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FOREIGN INVESTMENT, JOBS, AND NATIONAL SECURITY: THE CFIUS PROCESS

HEARING

BEFORE THE

SUBCOMMITTEE ON
DOMESTIC AND INTERNATIONAL
MONETARY POLICY, TRADE, AND TECHNOLOGY

OF THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

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CONTENTS

	Page
Hearing held on:	
March 1, 2006	1
Appendix:	
March 1, 2006	79

WITNESSES

WEDNESDAY, JANUARY 00, 2006

Edelman, Eric S., Under Secretary of Defense for Policy, U.S. Department of Defense	12
Ervin, Clark, Director, Homeland Security Initiative, The Aspen Institute	63
Glassman, James K., Resident Fellow, American Enterprise Institute	56
Jackson, Michael P., Deputy Secretary, U.S. Department of Homeland Security	10
Kimmitt, Robert M., Deputy Secretary, U.S. Department of the Treasury	7
Malan, Todd M., President and CEO, Organization for International Investment	57
Marchick, David M., Partner, Covington and Burling	59
Reinsch, William A., President, National Foreign Trade Council	61
Welch, C. David, Assistant Secretary, Bureau of Near Eastern Affairs, U.S. Department of State	15

APPENDIX

Prepared statements:	
Biggert, Hon. Judy	80
Castle, Hon. Michael N.	82
Edelman, Eric S.	84
Ervin, Clark	91
Glassman, James K.	94
Jackson, Michael P.	102
Kimmitt, Robert M.	112
Malan, Todd M.	118
Marchick, David M.	128
Reinsch, William A.	139
Welch, C. David	143

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Kimmitt, Robert M.:	
Responses to Questions Submitted by Various Members	144

FOREIGN INVESTMENT, JOBS, AND NATIONAL SECURITY: THE CFIUS PROCESS

Wednesday, March 1, 2006

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON DOMESTIC AND INTERNATIONAL
MONETARY POLICY, TRADE, AND TECHNOLOGY,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:03 p.m., in room 2128, Rayburn House Office Building, Hon. Deborah Pryce [chairwoman of the subcommittee] presiding.

Present: Representatives Pryce of Ohio, Biggert, Leach, Castle, Paul, Manzullo, Gerlach, Price of Georgia, Maloney, Sanders, Waters, Lee, Sherman, Gutierrez, Wasserman-Schultz, Moore of Wisconsin, Kelly, Garrett, Bachus, Ryun, Campbell, Barrett, McCarthy, Matheson, Cleaver, Davis of Alabama, Moxley, Meeks, and Scott of Georgia.

Ex officio present: Representatives Oxley and Frank.

Chairwoman PRYCE. This subcommittee will now come to order. Pursuant to the notice given previously, the Chair announces it shall limit recognition for opening statements to the Chair and the ranking minority members of the subcommittee and the Full Committee. Without objection, the opening statements of all members will be included in the record. I appreciate everyone's consideration of this. We have a lot of members who want to participate today, and we would never get to the witnesses if we allowed full opening statements.

At this time, the Chair recognizes herself for an opening statement.

First of all, I am very pleased to welcome all of you here today to this hearing on the Committee of Foreign Investments in the United States, CFIUS. I would like to thank our witnesses for being here on such short notice. I know that we all appreciate the opportunity to discuss the CFIUS process, and hopefully answer some questions regarding recent transactions.

The CFIUS process is not something that every American is aware of, or perhaps even every Member of Congress, until this past week. It is my desire to focus this hearing on how the Committee on Foreign Investment in the United States operates. I want the American people to have more information about the oversight and protections that are in place to determine if foreign investment is in the best interest of the United States' national security.

I would like to hear from our witnesses today how each CFIUS member evaluates a proposed transaction, and especially how the

process for the Dubai Ports World acquisition of the Peninsula and Oriental Steam Navigation Company's U.S. assets took place.

I, for one, was alarmed by the comments of Secretary Chertoff made over the weekend that America must "balance the paramount urgency of security against the fact that we still want to have a robust global trading system." To me, and to many Americans, that statement implied that there are aspects of our Nation's security that must be sacrificed at the altar of free trade. That is something that I fundamentally reject.

Since 9/11, Congress has invested millions and millions of dollars to strengthen our Nation's seaports, and has called for comprehensive security improvements costing billions over the next decade. Selling the management rights of these ports to foreign interests undermines the confidence Americans have in their leaders.

I am hoping you might reassure this subcommittee and the American public that there is no trade-off between participating fully in international trade, and ensuring the safety and security of our Nation.

Each of the departments and agencies that comprise CFIUS plays a critical role in securing our Nation from threats, both foreign and domestic. I think we can all agree that feeling secure is as much a perception as it is something that can be empirically assessed.

Therefore, I am hoping to learn today what, if any, consideration was given by CFIUS to the public's perception of the Dubai transaction, and how it might have weighted against the myriad of other factors the committee analyzed in reaching its conclusion.

This subcommittee has jurisdiction over the Exon-Florio provision of the Defense Production Act, which includes CFIUS, and we should take our responsibilities seriously. That is why we are here.

It is important during this period of concern for our security that we do not hinder future investment in the United States. That said, in this particular case, the DP World transaction, perhaps a little more forethought from our Administration and this committee would have helped to reassure our citizens that they will continue to be safe.

CFIUS gives the President powers to block certain types of foreign investment. But in our post-9/11 America, we need the assurance that our President has seen the CFIUS review, and that department heads are aware of what is going on in their agencies.

The Byrd Rule was instituted 13 years ago, 13 years before Osama bin Laden, 13 years before each American knew what a yellow, orange, or red elevated threat meant, and 13 years before there was a Department of Homeland Security. In a post-9/11 world, Congress operates under heightened awareness when it comes to all aspects of national security. Perhaps it is time we bring the Byrd Rule and the CFIUS process into a new decade with greater transparency and accountability, and I pledge to you all that this committee will do its best to see that that happens.

DP World has recently reissued its CFIUS request, and we in Congress welcome a thorough review of this company and this transaction. If DP World can effectively manage these ports without putting any aspect of American security at risk, then this 45-day review will bear that out. But should any aspect of the review

leave continued questions or concerns, I believe that Congress should take swift measures to address the security of our people and our ports.

My State of Ohio doesn't have any ports, but this issue goes beyond ports or railroads or airlines. This issue touches every American who wants to know that each day, they are safe. I hope that this hearing can begin to reassure our citizens, and I very much look forward to hearing our witnesses' testimony. And I will yield back the balance of my time and recognize my good friend, the gentlelady from New York, for her opening statement.

Mrs. MALONEY. I thank the gentlelady for yielding and for calling this important hearing.

A great number of questions have been raised about the security of our ports and the secretive approval process that led to this deal. Unless the President and the Congress act promptly, in the next day or so, the Government of Dubai will buy, over the strong objection of the American people, the company that operates 20 U.S. ports, including 7 of our largest ports, among them the ports of New York and New Jersey, which remain key terrorist targets.

The Administration hastily approved this deal, even without the 45-day investigation of national security concerns required by law. They approved this deal without consulting with or even informing the Congress, the American people, or the affected communities.

The American people find this deeply troubling. Wherever I go in New York, I am stopped by people. They literally walk across the street and ask me, "How can our government be so stupid?"

Clearly, the Administration's approval process reflects a pre-9/11 mentality. Our country cannot afford it, and the underlying law needs to be updated to reflect the post-9/11 world. We need to be focusing on how to improve national security at our ports and elsewhere, and not on how to do an end run around the national security reviews.

The law requires a 45-day investigation whenever an acquisition by a foreign government—and I quote—"could affect national security." Neither the President nor any of the 12 agencies involved in the government approval process thought that this $6.9 billion transaction to a foreign government in any way "could affect national security?" At the very least, we need to change the Administration's definition of national security. We need to inform them that our ports and the country's infrastructure are terrorist targets and national security concerns.

The 9/11 Commission Report concluded that terrorists have the opportunity—and I quote—"to do harm as great or greater in maritime and surface transportation as the 9/11 attacks." We need to ask probing questions today about a foreign government takeover of port management, and the process by which this decision was made. We need to see the objections of the Coast Guard or any other agency that raised questions.

And I might add that we would be asking the same questions if this agreement involved other foreign countries, such as China, Russia, Venezuela, or Pakistan. This is not discrimination, as has been alleged by the President. It is about protecting our national security.

I am not reassured by the new offer of a 45-day review. The President has made very clear that he will approve this deal no matter what any review shows. I am asking that this committee have access to all documents relating to the new investigation and to the prior review, every single bit of paper.

I am particularly interested in any objections. In a $6.9 billion deal to a foreign government, you would think there would be some objections somewhere, or some review, not a decision to just bypass the national security required 45-day review. So it is important that we see all of these documents.

We need to reform the CFIUS process. We need to make it stronger and more open to Congressional review. We need to ensure that it reflects the risks of the post-9/11 world. And most of all, we need to make sure that the American people are protected in their ports and in their trains and anywhere in America.

I yield back.

Chairwoman PRYCE. Thank you, Mrs. Maloney. The Chair now recognizes the Chairman of the Full Committee, the Honorable Michael Oxley, from the great State of Ohio.

The CHAIRMAN. Thank you, Chairwoman Pryce, and thank you for your leadership to address the Dubai Ports World issue, as well as examining it in the larger context of the CFIUS process and port security in general. I think that over the next few hours, we're going to learn a lot for our committee about the process and how it works. And while many people had an initial strong reaction to the Dubai Ports World acquisition and the company's increased role in port management, we must view this in context. So if this additional 45-day review gives us the opportunity to reexamine the issue and look at the progress that has been made in this area, then that is all for the good.

Certainly, we all welcome the added scrutiny, which will give everyone involved a chance to review the security issues and the status of the cargo shipping system. For instance, I have seen the press reports detailing the Coast Guard's reported concerns about the screening of cargo ship personnel and security of the cargo holds protection system. While they may or may not be directly related to the port management company, certainly we would be wise to give these specific issues further thought and evaluation. My own prediction is that this process eventually will reveal the merits of the President's position, and will show a system that is both efficient and seamless.

The world's cargo shipping system is global and interdependent. We trust our allies and our trading partners, because we all share a mutual interest and a secure system. Great strides have been made in increasing the security and efficiency of the system, which were begun long before the age of terrorism.

Much has been changed since I was on the docks of New York investigating organized crime as a young special agent of the FBI. After all, nearly one third of U.S. ports are managed by foreign-based companies. The role of the management company is to track where the cargo comes from and where it goes. The U.S. Coast Guard is in charge of port security. U.S. Customs Service is responsible for checking those cargoes. U.S. longshoremen handle the cargo and operate the cranes. To assume some connection between

the port management company and the content of the cargo misses a great deal about how the system operates.

As far as the CFIUS process is concerned, we should all be reminded that it is not, nor should it be, political in nature. That is a slippery slope, and it would be a mistake to take that step.

In our discussions with the Treasury officials who administer CFIUS, they have expressed their willingness to communicate more effectively and more often with this committee and with Capitol Hill. We have discussed informal quarterly briefings, and we at the Financial Services Committee would welcome that.

Now is a good time to think about the tremendous value of foreign investment for the U.S. economy and the message we want to convey to the world. According to the Organization for International Investment (OFII), U.S. subsidiaries of foreign-based companies employ 5.3 million Americans and support an annual payroll of $318 billion, with an average worker's salary of more than $60,000 a year.

Also, according to the OFII, U.S. subsidiaries of foreign-based companies invest heavily in the manufacturing sector. In my own State of Ohio, 208,600 workers are employed by foreign-based companies. We should be welcoming and encouraging foreign direct investment, not shutting it out.

I recommend to the members columnist Thomas Friedman's New York Times column on this issue that he wrote recently. And I quote, "The world is drifting dangerously toward a widespread religious and sectarian cleavage, the likes of which we have not seen for a long, long time. The only country with the power to stem this toxic trend is America."

Let's not be ruled by our worst fears. Let's not close off America, as the terrorists would hope we would. While protecting ourselves against any security threat, let's remember our American values of free trade and fairness and capitalism and the inherent worth of our relationships with other nations. Those are the American ideals we need to export to the rest of the world.

Madam Chairwoman, I want to particularly welcome our first panel, all distinguished gentlemen, three former ambassadors, a former lead individual with the Transportation Department, all with great knowledge not only of the CFIUS process, but the port issues in general. And I can't think of a more qualified and strong group to head this first panel. And with that, I welcome them and yield back the balance of my time.

Chairwoman PRYCE. Thank you very much, Mr. Chairman. I'd now like to yield for opening statement to the ranking member of the Full Committee, Mr. Barney Frank.

Mr. FRANK. Thank you, Madam Chairwoman. I am not often moved to poetry in this forum. But a line from a British poem—I regret that neither the author nor the title remains in my mind—is describing a seduction: "Whispering she would ne'er consent, consented." And that appears to me to describe the process in which we are now engaged.

There was a great deal of anger across the political spectrum when this was announced. Indeed, judging from the reactions my Republican colleagues have had on a wide range of other issues, it was not surprising that they reacted so negatively to this process.

But the seduction process appears under way. And I must say that while this committee has usually functioned in a very bipartisan fashion, I am distressed that the request of our ranking member for a witness list that was not so overwhelmingly one-sided was rejected.

We will have nine witnesses today, eight of whom will be ardent proponents of the deal. Now, we expect that from the Administration. What troubles me is out of the five non-Administration witnesses, there are two who take intellectual positions, one on either side, and then three other witnesses, all of whom are professionally involved in advocating for foreign trade.

Now, that is a perfectly reasonable thing to do, advocating for foreign trade. But if you're trying to have a reasonable hearing, then to have all three of those witnesses be people who have a professional interest in this, one an attorney. Again, perfectly honorable, but he practices before CFIUS. The likelihood that he would be at all critical seems to be rather low.

Then we have the Foreign Trade Council and the Organization for International Investment. Frankly, I don't even think FOX News would claim that this was fair and balanced.

So I really regret the one-sidedness of the witness list, and I know that our ranking member asked for some more balance.

Secondly, I want to address the issue that well, this is going to cause us problems, some of this criticism, with our allies in Dubai and in the United Arab Emirates. Although I must say that the argument that we should not be treating the Emirates any differently than England seems to me to be totally fallacious. The President said that.

Now, I am a strong supporter of the Visa Waiver Program. I fought hard to get Portugal involved. Britain, you can come to America from England without a visa. I don't want Dubai in that program. Does that make me a bad guy? I don't think I am prejudiced. I can think of a lot of other areas there. I am offended by their participation so eagerly in the boycott of Israel.

And I think we have a right to differentiate, and maybe not in this particular case. But to treat all countries the same when they have very different policies? Frankly, I am particularly upset that right now, the United Arab Emirates is sending 12 men to jail because they happen to be gay. And that doesn't happen in England. Now, that may or may not in the end be relevant, but it is one of the things you take into account.

But the central point I want to make here is that this seems to me, sadly, to be the latest example of incompetence on the part of this Administration. I agree it is regrettable that we are in this public debate involving the United Arab Emirates, which in some ways has been constructive and helpful, although they're subject to pressures. That is the President's fault. That is the fault of the people who let this go through.

In October, when Dubai approached the United States and said, "We want to buy the company that will run the ports," did none of you say, "You know, this might not be the best time to do that"? This political furor was entirely predictable. It is regrettable, but it was predictable.

And it is the incompetence of this Administration that has put us in this position. You should have told them back then, "You know what? There are a lot of things you can buy. We'd love to have the investment. Why don't you stay away from the ports for a while? We've had a lot of controversy over port security. We're worried about things being smuggled in. There is all this tension."

So yes, I think it is unfortunate we are in this situation. I think anyone with any sense last fall should have foreseen this. And again, it is not purely partisan. Didn't you have a sense that the Republican majority leader and the Republican speaker might be upset about this? Well, one reason perhaps you didn't is that there was no conversation, no consultation. I think that maybe this Administration will learn that doing these things without any kind of consultation is a mistake.

So we have very serious questions. And the final thing I would say is this with regard to this procedure. The notion that the President of the United States and the people under him are now going to conduct an independent review of a decision which he says was absolutely correct fools nobody except those who are eager to be fooled, those who are whispering they will not consent are planning to consent.

And here's the question I would have. If, in fact, the 45-day review is now necessary, why didn't you do it in the first place? And if you didn't really think it was necessary in the first place and you still believe it, why should we put any credence in the fact that you're doing it now?

So Madam Chairwoman, I am happy that we are having this hearing, but I would be happier if it was a better hearing.

Chairwoman PRYCE. The gentleman yields back, I assume. I'd now like to introduce our witnesses for today's hearing, and we'll hear from them as soon as the introductions are complete.

