcement and other information related to terrorism. Yet the Committee has been told that DHS officials have had trouble obtaining certain information they believe they are entitled to receive under the law.

   a. I am encouraged by your statement that you believe the Secretary and IAIP have clear authority to obtain information from other Executive Branch departments and agencies, as well as from other components of DHS. Will you pledge to work to ensure these authorities are fully realized?

ANSWER: Yes.

   b. At the same time, the newly enacted Intelligence Reform and Terrorism Prevention Act creates a new Director of National Intelligence with significant authorities to integrate the Intelligence Community into a single enterprise. How do you view the authorities of the DNI with respect to DHS, and how will you work to ensure that this new relationship is successfully developed?

ANSWER: The Secretary has instructed that the Department cooperate fully with the DNI. I also believe that DHS should cooperate fully, and I will work to assist the Secretary in that effort.

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