We have with us today the Honorable Robert Kimmitt, who is the Deputy Secretary with the Department of the Treasury. Welcome. The Honorable Michael Jackson, Deputy Secretary with the Department of Homeland Security. Thank you for being here.

Joining them is the Honorable Eric Edelman, Under Secretary with the Department of Defense. Thank you.

And the Honorable David Welch, Assistant Secretary of Near Eastern Affairs with the Department of State.

Thank you, gentlemen, all for being here. Thank you for your consideration of this issue, your preparation for it.

We look forward to hearing your testimony today, and we will begin with the Honorable Robert Kimmitt. Thank you.

STATEMENT OF ROBERT M. KIMMITT, DEPUTY SECRETARY, U.S. DEPARTMENT OF THE TREASURY

Mr. KIMMITT. Thank you, Madam Chairwoman, Chairwoman Pryce, Ranking Member Maloney, Chairman Oxley, Ranking Member Frank, and members of the subcommittee and Full Committee.

Thank you for the opportunity to appear before you this afternoon to address the Committee on Foreign Investment in the United States and its role in the review of DP World's acquisition of P&O.

CFIUS is an interagency body comprised of the Departments of the Treasury, State, Defense, Justice, Commerce, and Homeland Security, and six White House offices: the National Security Council, the National Economic Council, the U.S. Trade Representative, the Office of Management and Budget, the Council of Economic Advisors, and the Office of Science and Technology Policy.

The committee was established by executive order in 1975 to evaluate the impact of foreign investment in the United States. In 1988 and 1992, Congress passed legislation, now embodied in the Exon-Florio amendment, which empowered the President to suspend or prohibit any foreign acquisition of a U.S. corporation if the acquisition is determined to threaten U.S. national security.

CFIUS has evolved over time to keep pace with changes to the concept of national security. For example, in 1998, the Intelligence Community Acquisition Risk Center, known by the acronym CARC, was created. This office is now under the Director of National Intelligence, and provides CFIUS with the threat assessment of the foreign acquirer.

Further, following September 11, 2001, the newly-created Department of Homeland Security (DHS) was added to the committee, and DHS has played a primary role in reviewing many transactions, including the case at hand. Further, agencies that are not formal members of CFIUS are often called upon to lend their expertise.

CFIUS operates through a process in which Treasury is a chair, receives notices of transactions, circulates these and other materials to members of the committee, and coordinates the interagency process. Upon receipt of a filing, CFIUS conducts a 30-day review during which each CFIUS member examines the national security implications of the transaction, including the CARC threat assessment.

All CFIUS decisions are made by consensus. Any agency that identifies a potential threat to national security has an obligation to raise those concerns within the review process. If any member of CFIUS objects or raises a national security concern that cannot be satisfactorily addressed during the initial 30-day review period, then the case goes through an extended 45-day investigation period. The investigation period provides CFIUS and the transaction parties additional time to address security concerns that were identified but not resolved during the review period.

Under the Exon-Florio amendment, upon completion of the 45-day investigation, the Secretary of the Treasury, as chairman of CFIUS, forwards a recommendation and report to the President, who then has 15 days to take action. Upon making a determination, the President sends a report to Congress detailing his decision. The most recent such report occurred in September 2003, when the President reported to the Congress on his decision not to block the transaction between Singapore Technologies Telemedia and Global Crossing.

Let me turn now to the DP World transaction. At the outset, let me note that in contrast to some accounts, this transaction was not rushed through the review process in early February, nor was it casual and cursory.

On October 17, 2005, lawyers for DP World and P&O informally approached the Treasury Department's staff to discuss the preliminary stages of the transaction. This type of informal contact enables CFIUS staff to identify potential issues before the review process formally begins. In this case, Treasury staff identified port security as the primary issue, and immediately directed the companies to the Department of Homeland Security. On October 31st, DHS and the Department of Justice staff met with the companies to review the transaction and security issues.

On November 2nd, Treasury staff requested an intelligence assessment from the Director of National Intelligence. Treasury received this assessment on December 5th, and it was circulated to staff members of CFIUS. On November 29th, DP World issued a press release concerning the transaction. On December 6th, staff from the CFIUS agencies met with company officials to review the transaction and review additional information.

On December 16th, after almost 2 months of informal interaction and 45 days after CFIUS requested the intelligence assessment, the companies officially filed their formal notice with Treasury, thus beginning the 30-day process. Treasury circulated the filing to all CFIUS departments and agencies, and in this case also, the Departments of Energy and Transportation because of their statutory responsibilities and experience with DP World.

During the 30-day review period, the CFIUS departments and agencies continued their internal departmental reviews, and were in contact with one another and the companies. As part of this process, DHS negotiated an assurances letter that addressed port security concerns that had been raised earlier in the process. The letter was circulated to the committee on January 6th for its review, and CFIUS concluded its review on January 17th. Far from rushing the review, members of CFIUS staff spent nearly 90 days carefully reviewing this transaction.

Last Sunday, February 26th, DP World announced that it would make a new filing with CFIUS and requested a 45-day investigation. Upon receipt of DP World's new filing, CFIUS will promptly initiate the review process, including DP World's request for an investigation. The 45-day investigation will consider existing materials, as well as new information anticipated from the company. Importantly, the investigation process will also consider very carefully concerns raised by Members of Congress, State and local officials, and other interested parties. We welcome your input during this process, including issues that will be raised at today's hearing.

Madam Chairwoman and members of the subcommittee, those of us sitting at this table this afternoon share with you one fundamental principle, that our highest responsibility as government officials is protecting the national security of the United States. The work done by our colleagues in the initial review was guided by this standard, as will be our further efforts during the 45-day review. I am sure it will also guide your review of the President's report to you at the end of the investigation.

I thank you for your time this afternoon. I am happy to answer your questions after my colleagues make their statements.

[The prepared statement of Mr. Kimmitt can be found on page 112 of the appendix.]

Chairwoman PRYCE. Thank you, Mr. Secretary. And now we will hear testimony from the Honorable Michael Jackson, Deputy Secretary with the Department of Homeland Security.

Mr. Secretary.

STATEMENT OF MICHAEL P. JACKSON, DEPUTY SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. JACKSON. Thank you, Chairwoman Pryce, Ranking Member Maloney, Chairman Oxley, Ranking Member Frank, and members of the subcommittee and the Full Committee. I am grateful to be here today. We hope to have a good conversation about the issues involved in this testimony, and look forward to your questions. I'll be as brief as possible by way of an introduction.

I share the concerns and the assessments of Deputy Secretary Kimmitt about our commitment here to the process of working with the goal of defending the homeland. That is the touchstone against which the whole CFIUS process is graded, and it is the touchstone for us on all of our work in the CFIUS process. And I can guarantee you it will be our touchstone as we go forward in the 45-day review process.

I'll say just a word about whether or not the process was adequate in its time and attention to the task at hand. And I totally agree with Deputy Secretary Kimmitt that we had an adequate amount of time, a fully structured and resourced review of this matter. It was in part due to the fact of the long lead prior to the formal filing that we were able to look at this transaction with care and in detail.

Our Department, as Bob said, began on October 31st the formal work of meeting with the parties in this transaction, and it culminated in January with the determination that we had no objection to this transaction. Along the way, we reviewed all of the evidence available to us from the intelligence community and from our own resources within the Department, which we put against this task, and all of the Department's components concur in the conviction that the Department of Homeland Security should have no objection to this transaction moving forward.

I would like to just say that this was made somewhat easier in our case at DHS because of the already strong relationships that we have with Dubai Ports World in our work with them in Dubai with various programs that are administered by Customs and Border Protection and by the Coast Guard. So we had a record of understanding the nature of this firm and its operation and its commitments to the security regime, which we are bringing to domestic maritime activities.

I'd like to say just a little bit about the context for thinking about this transaction. The first views about this focused on, I think, misperceptions, and more information and more discussion is valuable here.

This is not about buying ports. The ports are owned by the State and local authorities. There is already a very, very strong investment by foreign-owned corporations in terminal operations of two types. One, by the ocean carrier industry that services our ports. That industry is today almost entirely foreign-owned. Second, by operating companies who operate terminals. And there are many

foreign terminal operators working today in the United States. This is a global supply chain business, and this transaction is not a dramatic new step in the profile of security management that we see in ports.

Just a word about the framework, then, in particular on port security. It begins overseas. We have after 9/11 made transformational changes, and I would say substantial investments. From fiscal year 2004 through the proposed fiscal year 2007 budget, which we have recently submitted, the Department of Homeland Security alone will have invested $10 billion in maritime security activities. This includes a variety of programs, but I'd like to highlight just a few.

One is our Container Security Initiatives that are managed by the Customs and Border Protection. These begin with pushing our borders out to foreign ports, to our work to inspect in-bound containers overseas before they leave. Approximately 80 percent of the in-bound containers are in the so-called CSI initiative today, and our work overseas with ports, including Dubai's terminal operator here, DP World, is extensive.

Similarly, when those containers come into the country, we have advance notice of the contents of those containers. They are run through a program of very intense analysis. We screen every single container in-bound through the United States. We then inspect 100 percent of all containers when they arrive that have any concern based upon our screening, our complex screening of the history of who's moving the container, what is in the container, who's receiving the container, who has touched the container, all the information that we have.

So on the container side, it starts overseas. The terminal operator unloads the container and does not have knowledge and visibility into the contents of the container. The terminal operator has a very important role in the security regime for these containers, but they do not have access to the rules and the determinations made about the selection of which containers we believe to be meriting further scrutiny.

In addition to the role of Customs and Border Protection, the Coast Guard has a preeminent role or protecting the maritime domain. This begins as well overseas in port inspections. It begins at the inspection and the review of in-bound ships and the crews on those ships with advance notice, so that we have time to review the nature of the vessel and the people on the vessel. This is combined and coordinated with our Customs and Border Protection review of the contents of the vessel. The captain of the port and the Coast Guard has authority for a comprehensive security regime at the entire port operation.

I am happy to answer further questions about that regime and the details of it. But we partner in this with our port authority partners, the public entities that own these ports. It is a water side and land side security regime. There are teeth in the regime for people who are scofflaws or who are not able to bring to bear the type of demands that we have for security. And we enforce those rules. The Congress has given us in recent years, in 2002, additional security challenges and authorities, and we are executing those responsibilities as well.

So what I would like to leave, just by way of introduction, is the understanding that this is a company that got a thorough review. This is a company that we had prior knowledge of and had worked with before. This is a security regime in the maritime world which is a complex layered system of systems, a web of security. And the terminal operating company is one part of that, and it is a small part of a larger piece of the security puzzle.

I am very comfortable that the review that took place was appropriate and fair. By the same token, I look forward to additional information that might be made available to the department as we participate in the 45-day review that is proposed. Thank you.

[The prepared statement of Mr. Jackson can be found on page 102 of the appendix.]

Chairwoman PRYCE. Thank you, Mr. Secretary. For the information of the members and the witnesses, we expect to have a Floor vote at about 3:00. It is the intention of the Chair to continue this hearing through that vote, or we'll be here all night. And so anybody who wants to leave and come back, feel free to do that, but we will continue the questioning of the witnesses through that 3:00 vote.

With that said, joining us now is the Honorable Eric Edelman, Under Secretary for the Department of Defense. Thank you very much, Mr. Edelman.

STATEMENT OF ERIC S. EDELMAN, UNDER SECRETARY OF DEFENSE FOR POLICY, U.S. DEPARTMENT OF DEFENSE

Mr. EDELMAN. Thank you, Madam Chairwoman, Congresswoman Maloney, Chairman Oxley, Congressman Frank, and members of the subcommittee and the Full Committee. Thank you for the opportunity to appear before you today to discuss the Department of Defense's role in the Committee on Foreign Investments in the United States and our review of the Dubai Ports World and Peninsula and Oriental Steam Navigation Company transaction.

As a formal member of the CFIUS process, the Department of Defense weighs a number of factors when it considers any individual proposed foreign acquisition of a U.S. company. First and foremost, a primary objective—

Chairwoman PRYCE. Mr. Edelman, could you just move the mic a little bit closer? We're having a hard time hearing you.

Mr. EDELMAN. How about that?

Chairwoman PRYCE. That is much better. Thank you.

Mr. EDELMAN. As a formal member of the CFIUS process, the Department of Defense weighs a number of factors when it considers any individual proposed foreign acquisition of a U.S. company. First and foremost, our primary objective in this process is to ensure that any proposed transaction does not pose risks to U.S. national security interests.

To do this, the Department of Defense reviews several aspects of the transaction, including the importance of the firm to the U.S. defense industrial base. That is, is it a sole source supplier, and if so, what security and financial costs would be incurred in finding and/or qualifying a new supplier if required? Is the company involved in the proliferation of sensitive technology or weapons of mass destruction? Is the company to be acquired part of the critical

infrastructure that the Department of Defense depends upon to accomplish its mission? Can any potential national security concerns posed by the transaction be eliminated by application of risk mitigation measures either under the department's own regulations or through negotiation with the parties?

Regarding this specific CFIUS transaction, the Departments of Treasury, Commerce, and Homeland Security met with legal representatives of Dubai Ports World and P&O for CFIUS pre-filing notification consultations on October 31, 2005. On December 6, 2005, the companies held a pre-filing briefing for all CFIUS agencies. The Defense Technology Security Administration attended the meeting for DOD.

On December 16th, the Department of the Treasury received an official CFIUS filing. And on that same day, Treasury circulated the filing to all CFIUS member agencies for review, and DTSA staffed the filing to 16 other Department of Defense elements or agencies for review and comment.

The review conducted by the Department of Defense on this transaction was neither cursory nor casual; rather, it was in-depth and comprehensive. The transaction was staffed and reviewed within the DOD by 17 of our agencies or major organizations. In this case, DOD agencies reviewed the filing for impact on critical technologies, the presence of any classified operations existing within the company being purchased, military transportation and logistics, as well as other concerns the transaction might raise.

During the review process on December 21, 2005, through January 6, 2006, DOD did not uncover any national security concerns that warranted objecting to the transaction or requiring a 45-day investigation. The positions of the different agencies and elements were approved by staff who ranged from subject matter experts up to the Deputy Under Secretary of Defense as appropriate to the various offices undertaking the review. All who were consulted arrived at the same position: Do not investigate further.

The DOD organizations that reviewed this and all other CFIUS transactions bring to bear a diverse set of subject matter expertise, responsibilities, and perspectives. The organizations include, for example, the Office of the Under Secretary for Intelligence; the Office of the Under Secretary for Acquisition, Logistics & Technology; the military departments—Army, Navy and Air Force; U.S. Transportation Command; the National Security Agency; and the Defense Intelligence Agency.

The Army, for example, reviewed the case in the following manner. Army Material Command, Headquarters, and Assistant Secretary of the Army for Acquisitions, Logistics, and Technology staff gave a preliminary review immediately upon receipt of the case. AMC staffed the filing to their subordinate readiness commands responsible for acquisition and logistics, including the Military Surface Deployment and Distribution Command. For this case, the Army's review criteria included the question of assured shipping, and the Army's final position was "No objection."

The Defense Technology Security Administration, which reviews, coordinates, and analyzes the recommendations from all the DOD components, as well as assessing export control and sensitive technology issues, ultimately signed off on the transaction for the De-

partment. Therefore, we had a comprehensive and in-depth review of the transaction. No issues were raised by any agencies or departments within the Department of Defense. We remain comfortable with the decision that was made.

I do want to provide a perspective from the Department of Defense regarding our relationship with the United Arab Emirates and their support as a friend and ally in the global war on terrorism. In the war on terrorism, the United States needs friends and allies around the world, and especially in the Middle East, to help in this struggle. A community of nations is necessary to win this long war.

In our recently published Quadrennial Defense Review, we've highlighted that in conducting this fight to preserve the security of the American people and our way of life, it is important that we strengthen the bonds of friendship and security with friends and allies around the world. We must have the authority and resources to build partnership capacity, achieve unity of effort, and adopt indirect approaches to act with and through others to defeat common enemies.

The United Arab Emirates is an outstanding example of the kind of partner we need in order to win this long war. Dubai was the first Middle Eastern entity to join the Container Security Initiative that Michael Jackson just described, a multi-national program to protect global trade from terrorism. It was also the first Middle Eastern entity to join the Department of Energy's Megaports Initiative, a program aimed at stopping illicit shipments of nuclear and other radioactive material.

The UAE has also worked with us to stop terrorist financing and money laundering by freezing accounts, enacting aggressive anti-money laundering and counter-terrorist financing laws and regulations, and exchanging information on people and entities suspected of being involved in these activities.

As you may know, the UAE provides the United States and our coalition forces with important access to their territory and facilities. General Peter Pace has summed up our defense relationship by saying that, "In everything that we've asked and worked with them on, they've proven to be very, very solid partners."

The UAE provides excellent access to its seaports and airfields, like Dhafra Air Base, as well as overflight through UAE air space and other logistical assistance. We have more Navy port visits in the UAE than any other port outside the United States. Last year, U.S. Naval warships and Military Sealift Command ships spent over 1,400 days in the ports of Dubai, Jebel Ali, Abu Dhabi, and Fujairah. And by the way, the port of Jebel Ali, which is the only carrier-based port in the Gulf, is managed by Dubai Ports World.

Coalition partnerships also used the UAE ports in this past year. The U.S. Air Force has operated out of Dhafra since the Gulf War in 1990. And today, Dhafra is an important location for air refueling and air reconnaissance aircraft, and for supporting operations in Iraq and Afghanistan.

And we should note that our most important commodity, our military men and women, were frequent visitors to the UAE. In fact, over 77,000 military men and women were on liberty or leave in the UAE in 2005.

So we rely on the Emirates for our security in their country, and I appreciate and would like to express my thanks to the government of the UAE for that.

Our close military-to-military relationship with the UAE also includes the use of the UAE Air Warfare Center established in January 2004, where our pilots train with pilots from countries across the Middle East.

Finally, the United Arab Emirates have been very supportive of our efforts in Iraq and Afghanistan. They've provided military and operational support to Operation Enduring Freedom in Afghanistan, and financial and humanitarian aid to Afghanistan and its people. The UAE has provided monetary and material support to the new Iraqi Government, including a pledge of $250 million in economic and reconstruction assistance.

Madam Chairwoman, this concludes my formal statement. I'd be happy to answer any further questions you or your colleagues may have on this subject.

[The prepared statement of Mr. Edelman can be found on page 84 of the appendix.]

Chairwoman PRYCE. Thank you very much.

And now we'll hear finally from the Honorable David Welch, Assistant Secretary of Near Eastern Affairs with the Department of State.

Thank you very much for being with us this afternoon, Mr. Welch.

STATEMENT OF C. DAVID WELCH, ASSISTANT SECRETARY, BUREAU OF NEAR EASTERN AFFAIRS, U.S. DEPARTMENT OF STATE

Mr. WELCH. Thank you, Madam Chairwoman. I'll try not to repeat what my colleagues have already said in order that you and your colleagues may make the vote and expedite the hearing.

Forgive me for my voice. The UAE is a longstanding friend and ally of the United States, and a key partner in the global war on terror. Secretary Rice reiterated this during a recent visit just last week to the United Arab Emirates.

As Ambassador Edelman said, the UAE provides the U.S. and Coalition forces with critical support for our efforts in Iraq and Afghanistan, including unprecedented access to ports and territory, overflight clearances, and other critical logistical assistance.

Furthermore, as a moderate Arab state, the UAE has long supported the Israeli-Palestinian peace process, and shares our goals of a stable economic, political, and security environment in the Gulf region, and in the Middle East more broadly.

The UAE also cooperates with us on a host of non-proliferation and law enforcement issues. It has enacted aggressive counter-terrorist financing and anti-money-laundering laws, it has frozen accounts, and it has exchanged information with us on people and entities suspected of being involved in terrorist financing and proliferation activities.

The UAE also provides substantial assistance to its friends around the world, including military support and financial support to the Iraqi Government; humanitarian relief for the people of Afghanistan; housing and hospitals for the Palestinian people; and

$100 million for the victims of the recent Pakistani earthquake. The UAE was also one of the first nations to offer financial aid to the United States after Hurricane Katrina struck the Gulf Coast, and it provided one of the largest foreign donations of $100 million.

As Deputy Secretary Jackson has mentioned, the UAE is an established partner in protecting America's ports. The purpose of the interagency CFIUS process, in which the Department of State is an active participant and reviews, is to establish whether a transaction could affect national security. And the fact that the United Arab Emirates is a friend and ally of the United States did not and will not diminish the rigor of that process. We're confident in the State Department that the additional time now available will provide an opportunity to review the concerns expressed over this transaction, and to confirm that it does not jeopardize in any way the national security of our country.

Thank you very much.

[The prepared statement of Mr. Welch can be found on page 143 of the appendix.]

Chairwoman PRYCE. Well, thank you very much, gentlemen, for your testimony this afternoon. Let me just start off by asking all of you—and maybe one would prefer to answer first. Maybe our Homeland Security representative would like to go first. But I want to start out with the question that every American wants the answer to. Are we more or less safe if this deal goes through? Mr. Jackson, do you want to—

Mr. JACKSON. If this transaction goes through, we are no less safe tomorrow than we were today.

Chairwoman PRYCE. And you make the case that you can separate operations from security, but it just doesn't equate to me how that is possible. Won't there be some sharing of information and data in terms of logistics and escape routes and emergency measures, and just the basic things that working together require the sharing of?

Mr. JACKSON. Well, let's unpack this a little bit. First of all, in the global supply chain, there is widespread understanding of the nature of our security requirements, which this firm already enjoys by virtue of its participation in the Container Security Initiative today. There is the broader understanding that any member of the global supply chain marine industry has of our broad contours, which are written into law and published in regulations and explained very routinely and clearly, that describe security measures.

There are certain things in the terminal operation which are simply not accessible to the terminal operator. For example, the terminal operator's main role is to unload containers, unload cargo, and to place them on trucks or trains for shipment into the United States, and similarly, to load cargo and freight leaving the country.

In doing so, the content of those containers is simply not known to the men and women doing the daily work. This is the role of a different set of government actors. There are security requirements that we can audit and do audit on a routine basis that they're required to know. And so certainly there are facility security arrangements that are specific to a given terminal. And we have a capacity to come in and audit the people who are implementing them, and we have the capacity in this transaction, frankly, to draw more in-

formation about Dubai Ports World's employees in the United States more readily than we can at present with other terminal operators. And that is a feature of the assurances letter which they have provided us.

So we believe that we can impose the right type of background scrutiny of employees and security arrangements at the terminal. And there are certain things that they will see by virtue of operating the terminal, but other security features are beyond their control, random in nature, and unknown to the terminal operators.

Chairwoman PRYCE. Well, let me take a different tack, then, on to a different subject. This 45-day investigation that will begin soon, once the filing is made, who will conduct the investigation and how is that different than the work that's already taken place? And to what end will it be shared with the public? Deputy Kimmitt, is that your bailiwick?

Mr. KIMMITT. Yes, Madam Chairwoman. Once the company files—and it will be a new filing, a resubmission—the filing will, as I indicated earlier, be immediately circulated to all the agencies who comprise CFIUS. The policy level—that is, assistant secretary level—of the government that to some degree had been involved in the decision thus far will look at that new filing, determine what additional questions they might have, what additional information they may need, and then they will send it up to the deputies' level. That will be the commencement of the 45-day period.

During that period, we at the deputies' level will be looking both at the information that had been originally filed and the new information, and listening, of course, very carefully, as I said, to concerns that had been raised by the Congress and other interested parties.

During that period, we will then make a recommendation to the Cabinet Secretaries. And then no later than the 45th day, the Secretary of Treasury, as chair of the CFIUS committee, will send forward both a recommendation and a report to the President, who has 15 days to consider that submission. Once he makes his determination, a report will be sent to the Congress, as has been done in previous cases.

Chairwoman PRYCE. My time has expired. The gentlelady from New York.

Mrs. MALONEY. Thank you. Defense, you testified that you did not think that critical infrastructure was national security. And as we know, the law requires a 45-day review for any act that could affect national security.

So my question—and I'd just like a yes or no answer, and just go down the line from Treasury to Homeland—would you accept a change in the CFIUS law that would have a broader definition of national security for the CFIUS process that would include critical infrastructure?

Most national security experts, and certainly the 9/11 Commission, wrote that our ports were part of our critical infrastructure and important to our national security. So Treasury, yes or no? Broader definition, yes or no?

Mr. KIMMITT. Well, first, I think the current definition does encompass critical infrastructure. If I may?

Mrs. MALONEY. I want a—would you accept a broader definition that includes critical infrastructure? Yes or no? I've heard some reports and read reports that you're opposed to that.

Mr. KIMMITT. No. I think there needs to be a broader definition.

Mrs. MALONEY. You think there needs to be one. Homeland.

Mr. JACKSON. We would have no objection.

Mrs. MALONEY. Defense?

Mr. EDELMAN. Congresswoman Maloney, I'd just like to make clear that what I testified to was that whether or not a company is acquiring critical infrastructure is a consideration that the Department of Defense considers, critical infrastructure from the point of view of the Department of Defense—

Mrs. MALONEY. And would you accept a broader definition of national security to include—

Mr. EDELMAN. Critical infrastructure is part of national security, from my point of view.

Mrs. MALONEY. Would you accept a broader definition? Yes or no?

Mr. EDELMAN. I would accept that definition.

Mrs. MALONEY. You would? And State?

Mr. WELCH. No objection.

Mrs. MALONEY. No objection. Well, I am working on legislation to strengthen the CFIUS process, and certainly the American people believe, and I think they're correct, that our national infrastructure is part of national security and should have a higher level of oversight. I am—

Mr. JACKSON. Can I just assure you that in this process, we do that.

Mrs. MALONEY. May I—you've all agreed on that, so let's keep going. I'd like to go to the approval process that I found troubling when the President of the United States said he wasn't aware of this approval, and the head of Homeland Security said he wasn't aware of it. Defense said they weren't aware. Although there are 12 agencies that make this decision, the decision was made by mid-level or low-level people for a $6.8 billion agreement that included 20 key ports, and was a major change in that Dubai Ports World, is a foreign-controlled company, which is different from P&O, a British company that is privately owned.

Treasury told me earlier that there are roughly 40 to 60 of these decisions in CFIUS every year, but most of the acquirors are privately owned. How many involve foreign government-owned companies? How many government-owned, such as Dubai Ports World?

Mr. KIMMITT. Could you give me a time period?

Mrs. MALONEY. Within a year.

Mr. KIMMITT. Within a year? Well, let's take 2005, for example, Mrs. Maloney. There were 65 notifications, of which 12 were government-owned or controlled.

Mrs. MALONEY. Twelve. I would venture to say that 12 decisions of this importance should be made at the cabinet level, not by low-level employees that people don't even know who they are. I've looked at the lists. I've never heard of them.

But I just want to say there was a—and I would like to request copies of all of these leases and all the documents pertaining to those leases. And in this agreement process that we're going for-

ward with, I would like to know, when the committee decided not to undertake a 45-day investigation, did it provide DPW with a document saying that? When you decided not to take the 45-day option?

Mr. KIMMITT. At the point the 30-day period concluded, the company was notified of the results of that 30-day review.

Mrs. MALONEY. Could we get a copy of that notification, the committee?

Mr. KIMMITT. We'll certainly provide it.

Mrs. MALONEY. And was this letter withdrawn as part of a new agreement to a 45-day review?

Mr. KIMMITT. I am not sure of the form of communication, Mrs. Maloney. I'll find out what that is. And once the new filing takes place, we'll be dealing with a second separate case.

Mrs. MALONEY. And can we get a copy of the standstill agreement?

Mr. KIMMITT. My understanding is that the company has provided that to Members of Congress. I've actually seen Members of Congress refer to it on television.

Mrs. MALONEY. Oh, I would love to see it.

Mr. KIMMITT. We'll certainly—

Mrs. MALONEY. And they're new application? Is that out, their new application, a copy of that?

Mr. KIMMITT. They have not yet filed that.

Mrs. MALONEY. They haven't filed it. Okay, thank you.

Chairwoman PRYCE. The gentlelady's time has expired.

Mr. KIMMITT. Madam Chairwoman, may I please? With respect, Mrs. Maloney. The people who conducted this review are highly dedicated career professionals. These are the people we entrust to safeguard our security every day. I think there was clearly a problem here with the Congressional notification aspect of the process. I admit that. We at higher levels take responsibility for that.

But I have to strongly support the professional work done by career professionals who day in and day out, through Administrations Republican and Democrat, are called upon to make sacrifices for their country to make tough decisions like this. And I know you weren't suggesting that this process be politicized.

Clearly, we want the security review to be undertaken by the people best equipped to do that. I think we have to figure out how to take their good work and communicate with you to make sure that you can discharge your important oversight responsibilities.

Mrs. MALONEY. May I respond briefly, Madam Chairwoman? When we're talking about a $6.9 billion contract, and it is only a few contracts, I think that the head of the agency should be aware of it.

And all of us bring our personal experience here. And one of my—part of my personal experience was one of the biggest scandals in New York City history was a $25 million contract—millions, not billions—whereby the head of the agencies didn't approve it, but low-level, mid-level people. And the reform that came out of it is that the head of the agency, on something that involves that much money, that much real estate, 20 ports, two of the highest terrorist targets in the United States, according to the CIA and FBI, the New York and New Jersey ports, that this warrants the

review of the head of an agency that people know, people trust, and people—

Chairwoman PRYCE. In the interest of—

Mrs. MALONEY. It does not build my trust to hear that heads of agencies and the President are not aware of this agreement.

Chairwoman PRYCE. Members must get to their votes, Mrs. Maloney. We must proceed. All right. The gentleman from Delaware, Mr. Castle.

Mr. CASTLE. Thank you, Madam Chairwoman. Mr. Kimmitt, I assume from your answer, and I'd like to ask the others as well, that the four of you were not involved in the initial 30-day CFIUS review of this particular application; is that correct? Were any of you in the room during that review period?

Mr. KIMMITT. No, that is correct. Generally, what would come to the deputies' level is any unresolved security concern that would have to be taken into an investigation.

Mr. CASTLE. Did those types of security concerns come to the attention of any of you before this decision was actually made?

Mr. KIMMITT. Not before me personally.

Mr. CASTLE. Anybody? You're all shaking your heads no?

Mr. JACKSON. No, sir.

Mr. EDELMAN. No, sir.

Mr. CASTLE. Based on—when, then, did each of you find out about this? After the dust-up occurred and it started making the news? Or do you typically have a review at some point before that? Very quickly, how did each of you find out about the decision itself, and what occurred that made you find out about it? Or is it normal course, or something that happened?

Mr. KIMMITT. I had it called to my attention by a member of my staff in February, several weeks after the decision had been made.

Mr. JACKSON. I had it called to my attention by Deputy Secretary Kimmitt giving me a call to alert me that this is something that he had had a question raised with him about.

Mr. EDELMAN. I also learned about it from Deputy Secretary Kimmitt in a phone call.

Mr. WELCH. Sir, I learned as we were preparing for the Secretary of State's trip to Abu Dhabi and the UAE, and that would have been about 3 weeks ago.

Mr. CASTLE. So a lot of this is pretty recent is what you're really saying. I mean—

Mr. WELCH. In my case, sir, perhaps I should explain a little bit.

Mr. CASTLE. If you can do it quickly.

Mr. WELCH. The person responsible in the State Department is in a different office. He may well have learned earlier.

Mr. CASTLE. Got you. You're in a different level. Got you. Or a different circumstance.

My next question, then, is based on what you have learned since then, and if you put yourself back in the position of reviewing, in that 30-day period, would you have agreed with the decision that was made then, or do you think this is something that should have gone into the 45-day period and be reviewed by the President?

And I've just looked at a CRS report, which indicates that doesn't happen very frequently. And I've listened to your testimony today, which indicates to me you're going to say no, you wouldn't change

your minds. But there has been a heck of a lot of water that's gone under the bridge since this decision was made public. Some of it may be not totally credible. Some of it may be credible. And I don't know if it's brought any doubts. Do you wake up early thinking about this, that maybe somebody had made a wrong decision or whatever?

I am not trying to impugn anyone's reputation or decision-making. But do you think that in retrospect, perhaps this was not a correct decision to close it out on the 30 days and not extend it to the next cycle, for national security reasons?

Mr. KIMMITT. I think the security review was conducted thoroughly and professionally, Mr. Castle. If I had learned about it before the decision was made, I would have come—after I apprised myself of the facts—I would have come very quickly into contact, as I did, with my colleagues at the deputies' level, assuming that they were as comfortable as I that the proper procedures had been followed and that the correct security experts had looked at it.

I think that one of the things that we would have thought, not only of informing our bosses, but how best to notify the Congress. When I found out about this, I got the facts, I told my boss, and I said, "Let's notify the Congress."

Mr. CASTLE. So you're sort of suggesting that you would have had sort of a political concern if you had known about it?

Mr. KIMMITT. Well—

Mr. CASTLE. Again, I am not trying to put words in your mouth here and suggest anyone was wrong in their decision. You're suggesting to me—

Mr. KIMMITT. I would say it would have given us a better chance to present the facts that were before the security review. Our first obligation would have been to look at it, of course, to see if, in fact, the national security interests of the United States were protected. That is our first obligation, and certainly it was yours.

But if we agreed, as we do in this case, that the people at that level acted professionally, consistent, I might say, with practices going back almost 20 years, then I think the question would have been how best to bring that to the attention not only of people more senior in the Administration, but to come into close contact with the Congress—

Mr. CASTLE. Let me get—I only have a little bit of time. Could the others try to take a shot at answering that question?

Mr. JACKSON. But what I know right now, sir, I do not see evidence on the table that would make me feel concerned about changing the Department's vote on this issue. I will say that we have internally already re-racked the way that we manage inside DHS the discussions of this so as to make sure that they all come up to the front office for—

Mr. CASTLE. What about just the plain political—I know I am running out of time—the plain political point of view in terms of the sensitivity of a Middle Eastern country, maybe an ally, but maybe not known to the public at large, maybe even to Members of Congress, in not having a more thorough public discussion of this in that kind of a decision-making? Was there some sensitivity with that, even if you agree with the decision?

Mr. JACKSON. I think that it is apparent we could have done better on communicating with Congress about this transaction. There were lots of reasons why we anticipated a process would brief in the normal course of events, and this one turned out not to be a normal event. There was also, I think, quite a bit of evidence about this transaction in the press prior to the conclusion of the transaction review, and that did not raise warning signs within the—

Mr. CASTLE. Mr. Jackson, could I get a quick answer from the other two, and then maybe perhaps Mr. Kimmitt? But the Chair may cut me off at any moment here.

Chairwoman PRYCE. I am going to cut you off in a second. Go ahead. Secretary Kimmitt and—

Mr. KIMMITT. Well, if I could, just one point before my colleagues answer Mr. Castle. Because you asked the question then about the public, if you look at the law, the law says that we are to hold confidential information provided to the committee during the pendency of a review. There is an exception for the Congress, but not for public disclosure.

And remember the important reason for doing this, not just that classified information may be involved in the intelligence review, but you want these companies to feel comfortable filing with CFIUS and providing their most sensitive proprietary data. And frankly, a lot of these transactions don't go forward. We tell them it is not going to work, and they don't want to suffer the reputational risk of having CFIUS reject the deal.

Mr. CASTLE. Not too many, though.

Mr. KIMMITT. No. A good—

Mr. CASTLE. About six or seven out of, what, 1,500 or so?

Mr. KIMMITT. Well, I'd be glad to discuss longer. What you have seen are the ones where the company decides to take it all the way through the process. What we need to do is give you a lot more fidelity on the number that are withdrawn.

The CHAIRMAN. [presiding] The gentleman's time has expired. The gentleman from Vermont.

Mr. SANDERS. You don't look like a Madam Chairwoman. Thank you, Mr. Chairman.

Let me be very clear, and I want to thank our guests for being with us today. I have very strong concerns about this proposed agreement. And frankly, it is incomprehensible to me that a President who has talked so much about national security would allow this agreement to go through.

At a time when we are spending billions of dollars trying to protect the American people from terrorism, I cannot understand how the Committee on Foreign Investments in the United States would okay a deal that would put the operations of major American ports into the hands of a company that is wholly owned by the United Arab Emirates Government. This is not a foreign company. This is a government-owned company.

Several facts that I think we need to know about the United Arab Emirates, who, if this deal goes through, will own and control this company. And I say this, making clear that I am not a xenophobe, I am not anti-Arab, I am not an Arab basher. But I think it is important that we get some facts out.

According to the 9/11 Commission, unlike Iraq, to whom we went to war, the United Arab Emirates Government had direct ties to Osama bin Laden, and was one of three countries in the world to recognize the Taliban Government of Afghanistan. At least two 9/11 hijackers came from the United Arab Emirates. According to the FBI, money was transferred to the 9/11 hijackers through the UAE banking system. After 9/11, the Treasury Department reported that the UAE was not cooperating in efforts to track down Osama bin Laden's bank accounts. The UAE has been a key transfer point for illegal shipments of nuclear components to Iran, North Korea, and Libya.

Further, there are, as I understand it, no Democratic institutions in the United Arab Emirates. There is no transparency. People cannot speak up, or else they go to jail. And yesterday, we learned that the parent company of Dubai Ports World is honoring an Arab boycott of Israel.

Here are my questions. And given the time limitations, I would appreciate you guys being brief.

Question 1: The 9/11 Commission reported that a United States missile strike intended for Osama bin Laden had to be called off in 1999 because members of the United Arab Emirates royal family and government officials were at bin Laden's hunting camp in Afghanistan. In other words, we could have killed Osama bin Laden over 2 years before 9/11 if we were not concerned about harming the royal family of the UAE.

Can any of you tell the American people the names of the government officials or royal family who enjoyed hunting trips together with Osama bin Laden? Further, can you tell us that these very same officials will not be involved in the UAE Government-run Dubai Ports World, which will have ownership of six major American ports?

That is my question. I would appreciate an answer.

Mr. KIMMITT. I do not know the facts, Mr. Sanders, on the first part of your question. I will tell you that when we look at a company, we take a look at its management, its board, and so forth.

Mr. SANDERS. Which in this case is the Government of the UAE.

Mr. KIMMITT. There are government representatives—

Mr. SANDERS. This is owned by the UAE Government; is that correct?

Mr. KIMMITT. As the intelligence community takes a look at this, they take a look at the company. As you say correctly, in this case, it is both an operational company and the government.

Mr. SANDERS. Here's my question. According to the 9/11 Commission, UAE top officials and royal family members associated with Osama bin Laden. Can you tell us absolutely that these very same people will not be running six major American ports in the United States? Can you tell me that?

Mr. KIMMITT. I will pledge to get that information back to you, Mr. Sanders.

Mr. SANDERS. All right. Could any of you tell me? This is a government-run company, and government officials had a friendly relationship with Osama bin Laden. Can anybody else tell me that we will know for a fact that some of these very same officials will not be running this company? I am not hearing it. And to my mind,

it is beyond comprehension that if you cannot answer that simple question, I cannot understand why we would go through with this transaction.

Mr. KIMMITT. Mr. Sanders, I said I would get you the answer.

Mr. SANDERS. Please get it.

Mr. KIMMITT. I just don't have the information. And what I will say—

Mr. SANDERS. I will be very surprised. And tell me what I am missing here. Government-run company, government officials associating with Osama bin Laden. And how do you know that tomorrow, new people will not be put in place? Can you tell me that?

Mr. KIMMITT. Well, first, there have been some pledges made by the company.

Mr. SANDERS. By the government.

Mr. KIMMITT. Right, by the government.

Mr. SANDERS. Yeah.

Mr. KIMMITT. I would say on the fundamental point you've made, when the intelligence community makes its risk assessment, they are looking at all information available to them; certainly, what the 9/11 Commission has reported and what has come since.

What I need to do is to go back and get you that answer, and I pledge to do it.

The CHAIRMAN. The gentleman's time has expired.

Mr. SANDERS. Thank you very much.

The CHAIRMAN. I'd take the priority of the Chair to ask a few questions.

Ambassador Kimmitt, have you received a new filing from the Ports World?

Mr. KIMMITT. We have not, Mr. Chairman. Their chief operating officer testified yesterday. My understanding is they are also in consultation with people on the Hill today. We anticipate receiving it very shortly, but we have not received the formal filing. We have received some of these documents referred to, one of which I said we would endeavor to get either from them or directly to Mrs. Maloney.

But the actual CFIUS filing is still under preparation, and I think one of the things that has delayed it is listening to the concerns raised by the Congress.

The CHAIRMAN. Would the trigger for the 45 days begin at the filing?

Mr. KIMMITT. No. Mr. Chairman, when the filing comes in, it will be stamped in as a new case at the CFIUS staff level. It will then move to the policy, or assistant secretary, level. And only when it comes to the deputies' level does the 45-day clock begin.

I would imagine that would be relatively quickly. But at each level, the staff needs to do its circulation of this new material. The policy level needs to look at whether there is any additional information they need to move it forward. So the actual 45-day clock begins when it has been passed from the policy level to the deputies' level.

The CHAIRMAN. Thank you. The CFIUS process is under the jurisdiction of this committee, has been since the act was passed. And we've had numerous discussions, both informal and hearings

and so forth on the CFIUS process. It is clear that the general public really doesn't know what CFIUS is.

As a matter of fact, one of the writers, Homan Jenkins, for the Wall Street Journal, was—he said that CFIUS sounds like one of the hazards of a foreign holiday that your doctor warns you about.

But anyway, what—and in my opening remarks, I made it clear that I felt that to politicize the process, the CFIUS process, would be a huge mistake. I meant that in the true sense. I didn't necessarily mean in terms of more openness and transparency.

If you were to, in hindsight, now, advise this committee how we should proceed, if at all, with another look at the CFIUS process, what would you recommend?

Mr. KIMMITT. Well, again, Mr. Chairman, I think the interagency aspect of the CFIUS process worked well. I might say this is one of hundreds of interagency committees in the government, and this is actually one that's been looked at probably more frequently by the GAO. We have public regulations out in the public domain.

When it is referred to as secretive, it is just that when the committee meets, because we're dealing with proprietary information that we're barred by the law from discussing publicly, and sensitive, sometimes very sensitive, classified information, like any interagency process, the actual meeting itself is held behind closed doors.

I think where we need to focus our attention, Mr. Chairman, is on determining the way that we can help you better exercise your important oversight functions. That means, as Deputy Secretary Jackson said, we need to make sure that, for example, in our departments, in addition to these highly professional security personnel who do the actual review, that we get both higher-level people involved, but also our legislative liaison, public affairs, and other people to determine how, as we come into contact with you, we can have an opportunity for the dialogue that ultimately will give you more visibility, and then ultimately determine how best to present it to the public.

The CHAIRMAN. And would that be informally in the committee? Or how would that work? How would that interaction work? And particularly as it related to sensitive information, proprietary information, that kind of thing. Obviously, it is a very difficult—try to lead us through that, how that would work.

Mr. KIMMITT. Well, Mr. Chairman, I think as you said in your comments, one of the concerns expressed in the GAO report—and I might say the GAO is as knowledgeable on this subject as anybody. They've done a very good job of looking at this. We may not agree with everything that they say, but I think they performed a real service.

We talked both last fall and more recently, and one of the things that was pointed out was that we were not providing regular briefings to the committees of jurisdiction on cases that had closed. And so we were improving our process for briefing Congress.

For example, we had, even before this case broke publicly, scheduled briefings on cases that had closed toward the end of 2005, early 2006, this being one of those cases.

I think now where we really need to focus our attention is how you and we interact on pending cases in a way that ensures, as you

said, that people continue to look at the United States as a place they might want to invest. Because investment is a vote of confidence that is in our marketplace and our workers and their productivity. As you know, between 5 and 6 million Americans are employed by company's headquarters overseas. FOI accounts for 20 percent of our exports and $30 billion a year in R&D.

But we have to protect the national security. And one of the ways you protect it is to get the companies to come in with exceptionally sensitive information during that review process. We also need exceptionally sensitive information from the intelligence community during the review process, particularly on government-owned and -controlled companies. In order for the security professionals to conduct their review, we must encourage people to still be as candid as we need. And at the same time, work with the Congress to help you perform your important functions. I think this is where we need to have the discussion. I'd rather leave the form until later, until we decide what goal it is we're pursuing.

The CHAIRMAN. Thank you. And obviously, this committee has the same goals in mind, and we'll continue to work with all of you in the process.

Let me just ask one question. I am over my time. But is there anyone—is there any agency not in the CFIUS process that ought to be, or have we pretty well covered the waterfront here?

Mr. KIMMITT. Well, first, we have the 12 members outlined, and then we always look at each individual transaction at which other agency should be invited. Going to Mrs. Maloney's very good question, really, to a considerable degree, national security is defined based on the circumstances in which the transaction is presented, and each department and agency brings their important national security responsibilities to the table, which I would note does include critical infrastructure.

There have been some suggestions recently that—for example, the DNI, rather than just providing a report, would sit at the table during the deliberations, as he does during other interagency meetings. I think that would be a good idea.

I think that we should continue that discussion to make sure that we get every possible national security perspective that is needed during the course of that review.

The CHAIRMAN. Thank you. My time has expired. The gentlelady from Wisconsin, Ms. Moore?

Ms. MOORE. Well, thank you, Mr. Chairman. And I want to thank the distinguished panel for coming and providing this testimony to us today.

If I repeat things that others have asked, please forgive me, but this is very important to my constituents. I am feeling a little bit concerned. And perhaps given the dearth of time that I have, I'll focus my—I'll direct my questions toward Deputy Secretary Michael Jackson of Homeland Security.

As I look through your testimony, you know, it kind of sounds good. But I am wondering about some of the assurances, the security plans. Aren't these basically paper security plans, and not really based on any physical inspections, like my saying, "I'll tell you the manifest of stuff that's in my purse, and you've just got to believe me"?

I also would like to know, you know, when you say things to us, like, "We have increased the port security, cargo security, by more than 700 percent," I mean, no one could be more impressed by those kind of data. But doesn't that, in fact, depart from the wisdom of, say, the Coast Guard, where literally billions of dollars lacking in our ability to inspect these cargo adequately?

And finally, there's been some concern, a lot of concern, by my constituents about the ownership arrangement where a foreign country actually owns the security company.

Now, I am really, really pleased to hear reports that the United Arab Emirates are making really tremendous efforts to route out terrorism in their country, and that, in fact, after 9/11, for example, they put in place laws, anti-money-laundering money laws, that they have, in fact, tried to close some of the security gaps that resulted in, you know, 9 out of 11 of the hijackers coming through there, through the UAE. I am happy to hear that they're making efforts to prevent nuclear material from coming through there.

But the question that I have, really, is given their 5 years—and this is the government that owns this company that would manage these terminals. Given their sincere effort over the course of the 5 years, combining that with our incapacity, really, to inspect these containers, when you say, for example, 100 percent—100 percent—of all of the cargo that is suspicious is inspected, and that really represents only 2, maybe 4 percent of all the packages, that those confluence of forces are things that are making my constituents very nervous.

Mr. JACKSON. Let me see if I can try to unpack a couple of components of your questions, and then address them.

First, one element of what you were asking about has to do with our physical inspections. And a couple of facts. Since 2004, we have done compliance examinations and have detected over 700 violations in various different facilities. Forty-four resulted in termination of cargo operations and access until corrections were made, and the others were corrected based upon assurances provided and reinspection of the facilities in question. This is just one small element, and I'd love to give you a lot more data. But it shows you that we do have a significant force on board.

In Dubai, where this firm that is proposing to purchase P&O operates, we have continuously had inspections examinations conducted by our people over there, and they have never had any intent or exercised any action to limit our access to a container that we wanted to open, inspect, or to look at a security plan.

So in relation to the particular firm, there has been good access for inspections in their facilities overseas. We fully expect that cooperation here. But we have gone further in the assurances by both regulation statute and by the assurances getting guarantees that we can have access.

Our record in the United States of access is very strong, and we have no real concern whatsoever that we will be able to do this. If we find a concern and have to shut down a terminal, that is the lifeblood of the terminal operator's business. That is a big stick, and we are not reluctant to wield it if it is necessary.

Another cluster of questions has to do with inspections and our process of inspecting containers. This is a layered system of secu-

rity. It begins when the supply chain starts with stuffing a container and moving it from another country into our Nation. And we are, through the so-called C–TPAT program, engaged with over 8,000 global shippers and their suppliers, which multiplies by manyfold the number of firms involved. And systematic requirements to impose security reviews of employees and physical facility measures to increase security. So far down the supply chain, this process of trying to bring greater discipline and visibility begins.

Twenty-four hours before a container is loaded, the United States is given information about that container, and we can inspect it in our Container Security Initiative ports and have that container reviewed. If we have any concerns about the vessel, we also have advance notice of vessel arrival, we can look at the people, the crew, and the containers, so that if we need to do boardings, which we routinely do at the Coast Guard, we can do that as well.

There is a system of systems, a layer of layers. It begins overseas. It comes to the terminal operator. The process is robust. Is it perfect? No, ma'am. Are we going to be better—

Ms. MOORE. And before my time expires, the money.

The CHAIRMAN. The gentlelady's time has expired.

Ms. MOORE. The money.

The CHAIRMAN. The gentleman from Illinois.

Mr. JACKSON. If I can just, Mr. Chairman, one thing on the money, just a punchline. This year, we are devoting $2.5 billion at the Department of Homeland Security alone to maritime security. This does not include the commitments and the Megaport Program for radiation portal monitoring overseas or work that we do with the Defense Department and other agencies of the Federal Government. There is a very considerable, and I fear under-appreciated, investment that the U.S. Government is making in maritime security.

The CHAIRMAN. The gentlelady from Illinois. Or the gentleman from Illinois.

Mr. MANZULLO. Thank you, Mr. Chairman. We have a lot of foreign-directed investment in my Congressional district and want to do everything we can to preserve it, because of over a quarter a million jobs in Illinois, most of those are manufacturing jobs that depend upon FDI.

I do have some questions as to—and I think this is the problem that you ran into, and why you're under—the Administration is under fire on this issue. As I read the statute, if you have a foreign entity—and everybody agrees this is a foreign entity? This is a wholly-owned state enterprise; is that correct?

Mr. KIMMITT. That is correct.

Mr. MANZULLO. That is correct. And, in fact, the New York Times was upset about it, because it said because they're a wholly-owned state enterprise, free enterprise companies did not have the ability to come in and meet the price. That was of no consideration to you.

Mr. KIMMITT. I am sorry, sir. Could you repeat that as a question? I didn't understand.

Mr. MANZULLO. The New York Times said that because Dubai is a wholly-owned state enterprise, free enterprise companies were not in a position to come in and bid on the contract. Has that ever entered into your consideration?

Mr. KIMMITT. Sir, I am not aware that there was any restriction whatever on who bid for this property.

Mr. MANZULLO. That is not the question. Let me go—

Mr. KIMMITT. Then I am sorry. I guess I don't understand it, sir.

Mr. MANZULLO. Let me go on to another question, then.

Mr. JACKSON. Can I just try to answer, perhaps? The CFIUS process deals with transactions presented to us, and we do not go behind the transaction that is presented to stimulate competition in the—

Mr. MANZULLO. That answers my question. Thank you very much. And thank you for trying, Mr. Kimmitt.

Mr. KIMMITT. I was going to say the only other bidder on—

Mr. MANZULLO. If I could go on, and then we could talk, perhaps, later on. But as I read the statute, amended in 1992, it said, "The President or the President's designee shall make an investigation in any instance in which an entity controlled by or acting on behalf of a foreign government," which is this case, "seeks to engage in any merger, acquisition," etc., "which could result in control of a person engaged in interstate commerce in the United States that could"—could—"affect the national security," and that is what triggered the 45-day period. That is what the statute says.

But the way you're interpreting it, according to your testimony, Mr. Kimmitt, on pages 2 and 3, it says that the CFIUS members, during the initial 30-day period of time, can resolve any national security concerns. And Mr. Jackson, you're saying on page 2 that the Department of Homeland Security has legal authority to eliminate any threat within the 30-day period of time.

And the issue here is it isn't until the 45-day period has kicked in that people of higher level within the departments even have an opportunity to look at the file; isn't that correct?

Mr. KIMMITT. That had been the practice, sir.

Mr. MANZULLO. And that is what happened here; isn't that correct?

Mr. KIMMITT. That is correct.

Mr. MANZULLO. So the people at the lower level within the agencies took it upon themselves to say whether or not there was a national security threat when the statute is clear if it is foreign-owned, and there could be a national security threat, then you must go on to the 45-day period of time. How could you possibly misread that statute and show to the American people the fact that Americans as a whole picked up the security threat? In fact, the Coast Guard did initially too.

That is why we're having problems. Because people with sufficient authority and sufficient levels of authority within the 12 or so departments didn't even know about the file; is that correct?

Mr. KIMMITT. That is correct. I'll give you the legal answer, although I am a policy official. But the legal advice that policy officials going back to 1992 have received, so through both Republican and Democratic Administrations, is that—and the practice that is followed is that—if there are any security concerns that have not been resolved during the 30-day period—

Mr. MANZULLO. The statute does not say that.

Mr. KIMMITT. Well—

Mr. MANZULLO. You are reading that into the statute. The whole purpose of the Byrd amendment was simply to say if there could be a security threat. Could be. Not that you resolve it in 30 days. If there could be a national security threat, then it goes to a higher level for more review. That is why Members of Congress want you to take the statute—I don't think we can make this any clearer.

Mr. KIMMITT. Well, I think, sir, one of the questions that has come up is why there is no period after "shall conduct a review." And again, what I would like to do is to get the lawyers to explain their position.

Mr. MANZULLO. Lawyers could never explain—

The CHAIRMAN. The gentleman's time has expired.

Mr. KIMMITT. But if I—

The CHAIRMAN. The gentleman's time has expired. The gentlelady from California, Ms. Waters.

Ms. WATERS. Mr. Chairman and members. To our panelists who are here today representing all of the agencies, it seems to me that there is some thought that we disrespect the work of professionals, and that you have got to come here and protect the reputations of the professionals who do this work, which means that you don't get it.

You don't get that the President of the United States has made fighting terrorism the cornerstone of his presidency. I don't think that you understand that because of that, we have created a Homeland Security agency. We have Patriot Act I and II. We have invaded and occupied Iraq and Afghanistan. We have spent over $250 billion on this war. We have jailed suspects at Guantanamo without trial, without charge. We have a National Security Agency with technology that is scanning the conversations of Americans and picking up on key words, and thus following up with surveillance and wire tapping.

You don't understand that our Nation has been damaged with the accusations of abuse of prisoners. I don't think you understand that right now, there's a civil war going on in Iraq between the Sunnis and the Shiites, and 2,295 American soldiers have been killed.

We have been so at this war on terrorism, we have caused two historic enemies, Iraq and Iran, to come together. We have talked about the President, the axis of evil, and even Kim Jong-il is threatening us with his nuclear capability. We are less safe, the entire Middle East has been destabilized, and I think Israel is more at risk.

And so when you and/or the President or anybody else wonders why we are raising questions about the decisions that are being made to allow our ports to be managed by a non-democratic society, then I just don't think you get it. And, the least of which I expected from the President of the United States was to play the race card and accuse those who question the decision of discrimination.

So this is not about whether or not your professionals are good, hard-working people trying to do their job. It is not even about whether or not the Emirates, or the United Arab Emirates, is capable of managing these ports.

This is about a Nation that is on edge, a Nation which is on edge living under the threat of orange, yellow, and red alerts developed

by this President because he said we were in danger. Osama bin Laden is still running around somewhere up on the border with Pakistan, maybe in Afghanistan. The poppy fields are flowing in Afghanistan, more drugs than ever are hitting the European markets, and you wonder why we question you; why a government-owned entity of an undemocratic country—non-democratic, rather—country has been given a contract, or will be given a contract?

Well, I just want to give you a little bit of that background so you can understand why the Members of Congress would question you, the secretaries of all the agencies, and the President himself. We don't care whether or not you are good professionals who just work at your job. What we care about is a Nation on edge that we all have to represent and we have to answer to. And we care about the fact that we have to say to people in our districts that we understand or we don't understand.

And so it is not even whether or not you can make us believe that this is a good thing that you are doing. What we believe, because the President has been so good at what he has been doing, he's hyped it, he's worked it, he's turned his Administration into this machine to fight terrorism—we care that not only are we alerted and we're standing waiting for the orange, yellow, and red alerts every day, day in and day out, we care that we don't end up with anybody in control of our ports or any of our sensitive areas in this country that we would raise any questions about.

Why would we raise questions about them? Let me show you what the New York Times said. "But Dubai's record is hardly unblemished. Two of the hijackers in the September 11th attacks came from the United Arab Emirates and laundered some of their money through its banking system. It was also the main transshipment point for Abdil-Kadir Khan, a Pakistani nuclear engineer who ran the world's largest nuclear proliferation ring from warehouses near the port, met Iranian officials there, and shipped centrifuge equipment, which can be used to enrich uranium, from there to Libya."

Did you investigate that? Did you investigate any of this? And if so, what did you find?

Mr. KIMMITT. Ms. Waters, first, I do very much appreciate the complimentary words to the career professionals who have worked on this. I think all the facts that you brought up were looked at in the initial review period. Those certainly were available to the intelligence community. And I think both those facts and the other concerns you've expressed will also be looked at closely during this 45-day investigation.

Ms. WATERS. After the—thank you. I yield back.

Chairwoman PRYCE. The gentlelady from New York is recognized.

Mrs. KELLY. Thank you very much. We have ports in New York. We're deeply concerned about this situation, and I think the Administration needs to give us better answers about the implications to our national security with this.

Yesterday, President Bush advised Members of Congress to look at the facts. So in reviewing the port deal, I'd like you to characterize for us how you dealt with the many facts which show us that

Dubai's territory and financial system has been a hornet's nest of activity for our enemies.

For example, how did CFIUS deal with the fact that Dubai is currently being used by Iran to finance its acquisition of weapons of mass destruction? I held a hearing 2 weeks ago in which OFAC advised me that they were part of an interagency team that was recently sent to Dubai to discuss proliferation issues. Did the CFIUS consult with this interagency team? I asked the Director of OFAC. He said he didn't know. What is the answer? Yes or no?

Mr. KIMMITT. The agencies who were involved in that team were all part of the CFIUS review, Mrs. Kelly.

Mrs. KELLY. Well, the Director of OFAC said he didn't know if they were involved. So you're saying they were.

Mr. KIMMITT. Well, inside the Treasury Department, as you know, because you've been a major supporter of Treasury's transformation into a Department that works very hard on terrorist financing, of which OFAC is a part—in fact, the gentleman you referred to is just now moving from OFAC to the Financial Crimes Enforcement Network—they were much a part of our internal review process, and they have been taking the lead also on working with the UAE on money laundering and other efforts.

Mrs. KELLY. A man is currently under Federal indictment for allegedly selling missile-related equipment to the Iranians using the Dubai branch of Bank Saderat, the Export Bank of Iran. Was this discussed during your review? Does the Bank Saderat have a business relationship with the Dubai Islamic Bank, which helped structure that ports deal?

Mr. KIMMITT. I'd have to get back to you on the facts. Again, I think that all the facts and intelligence throughout the intelligence community were available before the community assessment was given to the CFIUS—

Mrs. KELLY. Could you give me an answer on—this is a fact. I have the indictment right here. I'd like an answer about whether or not that was—to that question.

Mr. KIMMITT. Yes, Mrs. Kelly.

Mrs. KELLY. At any point during your deliberations, was it discussed that international arms trafficker and U.S. designated terror financer Victor Bout appears to continue operating freely in the UAE, despite repeated U.S. requests that he not?

Mr. KIMMITT. Again, I'd have to come back to you with that answer. What I will tell you is the departments and agencies, in addition to the intelligence community, who are responsible for both our counter-terrorism and counter-proliferation efforts were at the table when these issues were discussed.

Mrs. KELLY. Can you explain how much the government knows about who's going to own the debt of this company, and what kind of influence they are going to be able to exert on the company through the debt ownership, or the name of the purchasers of the debt, both the traditional and the Islamic sukuk bonds run through the OFAC list? Was any effort made by the U.S. Government to acquire the names of the bond purchasers from Barclays or Dubai Islamic Bank?

Mr. KIMMITT. I know some work was done on that, Mrs. Kelly. It may have been completed. I'd like to get you an answer to that, too.

Mrs. KELLY. Okay. I've asked you three questions, and I really would—well, several others prior to that. I really would like those questions answered.

Is it the case that if the company ever goes public, one third of the equity will go to the bondholders of Dubai Ports, thereby making them shadow partners? Is that true?

Mr. KIMMITT. I'd have to look at the specific ownership structure. I know it was looked at during the course of the review, but I'd have to come back to you with that answer.

Mrs. KELLY. It is my understanding that that is a mandate by law. The Dubai Islamic Bank ostensibly helped arrange the Islamic financing portion of this deal. The bank's Sharia Board has the responsibility to assure compliance with religious law and the implementation of all bank transactions, and correct any breaches that may occur. If this deal goes through, will the Dubai Islamic Bank's Sharia Board be obligated by Dubai law to enforce religious law with all the Dubai Ports World operations financed in the transaction? Do you have an answer for that?

Mr. KIMMITT. I will get you an answer for that.

Mrs. KELLY. I thank you, sir. I think we need to have answers like that before this committee and before Congress in general in order for us to have an informed view of the kind of background that the Dubai ports are going to be—their control over their ports will be for us who are concerned about our national security. Certainly I am concerned about our New York ports, and I"m hopeful that you will get back to me.

Madam Chairwoman, I would hope that you would request officially that these questions be answered by the gentleman.

Chairwoman PRYCE. The gentleman has indicated that he will supply the committee with that information. And if it is not forthcoming, we'll get back to him. Thank you.

Mrs. KELLY. Thank you very much.

Mr. KIMMITT. We take very seriously the concerns you've raised. I think these are good questions. We owe you answers. I am sure that there are answers that I just don't have in front of me. We'll get you an answer to each of those questions.

Mrs. KELLY. Thank you very much. I yield back the balance of my time.

Chairwoman PRYCE. Thank you, Mrs. Kelly. The gentlewoman from California, Ms. Lee, is recognized.

Ms. LEE. Thank you, Madam Chairwoman. Let me just say how—like the entire country, how disturbed I am about this, for many, many reasons. First of all, this war on terror. Domestic security, I would have hoped, was central to the war on terror in terms of Homeland Security and protecting this country, rather than waging illegal wars and unnecessary wars around the world. But obviously, now what is coming to surface is that really Homeland Security and domestic security really may or may not be that important in the scheme of things.

And I ask you, when these deliberations were taking place, did you go back to the 9/11 Commission report and measure this deal as against what the 9/11 Commission suggested?

In fact, I remember several months ago, I believe the 9/11 Commission recommendations, as they were being implemented, were given probably D's and F's in terms of scoring. And that, to me, is very scary. So here we go again. I suspect that now every category would be an F.

But let me just ask you, in the 9/11 Commission report, it concluded that "Terrorists"—and this is directly from the report—"Terrorists have the opportunity to do harm as great or greater in maritime and surface transportation than the 9/11 attacks."

Now, in your review of this deal, how did you look at that recommendation as it relates to this overall deal? And then secondly, let me just ask you, in terms of foreign companies operating terminals in the United States, how many are there? Where are they located? And what is the rationale for not making sure that ports comply with the same standards that our airline industry must comply with in our airports in terms of state-controlled and foreign-controlled companies? I'd ask, I guess, Mr. Kimmitt or Mr. Jackson if you could response do that, please.

Mr. KIMMITT. I will start out by saying that both the information and intelligence that went into the preparation of the 9/11 report, certainly their recommendations and progress since then would have been taken into account both by the intelligence community in providing their assessment, and then each of the departments and agencies in making their own individual judgments on this case.

I would say—I am sorry Mrs. Kelly has left—that one area in the 9/11 report that got a pretty good grade was on terrorist financing, having made progress on terrorist financing. Again, if you look at the report card. And I'll say that one of the countries that we've made considerable progress with in that region is the UAE. I'll turn to my colleague with regard to port security.

Mr. JACKSON. Regarding the 9/11 Commission report, let me just say that at Homeland Security, we take their work as a foundational document to help us understand what happened and what went wrong, and that is a series of observations and a series of findings that has been internalized within the department.

We did a very substantial and comprehensive review of this transaction, and all of the lessons learned about our experience in the field and the work of many fine other analysts, including the 9/11 Commission, are part of the screen that we apply to making these security determinations. Security is the driver of this process.

Let me just say a word about your specific question on ownership by foreign-owned corporations of port assets. If you look at the container ocean carrier industry, that is mostly all foreign-owned. Very little of that is U.S.-owned today. There has been a consolidation in the industry of very substantial means over the last 15 years, and there has been a consolidation principally in the hands of foreign owners. Those foreign-owned ocean carriers themselves operate terminals and terminal holding companies all across America in our ports. There are multiple different estimates on this, and we

are actually trying to get some very detailed facts terminal by terminal by terminal which we will make available to the committee.

But I would say that my rough estimate is well over half of those facilities in the container traffic world are foreign-owned. In certain segments of the port business—for example, fuel terminal operations—some of that has a higher concentration of U.S.-owned businesses. And I'd be happy again to provide the committee with much more detailed information.

On the question of is port security the same thing as aviation security, the answer is no. In one way, aviation security is much more simple, because it is a closed-loop system where everybody throttles through gates that we can inspect and manage in a different way than we do in ports. They're obviously vastly spread across the globe, and this is a system that has a different structure for its security. It is a more challenging structure. But I think that it is one where we have made phenomenal progress since 9/11. And I would be happy, again, to provide as much detail as you would like about the structure of these security arrangements.

Ms. LEE. Madam Chairwoman, may I just—

Chairwoman PRYCE. Your time has expired. If you have one—

Ms. LEE. Just very quickly. I'd just like to get an idea whether or not you believe that we need to increase our funding for port security efforts.

Mr. JACKSON. I think we are spending a very large sum of money on port security. Can we spend it smarter? Absolutely. We have more work to do here. But I think that this is all about a balance. And Madam Chairwoman, this was a question you raised earlier about Secretary Chertoff's use of the balance.

When the Secretary was talking about a balance, he was trying to convey that we must be a realist in this world. All of our investments of our limited resources have to follow risk. And there is a balance that comes with finding ways to prioritize around the greatest risks.

The maritime world poses some significant risk, and we are putting significant money in it. I don't want any of you to misunderstand that in trying to find the balance, we are in any way disdainful, and certainly not Secretary Chertoff, disdainful of this mission of protecting the homeland and guaranteeing that we find that right balance. And it is a balancing act.

But I think we have substantial resources added, and we will continue to use them wisely. We will do it iteratively. The tools that we used right after 9/11 in the first days are growing in maturity and complexity. That is a good thing. They'll get better. Continuous innovation is the requirement in this world.

Chairwoman PRYCE. Thank you. The gentleman from New Jersey, Mr. Garrett, is recognized.

Mr. GARRETT. Thank you, Madam Chairwoman. And also, thank you, members of the panel. I appreciate you all coming here to enlighten not only this committee, but also the American public as well to some of the background information that I think a lot of people in this country are looking to hear and have fleshed out.

I come from New Jersey. And just like Mrs. Kelly from New York, these issues hit home for us, because we're just in the shadows of 9/11. We lost more people in our district than anyone else.

So anything to do with security hits home. And although I don't have the ports particularly in my district, but Port Newark, Port Elizabeth are right down the road, figuratively speaking, where we are in northern New Jersey. So it hits home for us.

I won't be redundant on some of the question. Some have been answered, and others, I am looking forward to your answers. I think I have three specific questions, though.

One is procedural. It is the notice requirement. Maybe you said it. If you did, just refresh me. At what point along the line, if at all, Congress is officially notified of this? Because I do know during this whole thing in the press, someone from the Administration said, "Well, gee, it came out in Bloomberg on the wire, and Congress should have been aware of it back in October or November." And I know some people took offense that we had to look at it that way. So could you elaborate specifically at what point along the way we were notified?

Mr. KIMMITT. The answer for the DP World case is that once they refile and we complete the investigation, the President will make a full report to you.

In general, as I mentioned with Chairman Oxley, the practice had been to brief the Congress on a regular basis with regard to closed cases. We have to find a way consistent with the legal requirements to maintain confidentiality on the proprietary information that is given, I think, to share information with the Congress on these pending cases.

Mr. GARRETT. The proprietary information—just briefly on that—is merely on their filing of their, perhaps, private information. But the mere fact that a company is saying, "We want to do X, Y, Z," purchase this company, or purchase this American company, is that private proprietary information that you really have to be concerned about, or is it something within the file itself?

Mr. KIMMITT. I guess the answer is if they have, as in this case, made a public statement—

Mr. GARRETT. But if they haven't. I mean, other cases—

Mr. KIMMITT. If they haven't? I think if they just made an approach to us and said, "We're thinking of doing this. What is the process?" Because that is information that they gave us, even the fact that they might be doing the deal is considered confidential business information that we have not affirmatively briefed the Congress on it. I think the question would be if you were also aware of that and ask us a question, could we respond? I think that what we would try to do is to suggest the company should come closely into contact with you.

But to this point, when the information has not been publicly available, we haven't had a good process for discussing with the Congress these pending cases. And I think that is one place that we've got to turn. I think our first priority is to conduct this 45-day investigation thoroughly, rigorously, and professionally.

Mr. GARRETT. Right.

Mr. KIMMITT. But I think beyond that, we have to find a way.

Mr. GARRETT. Thank you. And I am working on legislation to that end to see how we can get that information so we're not left in this after-the-fact situation here.

Secondly, in the legislation that we're looking at, we're wondering whether or not it is able to change the burden of proof, if you will, in these cases, either in these cases or going forward as well. Here, it seems as though the burden of proof is on the Administration of the United States Government, to step in, review the matter, and say whether or not we're going to stop the proceeding, as opposed to when you're dealing with national security matters such as the ports or other ones, broader, as some of the members said earlier, whether or not the burden of proof should be basically on the other side.

And just as in a court case when it is a criminal matter, who has the burden of proof going forward basically raises the bar. And I wonder if anyone has comments as to where we put that.

Mr. KIMMITT. Well, I think burden of proof is a legal term. If I could just put it to the side.

The way the process works is the company has to give very detailed information. If that information raises any security concern, then the burden is on the company to either assuage that concern through mitigation, or the deal is not going to go forward. And in this case, because security concerns had been raised and were not resolved to the satisfaction of the Department of Homeland Security, a letter of assurances was put together to help address that.

So I think that, again, their responsibility is to give us the information. The responsibility of the CFIUS staff is to identify that concern. Then I think the burden does flow to them. And by the way, not just on port security, but on defense acquisitions and telecommunications cases, staff must address and mitigate that concern, or the deal doesn't go forward.

Mr. GARRETT. I didn't get to my third question. I'll submit that, then, if I may. Thank you.

Chairwoman PRYCE. All right. Mr. Sherman from California is recognized.

Mr. SHERMAN. Thank you, Madam Chairwoman. I will use some of my 5 minutes to make an opening statement, as is the tradition before this subcommittee.

The Administration was clearly incompetent, as Mr. Frank pointed out, for not simply quietly telling the UAE not to try to control American ports. The UAE has clearly lost far more in terms of its world standing and its standing with the American public than they are going to make by investing in our ports. They clearly could have spun off this business—creating a subsidiary— and never had this controversy. And the damage to our relations with the Arab world clearly must be laid at the doorstep of an Administration that could have defused this situation before it went off.

As Mr. Manzullo pointed out, this Administration chose to ignore our law. The easiest way to ignore American statutes is to twist them out of all conceivable shape. And when the Administration decides that a law that says if it could affect, just might possibly affect, our national security, you have to conduct a real review, and you reach the conclusion, "Oh, this couldn't possibly affect our national security," then you've twisted law out of all recognizable shape.

I would point out this is not unusual for the Administration. The Iran-Libya Sanctions Act is ignored again and again and again, to

the point where the Administration takes the position in the case of a Japanese oil company that declares to its own shareholders it is making investments in Iran, that we, the United States, don't know whether they're making investments in Iran.

This is an Administration that simply ignores the law again and again, because they think they know what is right, and they don't want Congress involved in our foreign policy. We're now engaged in a whitewash process. We're told, "Don't worry about this. They're not going to own our ports. They're just going to control them."

Eight of nine—as Mr. Frank pointed out, eight of nine of the witness to come before this subcommittee are boosters of this transaction. But don't worry. Eight out of nine Americans know this is bad for our national security.

I'll be introducing legislation to prohibit this transaction unless and until the UAE changes its policies. And let me make a prediction. My bill and similar bills will not get a vote in the 109th Congress. But let me make another prediction. In the 110th Congress, bills to reverse this whitewash transaction will get a vote on the floor, because the American people are going to demand that their representatives worry about American security.

Now, I'll point out that this is not an ethnic issue. It is a matter of the policies of the owners of the company. APM is not a government-owned company, so we shouldn't hold its owners responsible for everything the Danish government does. APL is a government-owned company, and we ought to look at what the Singaporean government does. But the Singaporean government is a stalwart ally against terrorism compared to the UAE.

DPW is part of the UAE government. And as several have pointed out, including Mrs. Kelly, it is hardly an ally in the war on terrorism. Don't just look at the mistakes they've made and the incompetence they've had in allowing nuclear materials to go through their ports, but look at their official policies.

This is a government which was praised by Hamas officially in July of 2005 for the massive amount of money that is going from the UAE and its leading citizens, in full conformity with UAE government policy, to terrorists on the West Bank in Gaza. I don't know how you classify a country as an ally in the war on terrorism, and that same country and government is classified by Hamas as an aid to Hamas's terrorist activities.

The father of the current president of the UAE gave millions of dollars to terrorist organizations, in full accord with UAE law. The current president sits on the board of a charity, a major charity, that provides millions of dollars to terrorists in the West Bank and Gaza. The UAE official government policy is to support a boycott of Israel. The princes of the UAE, several of them, have close personal relationships with bin Laden.

And I'll ask the panel, particularly the gentleman on my left, how did you reach the conclusion that owners of this company, the UAE Government, could be relied upon to be allies in the war on terrorism when they are facilitating the funding of the bomb-makers?

Mr. KIMMITT. Mr. Sherman, I'll give the answer from the point of view of the CFIUS committee, and then ask my colleague, Ambassador Welch, to talk about the specifics.

The issues that you've raised would fall in the U.S. Government to those departments and agencies charged with the responsibility for counter-terrorism: the State Department, the Treasury Department—

Mr. SHERMAN. Well, let's hear from State, then.

Mr. KIMMITT. And what I would say is—

Mr. SHERMAN. I have a limited amount of time. Let's hear from State.

Mr. WELCH. Sir, I've listed the things that you've mentioned. I am not aware of these contributions. I was just in Dubai.

Mr. SHERMAN. How could you not be aware of these contributions? They're in the public domain. I am not leaking classified information here.

Mr. WELCH. I didn't say that. I am not aware of them.

Mr. SHERMAN. You're not aware of the July Hamas press release praising the UAE?

Mr. WELCH. The United Arab Emirates Government does not have a relationship financially to Hamas.

Mr. SHERMAN. Do they allow their leading citizens to give millions of dollars to Hamas—American citizens can't give money to Hamas. UAE citizens are encouraged to do so.

Mr. WELCH. Sir, I think that the United Arab Emirates is playing a convincing and important role in controlling financing to terrorist organizations, including Hamas. We just had the Secretary of State—

Mr. SHERMAN. So when did they stop funding the terrorists?

Mr. WELCH. I am not sure they began, sir.

Mr. SHERMAN. So millions of dollars did not go from the father of the president of the UAE to Hamas? Hamas didn't praise the UAE for its unstilting support? Couriers are not going from the UAE bringing cash to Hamas? None of that is happening.

Mr. WELCH. Sir, that is a broad mix of things. With respect to the activities of the government, per se, again, I am not aware of those—

Mr. SHERMAN. When a government allows its leading citizens to send millions of dollars to terrorist organizations. When it allows a telethon for terrorists to be broadcast over the airwaves. A government is responsible for governing. It can't say, "Well, we didn't send a check. We just encouraged our leading citizens to do so," and be called an ally on the war on terrorism, unless you're adopting a hear-no-evil, see-no-evil policy toward defining who are our allies and who we have to be worried about.

Mr. BACHUS. [presiding] You can answer the question. But you're about 2 1/2 minutes over, but—

Mr. SHERMAN. I understand.

Mr. WELCH. Again, we've taken note of the list of those concerns. Let me just say that the UAE has cooperated in trying to freeze accounts of a number of terrorist groups. We have a number of mechanisms whereby we pursue individual cases if we know of them.

I am not aware of the ones you mentioned, again. They have a—we've just set up a Joint Terror Finance Coordinating Committee to look at increasing our efforts to combat this problem. The UAE is a major financial center, and of course, they have their responsibilities in that regard. We'll provide you information for the record in answer to your specific concerns.

Mr. SHERMAN. The UAE seems to take a position that they're anti-terrorist, except if the terrorist organization focuses on killing Israelis. Then they're pro-terrorist. And these people you call allies in the war against terrorism? I yield back.

Mr. BACHUS. Thank you. Thank you, Mr. Chairman. Let me address this question to the panel, a follow-up of what Mr. Sherman said. You know, you're not aware of some of these other things that Mrs. Kelly or Mr. Sherman has said. You are aware of the boycott of Israel; are you not? And I'll ask Mr. Welch.

Mr. WELCH. Yes, sir.

Mr. BACHUS. Does the Dubai Government or UAE honor the boycott of Israel?

Mr. WELCH. Sir, first of all, the United States opposes the boycott of Israel.

Mr. BACHUS. I said does the UAE honor the boycott?

Mr. WELCH. It does.

Mr. BACHUS. Is that a security concern for you?

Mr. WELCH. I don't know if that was evaluated in the course of this process or not.

Mr. BACHUS. Well, let me ask you—no, I'll follow up on that. That is a good—the four of you are the Under Secretary—or in your case, you're the Assistant Secretary for the Department. I think your appearance here conveys that you are aware of what went on in the vetting process. Am I wrong about that assumption? Were all of you all aware of what went on? You've come here to tell us what went on in the what is described as a robust debate and a full vetting process. Were you all involved in that process? Or is there someone else at your department that would be better able to testify?

Mr. KIMMITT. Well, there were individuals, Mr. Bachus, at the assistant secretary level and below who did the actual vetting in this particular circumstance. We were asked by the subcommittee and the committee to come up to discuss the process in general and to give our perspective.

Mr. BACHUS. Who could give us—who at the department—would you supply names of the people who actually were engaged in the process?

Mr. KIMMITT. Yes. That was one of the questions that Mrs. Maloney had asked. We know that answer. We'll be glad to do it.

Mr. BACHUS. Thank you. Do you know who was at the table, the individuals? Are you aware of—

Mr. KIMMITT. We do. I'd have to come back to you with those names.

Mr. BACHUS. Are you aware of what they discussed? Whether or not they discussed, say, the boycott of Israel?

Mr. KIMMITT. I am not aware of the specifics, but we can get you that information, which actually has been requested.

Mr. BACHUS. They're all under your supervision, though, or under your—you're their—

Mr. KIMMITT. Well, either ours, or I would mention in this case, Mr. Bachus, the Commerce Department takes a—

Mr. BACHUS. Sir, the Commerce Department is not here. But in your four cases, they're all under your supervision. Each one of you, these individuals are under your supervision.

Mr. KIMMITT. Who did participate. That is correct.

Mr. BACHUS. You only found out 21 days ago that this process had been going on for 130 days?

Mr. KIMMITT. Well, the process ran about 90 days; 60 informal, then the 30 formal days.

Mr. BACHUS. You had mentioned October 17th as the commencement.

Mr. KIMMITT. Right.

Mr. BACHUS. That is 133 days ago.

Mr. KIMMITT. I am sorry, sir. I was counting to the date on which the deal was—

Mr. BACHUS. Am I wrong when I say that the four of you all, although these were people under your supervision, and you were charged with supervision and oversight of them, that you were unaware of these negotiations until 21 days ago? Is that correct?

Mr. KIMMITT. That is correct, sir, in my case.

Mr. BACHUS. And the other three of you, at least two of you learned of these negotiations when Under Secretary Kimmitt called you?

Mr. JACKSON. That is correct in my case, sir. It is not the routine. If there are reasons to elevate during the 30-day period, based upon concerns that the staff raises, it is quite routine that it gets up to the Deputy Secretary level or above.

Mr. BACHUS. So this was such a routine run-of-the-mill matter that you weren't brought into the negotiations?

Mr. JACKSON. It was a matter that yielded very, very substantial common agreement within the 12 agencies, plus the two additional invited—

Mr. BACHUS. Do you think that it would have been proper for you to be advised and be part of the negotiations as the under secretaries involved?

Mr. JACKSON. For my sake, I wish in hindsight that I had been.

Mr. BACHUS. Do you think that there could be a full vetting process or a full debate without the participation of the under secretary? Or if you weren't involved, was the secretary of your agency involved?

Mr. JACKSON. In my case, not, sir.

Mr. BACHUS. How about in your case?

Mr. KIMMITT. No, sir. Well, not in this particular case.

Mr. BACHUS. Sure. Well, that is what we're talking about. How about in your case?

Mr. KIMMITT. As the Deputy Secretary said, Mr. Bachus, the way the system has worked—

Mr. BACHUS. I understand that. I am saying—I know how it worked in this case. You weren't consulted, nor I suppose none of the secretaries were consulted. When did the White House learn? Did they know before you knew?

Mr. KIMMITT. Well, as I said in my opening statement, Mr. Bachus, the White House has representation on the committee at the staff and policy level. In terms of when higher level people were advised, I'd have to speak with them.

Mr. BACHUS. So you and your secretaries were not aware of these negotiations. So it is probably fair to assume the President may not have found out about them until 2 or 3 weeks ago, about the time you were notified; is that correct?

Mr. KIMMITT. I think that is correct. I'd defer to the comments made by the White House Press Secretary, sir.

Mr. BACHUS. Sure. The Commerce Department, were there—other than national security issues, are there economic disadvantages that could be created by this; are they considered as national security, or is that not considered?

Mr. KIMMITT. I would think that would be one of the issues that Commerce and perhaps others would bring to the table, sir.

Mr. BACHUS. Now that you've been advised what these hearings were like, the port operator can determine sailing times, berthing assignments, docking order, all of which can make a million dollars difference in the case of each, you know, ship. Are we turning over that authority to the Dubai ports? Does anyone know? Or was there maybe a mitigating agreement that took that away from—that duty away from them?

Mr. JACKSON. Sir, I am sorry. I was consulting with Admiral Bone. But is your question does the terminal operator schedule the arrival and departure times?

Mr. BACHUS. Yeah. No. You know, let's say two ships arrive at the same time. Who determines the docking order or the berthing assignments, which can be advantage to—

Mr. JACKSON. The pilots in the Coast Guard schedule those sequencing of the—

Mr. BACHUS. Not the port operator.

Mr. JACKSON. Admiral Bone says that they are consulted. But at the end of the day, the authority about docking the vessel is ultimately derived from the pilot's authority.

Mr. BACHUS. Do you know if lobbyists were retained by Dubai, and then were in these negotiations? Or do they have registered lobbyists?

Mr. KIMMITT. I think the Government of the UAE does. I am not aware that they were involved in that process. We could certainly get that—

Mr. BACHUS. Will you find out if they were, and when they were involved, and if they were involved before you were involved?

Mr. KIMMITT. All right, sir.

Mr. BACHUS. Thank you. And let me ask you this. Were there any agreements to mitigate national security concerns? The law provides that you can enter into agreements to mitigate any of those. And the Coast Guard said that some of their objections were met. Were these reduced to writings and mitigating agreements, as called for by the statute?

Mr. JACKSON. Yes, sir. There was an assurance letter that was negotiated by DHS, and all of our concerns were accommodated within the contours of that letter. We've provided that publicly and on behalf of—

Mr. BACHUS. Is that an agreement? Is that considered a mitigating agreement which would have legal—

Mr. JACKSON. It does have legal binding authority.

Mr. BACHUS. Could we have copies of those mitigating agreements?

Mr. JACKSON. Yes, sir. Absolutely. But I thought we had provided them already.

Mr. BACHUS. My last question, it is my understanding that there has been a nomination to the U.S. Maritime Administration—I don't know that it is the director or whatever—and that the gentleman was an official with the Dubai ports; is that correct?

Mr. JACKSON. Yes, sir. That is correct.

Mr. BACHUS. So the ports will be operated by the Dubai ports and the—if this administrator of the U.S. Maritime Administration is, in fact, appointed by the Senate, he will run the U.S. Maritime Administration; is that correct?

Mr. JACKSON. The nomination is to head the U.S. Maritime Administration.

Mr. BACHUS. Now that you all know that these ports will all be operated—or, you know, if there's no change by Dubai ports, does it bother you or concern you at all that the head of the U.S. Maritime Administration might be a former executive with Dubai ports?

Mr. JACKSON. Let me make a distinction here, sir. It is widely being misrepresented here that this transaction has something to do with controlling ports.

Mr. BACHUS. No, no, no. Just the operator. Just the operator of the port.

Mr. JACKSON. The terminal operators.

Mr. BACHUS. Terminal operator.

Mr. JACKSON. Yes.

Mr. BACHUS. But does the fact that they are—the terminal operator at all the ports, does that—and that is obviously a $6.6 billion deal, so it is not like they're having janitorial services. I mean, it is an important—

Mr. JACKSON. Sir, if you take a position like any of the gentlemen that I am sitting at this table with, you have to file a total disclosure. And this gentleman would be recused in his position from anything having to do with his former employer from at least—

Mr. BACHUS. No, I understand that. I understand that. I am not accusing the gentleman of anything. I am not—

Mr. JACKSON. Well, I can speak to this as a former deputy secretary of—

Mr. BACHUS. I am saying now that the port operation of the terminals has been turned over to Dubai Ports, is it wise to proceed, in your opinion, with the nomination of a former executive, or do you think that it would at least be something that should be looked at and reviewed?

Mr. JACKSON. It is certainly the prerogative of the Senate to take that into consideration as they see fit. But let me say, speaking as a former deputy secretary at the Department of Transportation, wherein the Maritime Administration resides, it is imperative that we bring people into the Administration to serve in these senior jobs who have had real experience in the real world, people with

the highest degree of credibility and—I have every reason to believe that this gentleman—

Mr. BACHUS. Let me close with this question. You know, the whole premise—and I know you all have stated this several times. And I agree with you. I just use your word. Unnecessary restrictions by the United States on foreign investment may encourage other governments to restrict foreign investment by U.S. firms.

In other words, if we restrict them from being terminal operators, they may restrict us, or put restrictions on us. And that is one reason we have an open-door policy as far as foreign investment. And one of the reasons is we want to invest in those countries and their operations.

So my question is does the UAE permit investment in the maritime sector to the extent the United States does?

Mr. KIMMITT. I think that they do allow investment. I'd have to get you the detail as to what level of investment. But you're right, Mr. Bachus, that one benefit of an open investment policy is that it allows us, then, to use that to advocate on behalf of U.S. companies overseas.

Having said that, the real question still is—has the national security been protected? That is certainly what was in the minds of the people who did this review, and it certainly is what will guide our 45-day investigation.

Mr. BACHUS. And the only reason I say that, it is my understanding they won't allow full investment. They would not allow a U.S. company to come in as a 100 percent owner of a terminal facility. The UAE just simply does not allow that. We're allowing them to do that, so I wondered if there was some maybe mitigating agreement that said, "Okay. We're doing this with you all. You will allow U.S. companies 100 percent ownership of operations in the UAE," which would be important for our company.

Mr. KIMMITT. My understanding, but I want to get this fact for you, is that they allow investment up to the 75 percent level.

Mr. BACHUS. But we're allowing it up to 100 percent.

Mr. KIMMITT. 100 percent. But it is significant, Mr. Bachus, as you well know, any time you get above 50 percent—

Mr. BACHUS. Sure. I am just wondering if they won't allow us to get above 75 percent, should we allow them to get above 75 percent?

Mr. KIMMITT. Well, I'd like to get the facts and get back to you on that.

Mr. BACHUS. Sure. No, I think you're absolutely right. I've been told that they do allow 75 percent, but not 100 percent ownership by U.S. companies in their concerns.

At this time, I recognize Mr. Frank.

Mr. FRANK. I apologize for having been drawn away. And I gather this didn't get to the highest levels. But I have to ask you, because I think it is unfortunate that we're in this situation where we have to make this public decision about the UAE.

Let me ask all of you, were you surprised when the fact that the control of this part of the port business was going to be turned over to the UAE caused considerable political turmoil? Can I ask each of you? Were you surprised by that, Mr. Kimmitt?

Mr. KIMMITT. I was not surprised. That is why, as I said earlier, as soon as I learned the facts on this and informed my boss, I said that we—

Mr. FRANK. When did you get the facts? I am sorry. When did you hear about it?

Mr. KIMMITT. In February, after the approval—

Mr. FRANK. Mr. Jackson, were you surprised?

Mr. JACKSON. I had not contemplated the notification to Congress prior to this becoming public, and so I was, I would say, surprised by the degree of vehemence and intensity of—

Mr. FRANK. But you were surprised. Mr. Kimmitt wasn't. How about you, Mr. Edelman?

Mr. EDELMAN. When the Deputy Secretary of Treasury called me to discuss this issue, Congressman Frank, I realized that there would be a certain amount of controversy associated with it. But I have to confess that, like Deputy Secretary Jackson, I was surprised by—

Mr. FRANK. How about you, Mr. Welch?

Mr. WELCH. Yeah, I'd have to say, sir, I was surprised.

Mr. FRANK. You were. Okay. I would recommend—I don't know if there is such a program—but antenna development for members of the Administration. Because I am surprised that some of you were surprised. I don't know where you've been for the past few years. And I don't agree with all the sentiments here.

But frankly, I have to say this. For this Administration to complain that there was and has been an excessive outburst of too much skepticism, etc., etc., it is a little bit of not understanding what their own role has been. And I guess the fact that three of the four of you did not realize that making this public would cause this kind of concern does not speak well for the understanding of the political system. And part of good governance is understanding the political system.

And I have another question.

Mr. JACKSON. Sir, can I just say that I said I was surprised by the depth and intensity. I was not surprised that there would be controversy and a lack of agreement about this.

Mr. FRANK. Well, okay. But I think you should have been—that does not—I am sorry, guys. You can change that on the record. Frankly, I am surprised that you were surprised by the depth and the intensity.

The 45 days. Exactly what is going to happen during these 45 days? Let me put it this way. What subjects are going to be studied during the 45-day period that have not already been studied? Mr. Kimmitt?

Mr. KIMMITT. Well, as I mentioned, Mr. Frank, we'll look at—

Mr. FRANK. No, specific question. What are you going to look at in the next 45 days that weren't already studied?

Mr. KIMMITT. New information that will be brought to our attention by the company. We're awaiting the filing.

Mr. FRANK. New information from the company. So the company has information that they didn't give you in the first place? I mean—

Mr. KIMMITT. No. The company, as part of its filing, has indicated that it is considering structural changes and other issues of

that sort. That will be considered, measured against the security concerns that have been raised.

Mr. FRANK. Well, are these structural changes—why are they doing structural changes if they're not necessary? I mean, you did the study, and you said there's no problem. So are these structural changes that deal with security? In other words, are they more concerned than you guys were because they've now got—that you didn't have?

Mr. KIMMITT. No. We will look at the information that was available. We'll look at new information that is available and the concerns you have raised. We're going to take your—

Mr. FRANK. Okay, I understand. So you're going to re-look at what was available.

Mr. KIMMITT.—and take your views into account, sir.

Mr. FRANK. What is that?

Mr. KIMMITT. And take your views into account, the issues that you've raised. But—

Mr. FRANK. My views were that you people need a political common sense transfusion. I don't know if you can fix that up in 45 days.

But the issue is—well, let's be very clear. I don't know anybody who really believes that this 45-day review period is going to be anything more than a repeat of what we had, because you obviously didn't think it was necessary, and you completed this. And I would be interested to know what new information is going to be looked at. And you say, well, the company is going to give new information. I don't know whether that means that they didn't give us enough in the first place. But I really don't understand what the 45 days is going to be used for.

Mr. KIMMITT. Well, again, Mr. Frank, we're going to take a look at any information available in making the determination that national security interests are protected.

Mr. FRANK. Are you going to go over your own work again and see if you made any mistakes, or are you going to look at the future?

Mr. KIMMITT. We're going to look at the information that was available and information that will be made available.

Mr. FRANK. Okay. Let me ask, one of the things I saw the President said was that we shouldn't be treating Dubai and the Emirates any different than we treat England. I am making that statement. Now, it has been pointed out that P&O was not owned by the government, and that is one difference.

But let me ask each of you. Let me start with Homeland Security. You have immigration and these other—do you in your Department treat the United Kingdom and the United Arab Emirates the same in every regard? And, you know, immigration, visas, etc.?

Mr. JACKSON. No, sir.

Mr. FRANK. Thank you. Mr. Kimmitt, did Treasury, when you do your international work, do we have the same exact set of procedures with the United Arab Emirates that we have with the United Kingdom?

Mr. KIMMITT. Well, I don't think we have the same exact set of procedures with them.

Mr. FRANK. Okay. So we treat them differently in some ways.

Mr. KIMMITT. Well, any two countries, sir.

Mr. FRANK. Well, no. I am—well, I agree with that. I mean, it is the President that is the problem. I mean, I do think that he said we shouldn't treat Dubai and England differently. I think we do in many respects.

Let me ask Mr. Welch. Does the State Department treat—I mean, in terms of sharing of information and working together with the UN, is the United Kingdom and the United Arab Emirates, do we treat them pretty much the same?

Mr. WELCH. No, not at all, not—

Mr. FRANK. Okay, thank you. Well, I think—

Mr. JACKSON. Mr. Frank, I would like to say that I believe the President was making a basic equity argument. And obviously, we're looking at the differences between nations when we do the security review. But to give them the same type of level playing field for investment that we give Great Britain and other nations—

Mr. FRANK. Well, that is not what he said, Mr. Jackson. Let me say this, since you—obligated to respond. First of all, I mean, if you want to give advice to the White House on how the President should phrase his statements, you ought to do that. That is not what he said. And in fact—

Mr. JACKSON. I am not doing that. I am trying to help you understand the President's position, sir. I am just trying to help explain the Administration's position.

Mr. FRANK. No. I was talking about the President's statement. You were trying to suggest that the President said something other than what he meant. And I would say this. Yes, I know in this context. Frankly, one of the issues has to do with port security. One of the things I am going to ask for, would you please submit, whoever would be the appropriate one, a description of what it is that the people who are now going to be—if Dubai gets this—what do they do? What are their specific functions?

Because if I listen to you guys, it sounds to me like the people who do what these people do essentially stand on the pier and wave bon voyage to people. I mean, there's been this diminution of what they do that, boy, they're just down there. They don't really have much to do with what is going on. I think you have underdescribed the potential.

And here's the problem that many of us have. You have this government-owned company playing a major role in how the ports are run. It is a government in a tough part of the world. It is a nonelected government subject to a lot of pressures. It is a government that has to worry about fundamentalists, about angry anti-Americanism. It is not in the safest neighborhood in the world. It is not England. And the Government of Dubai has not got the freedom that the Government of the United Kingdom has in many ways. And the fear is that they could be pressured in some ways to allow some people into positions of responsibility that we'd rather wouldn't be there.

So when the President said we shouldn't treat Great Britain any differently than we treat the United Arab Emirates, I think it was wrong, that, in fact, we do in a number of areas. And one of them is in the capacity to even talk about the good will. Although I share

the gentleman from California's and others' unhappiness with that position on Middle Eastern affairs and the Israeli boycott, etc.

But we are saying that there was a difference in the capacity of the Government of the United Kingdom and the government of the United Arab Emirates in their willingness and ability to withstand some of the pressures that would come for things to happen wrong. And for the President to say that the mistake is that we are treating Great Britain and the United Arab Emirates differently—except for that one is easier for me to pronounce—I think this is just an example of how he is not arguing this thing very effectively, and not making anybody feel more comfortable.

And again, I don't know what you could do in the 45 days. But if this is the approach, I don't think you're going to be any further along 45 days from now than you are today.

Thank you, Mr. Chairman.

Chairwoman PRYCE. The gentleman from South Carolina.

Mr. FRANK. Madam Chairwoman. I am sorry. May I—you're back, and I just want to—I complained about the witness list. I still don't like the composition of the witness list. But I've double checked, and it may—I and the people with me, we may not have been as clear about our concerns as we were before. So I should not have made any implication that we were unfairly treated. I do not think the witness list was the right witness list. But I double checked, and I should not have suggested that there was any problem in our communication. I don't like the result, but I don't mean to make any criticism of the process.

Chairwoman PRYCE. I appreciate the gentleman and your statement, because that was the first I was aware that there was any problem. And I certainly would have worked with the gentleman if I had known.

Mr. FRANK. No, I appreciate it. I just don't like eight-to-one. But it was not a procedural problem.

Chairwoman PRYCE. Thank you. The gentleman from South Carolina.

Mr. BARRETT. Thank you, Madam Chairwoman. I appreciate that. Gentlemen, thank you. I am glad you have your steel underwear on today. I know it's been kind of tough.

You know, we've had a lot of different questions from different people, but the same theme that I see keeps coming back time and time and time and time again. This is a different day that we're operating in. People are extremely concerned. I have not seen my constituents as mad about this one issue as anything I've seen since I've been in the United States Congress.

So my question is very simple. Is CFIUS broken? Is this whole process—and I am not questioning—I am not trying to put blame, because I know that you are professional. I know that the people who are involved in this process did everything they felt like was correct by the letter of the law, but I think the process is broken. Because there's too many questions not being answered, too many people don't know what is going on, including possibly yourselves, especially late in the process.

So I would like an answer from each one of you. Just tell me, is this process broken? If it is, would you or your agencies be willing to tell us how to fix it? And if it needs to be fixed, does it need

to be fixed prior to making a decision on this sale? And we'll start here on the left.

Mr. KIMMITT. Sir, I don't believe it needs to be fixed before the final decision is reached in this case. As I mentioned, after the 45-day review, after up to 15 days consideration by the President, a report will be sent to the Congress in detail. Going back to what Mr. Frank and others have said, we know that we'll be measured against, among other things, the concerns that you've raised, the factual questions that you've asked, the opinions that you've expressed. I think for the DP World case, the process will run to that conclusion.

I think the process needs to be improved. The GAO report last fall talked about the fact that the security agencies were not having an opportunity to get their issues fairly addressed in the process. We at the deputies' level have worked very hard to make sure that every security professional, at whatever level, has the opportunity to get her or his views on the table to be fairly considered. There's no rush to judgment, in spite of a comment to the contrary. Anybody who had had a lingering concern among the literally hundreds of people who looked at this at the professional staff level, it would have gone into the 45-day period.

So I think the process—that is, the interagency part of this CFIUS process—worked. I think in terms of notification within departments, particularly moving it further up in the departments, we've talked about the improvements that we need to make there. I think where we really need to focus our attention is the relationship between the executive and the Congress in this process. Although I think we've done a better job of telling you about cases that have been closed, I think we need to focus more on what we can do within the law or beyond to better apprise you on pending cases.

Mr. BARRETT. Would you be willing to give me some comments on how to improve that?

Mr. KIMMITT. Oh, absolutely.

Mr. BACHUS. Okay, good.

Mr. JACKSON. Sir, I concur with Deputy Secretary Kimmitt that the process does merit consideration, specifically with the view to how we share information with the Congress. And our Department would be here to participate within the Administration and with Congress in any discussions of those issues.

Mr. EDELMAN. Congressman, I can attest to the fact that very early in my tenure last August, Deputy Secretary Kimmitt called me and asked me to come over and talk with him at the Treasury about the GAO report and the issues that had been raised in it about the Department of Defense and other security agencies not being able to sufficiently raise their concerns about this. I think a number of steps have been taken to improve that process.

I think all of us have learned some lessons. I won't speak for the others. But I think clearly, issues that are controversial, like this one, need to be raised to higher levels and policy and political levels earlier on in the process. We've taken some preliminary steps in the Department of Defense to try and remedy some of that.

Mr. WELCH. Sir, I agree with what they've said. And I am a little bit in a different position here, because within the State Depart-

ment, our seat at the table is held by another bureau, a peer of mine. In that process, if there's an issue involving a country or firm within our region, we are consulted. We were consulted fairly and responsibly in this process. Though, as I said in an earlier answer, I was personally not aware of it until we began preparing for the Secretary of State's trip.

Mr. BARRETT. I would welcome you submitting any of your suggestions to help better this process, gentlemen, in a timely fashion too. Thank you, Madam Chairwoman.

Chairwoman PRYCE. Thank you. Ms. Wasserman-Schultz?

Ms. WASSERMAN-SCHULTZ. Thank you, Madam Chairwoman. My first brief question is who from the White House participated in the CFIUS process, and who did they report to?

Mr. KIMMITT. There are, ma'am, six White House offices involved: the National Security Council, National Economic Council, Council of Economic Advisors, Office of Management and Budget, Office of Science and Technology Policy, and the U.S. Trade Representative. I don't know the reporting chains within the White House, but they have been members of the CFIUS process for some time.

Ms. WASSERMAN-SCHULTZ. There were six White House entities involved in this process, and the President didn't know anything about this before it was approved?

Mr. KIMMITT. There have been six White House offices involved in consideration of CFIUS cases going back for a number of years.

Ms. WASSERMAN-SCHULTZ. I realize that. But when this first came to light, in fact, you acknowledged—each of you acknowledged that you only recently were aware of it. It seemed as though the White House alluded to the President being aware of it, especially because the law requires if there's a national security review for the President to sign off on it at the end of the process.

Given the amount of alarm, and given that we're talking about a government-owned company where there are national security implications, how could there be six White House entities involved in the CFIUS process, and it didn't rise to the level of knowledge not just of the President, but even of your own awareness or the awareness of your superiors? That is just mind-boggling to most people.

Mr. KIMMITT. As I said, there were in this case not just the normal 12 participants. We also had participants from two other departments and agencies involved in this process. I think that improvements are being made not just in the departments but elsewhere on making sure that even those not involved in the actual security analysis are advised of pending cases.

Ms. WASSERMAN-SCHULTZ. I think this might be the case of too many cooks spoiled the soup. Really, I've never had more constituents in as short a period of time, like the gentleman from South Carolina said, contact my office. And I've literally had senior citizens, little old ladies, calling my office crying about their concern.

And I represent the State of Florida, and my district abuts the Port of Miami. I went to the Port of Miami last week, and I can tell you that when you walk through the Port of Miami Terminal Operating Company and see the potential for the national security

implications that are here, how the CFIUS process could not have triggered a 45-day review is beyond me.

But one of my greatest concerns stems from the fact that we're talking about a foreign government-owned company controlling the P&O company. There was really apparently a disconnect between the CFIUS process that made the decision and the fact that no national security implications were triggered.

I don't know how the CFIUS process, given the UAE's involvement just 5 years ago, in spite of the fact that they may be our friend now and may have been cooperative since 9/11, and the fact that this is a government that recognized the Taliban, only one of three countries that recognized the Taliban, the fact that this is a country that supports the boycott of the state of Israel. I mean, the fact that you have financial involvement in the September 11th attacks and the transport of nuclear material through that country to the state of Iran, how could all of those facts, did they not come to light, or were they not raised during the CFIUS process? And if they were, then how could that not have triggered the 45-day national security review?

Mr. KIMMITT. To the best of my knowledge, those facts and many others were taken into account during the process, both by the agencies charged with responsibility, but also by the intelligence community that would have looked both at historical and more current information and intelligence.

Ms. WASSERMAN-SCHULTZ. It is just—the most startling thing is the disconnect here, where—like I said, I was on the ground at POMTOC in the Port of Miami. The national security implications hit you in the face when you walk through that place. And virtually everyone I spoke to down at the port, including the people involved with POMTOC now, have national security concerns.

Let me ask you another quick question. Because in October of 2005, the GAO report that came out said that of the 500 notifications of acquisition between 1997 and 2005, CFIUS initiated only eight investigations. That is an alarming finding by itself. But the GAO report went on to say that CFIUS has frequently encouraged companies to withdraw from the process in order to address their security implications, really, I guess, so as not to trigger the 45-day review. You also in this process had a pre-CFIUS process, also seemingly to avoid triggering the 45-day review process.

So can you explain how it is that you're not just following the law so that we can really figure out whether there are national security implications with a deal like this?

Mr. KIMMITT. Well, I think the focus at every level is on determining whether there is a national security concern. If there is a national security concern that cannot be addressed, the deal will not go forward. If that concern cannot be addressed in the 30-day period, it will go to the 45-day period.

If a company makes a voluntary decision to withdraw, they have to start the process again. It doesn't mean that the security concern isn't there. They might need more time to address it. They might go back and restructure the deal. They might put the U.S. operations under a separate ownership.

And my feeling is that, again, our focus should be on whether the national security interests of the United States have been pro-

tected. If they haven't been, then those people in departments and agencies are not going to sign off on the deal going forward.

Ms. WASSERMAN-SCHULTZ. But the GAO report indicated that the CFIUS process has encouraged companies to withdraw when security implications have arisen, instead of allowing the 45-day review to be triggered. So why would you do that? I mean, why wouldn't you just allow the process to go forward so that the people at the highest levels that are responsible for that review and for those final decisions are allowed to engage in those decisions?

Mr. KIMMITT. Well, you go to the 45-day if an issue has been raised and has not been properly addressed. If a company says, "I need more time to address your concerns," and withdraws, that is an independent decision on their part.

Chairwoman PRYCE. The gentleman's time has expired.

Mr. JACKSON. Can I just add one footnote to this?

Chairwoman PRYCE. Very briefly. We have a whole other panel that has been very patient, so please be brief.

Mr. JACKSON. Many people withdraw because the 30-day process has indicated that there will not be an approval no matter what. The nature of the objections are so structurally comprehensively laid out that people do withdraw, do not resubmit, and do not pursue the consummation of the transaction. So there are multiple explanations, and this is one of them, for a transaction being withdrawn.

Chairwoman PRYCE. The gentleman from Georgia, Mr. Scott, is recognized.

Mr. SCOTT. I thank you, Madam Chairwoman. Let me just start very quickly by stating how important it is for us to register this one important point, and that is what the American people feel right at this moment. They don't want this thing delayed. They want it stopped. They want it stopped. They want all of our cargo checked at the ports, not 5 percent. Sort of like Ethan Hunt in Mission Impossible when he said, "The knock list is out in the open." Well, this list is out in the open, and the world knows we only check 5 percent. We better go to work and hurry up and get 100 percent of our cargo checked.

Now, I see some eyebrows being raised out there, and people kind of reacting. If Hong Kong can do it, why can't the United States? Hong Kong checks 100 percent of its cargo, and they're not even a terrorist threat. There's nobody wanting to blow them off the face of the earth. We're at war. This is a serious war. And this is a war against terror, against Islamic extremists, in the Arab part of the world. We're not using this as any discriminatory manner.

But here are the facts, gentlemen. The facts are these. This is a government-owned company owned by a government that is one of only three other governments—Saudi Arabia and Pakistan—that even to this day recognizes the Taliban as the official Government of Afghanistan. Yes, they do. While our young men and women in uniform are over there dying, that is what this company does. This country owns this company that has been active in illegal transfers of nuclear material to Iran to help build an atomic bomb, whose president says his one aim is to wipe Israel off the face of the earth. And this is who we're turning our security of our ports over

to? No wonder the American people are saying, "No. We're not going to take this."

What this meeting ought to be about is not examining any of the intricacies here. This meeting ought to be about what steps and how quickly we can terminate this deal, and how quickly we can begin to rise up and get the can-do spirit in America to say, "We need to protect our own securities at our ports." Why, the American people. And we need to start doing it at the point of origin, not wait until they get to the ports. By then, it is too late almost. We need to have Americans at each of these ports wherever their entry bringing materials into this country, checking not 5 percent, but 100 percent of them.

Gentlemen, this is the same country that owns this company that transfers financial backing to Al Qaeda. Comes right through this country. Gentlemen, this is the country that owns this company, of which two of the hijackers that flew those planes into New York's Twin Towers. And you mean to tell me you didn't even tell the President of the United States? He said he didn't know nothing about it. But yet still, he says it is a good deal. He's shot all his credibility.

It is up to this Congress of the United States, and the people of this country are looking to this Congress to finally stand up and do what we were elected to do, provide the oversight that is needed. It is shameful and a disgrace that such a decision was even thought about being made, to turn the security of our ports or the operations of our ports, whatever you want to say it is, this country owning this company has no business doing it.

And we need to sit back from the table a bit. And maybe this is a Godsend that will force us to examine why we're in the shape we are in in terms of our weak homeland security. The American people deserve better than this.

My first question that I want to ask is how can we stop this?

Mr. KIMMITT. Sir, the way the process works, as I have explained it, is that after the 45-day review and the review by the President, a report will be sent to the Congress. And at that point, my assumption would be that in exercising the oversight responsibilities to which you referred, you would look very closely at the report and measure it against precisely the concerns you've raised—

Mr. SCOTT. Let me ask you this question. Is it in your opinion that legislation is the only way of stopping this by the Congress? Because it is very important. Like I said at the outset, the American people want this stopped. And we need to tell them at this committee how it can be stopped.

Chairwoman PRYCE. The gentleman's time has expired. But the witnesses can answer this question, and then we'll proceed to the next panel.

Mr. KIMMITT. I would say the same answer, Madam Chairwoman, and that is I think we owe you, Mr. Scott, the report that will be sent by the President. We will expect you to look at that against the parameters that arise from the security concerns you've raised, legitimate security concerns. And then you will make the judgment and exercise your constitutional responsibilities on how to respond.

Chairwoman PRYCE. The gentleman's time has expired. Mr. Davis from Alabama is recognized.

Mr. DAVIS. Thank you, Madam Chairwoman. Let me ask you gentlemen a few quick questions, and then wrap up with an observation. Mr. Jackson, as a matter of curiosity, in how many other instances has the Department of Homeland Security raised concerns about a transaction that's been evaluated by CFIUS?

Mr. JACKSON. I'd have to get back in and look. We aggressively push it all the—

Mr. DAVIS. You don't know that? Do you know if it's been done at all? Do you know if DHS has ever raised the kind of concern that was raised here about any other transaction?

Mr. JACKSON. Absolutely. I've been personally involved in some quite aggressive conversations in the—

Mr. DAVIS. How many of those ended of being approved anyway?

Mr. JACKSON. Several since I've been confirmed a year ago.

Mr. DAVIS. Several means two? Three? How many?

Mr. JACKSON. I'd have to go back and look.

Mr. DAVIS. Did you identify those to the committee at some point?

Mr. JACKSON. I'd be happy to if it is allowed by law. And I think that it is, so I'd be happy to tell you about that.

Mr. DAVIS. Well, certainly, we would request to see if there are any other instances where DHS has raised concerns, and somehow the transaction has gone forward.

Mr. JACKSON. To answer your question fully, sir—

Mr. DAVIS. My time is limited, so I am going to move on to another question.

Mr. JACKSON. I know. But I would like to not make a misrepresentation here. We aggressively look at all the cases.

Mr. DAVIS. No, no, you're not answering my question. Let me move on to something else. The second question I want to pose and make sure I understand this, there has been some testimony by you all and some question as to whether or not the UAE has done a better job of strengthening its money laundering laws. And, of course, we know at one point, the country was notable for its almost complete lack of laws related to money laundering. Has the Treasury Department or the Department of Justice done any analysis as to how many money laundering prosecutions have happened in the UAE since it changed its laws?

Mr. KIMMITT. I would have to get that specific figure for you, but we are very directly engaged, Mr. Davis, with them.

Mr. DAVIS. Okay. But once again, my time is limited. Just so I can—because my time is limited, do you know how many prosecutions have been waged in the UAE since they changed their laws? Because that would be one measurement of how seriously—

Mr. KIMMITT. I will get that answer for you.

Mr. DAVIS. Okay. Another question. Let me make a very general point, because my time is about to wrap up. And then obviously, you all have been here for a while. I recognize you're not here as political advocates, but I do hope you take this point back to your respective departments. This is what is interesting. I think when my party got in trouble, when people on my side of the spectrum got in trouble, was, frankly, back in the 1970's and 1980's when a

lot of our leaders kind of got the attitude whenever the American challenged them, some people in my party would say, "You know what? We know what is right. We have the facts. We're really smart. We're really dedicated. And don't challenge us, because we know better than you."

And I'd be the first to admit to you a lot of liberal folks did that for a while, and that kind of turned off the American people.

I wonder if this doesn't become the turning point from the left and right kind of flip. And I'll tell you what I mean when I say that.

The way the Administration has defended this deal is essentially to say, "We have the facts. We know what is right. We have the country's best interests at heart. Don't challenge us. If you challenge us, you're being bigoted, you're being prejudiced, and you don't have all the information."

In other words, the people that you work for are starting to sound a lot like the people who got my party in trouble. And I think that there's going to be a price for that.

The final point that I want to make, the President said a few days ago that if this deal does not go through, that it sends a signal to the Arab world that the United States is not open for business with them.

I wonder if it doesn't send a different signal, gentlemen, if the deal goes through. I wonder if it doesn't send the signal to Arab nations that you can have any human rights practices that you want, that you can have almost no system of financial transparency, that you can be an opponent of one of the United States' strongest allies, that you can, in effect, have a deathbed conversion, and all of these things can happen overnight. I think that is the signal that we're sending, frankly. I think the signal that we're sending is that a country with a remarkably weak record and so many things that we care about can still do a multi-million-dollar deal with the United States.

I think that is the wrong signal to be sending, and I think that is why you've heard so much outrage from so many people on both sides of the aisle today. And I yield back the balance of my time.

Chairwoman PRYCE. Thank you, gentlemen, very much for being with us this afternoon, for your candid answers, and for the information that you promised to provide in the future. You are now excused, and have a good night's rest.

And we'll welcome our second panel, who has been very, very, very patient. You may want to wait to sit down, because I bet those are hot seats now.

All right. We'll proceed now with the second panel of witnesses. And once again, gentlemen, thank you for your patience. We'll introduce them in order.

Mr. James Glassman, a resident fellow with the American Enterprise Institute. Welcome, Mr. Glassman. Joining him is Mr. Todd Malan. Mr. Malan is president and CEO of the Organization for International Investment. And we have Mr. David Marchick, a partner at Covington and Burlington. Burling. Excuse me. And William Reinsch. Is that correct?

Mr. REINSCH. Well done.

Chairwoman PRYCE. All right. President of the National Foreign Trade Council. And Mr. Clark Ervin, director of the Homeland Security Initiative at the Aspen Institute.

Gentlemen, we welcome your testimony. You may summarize it and give your formal statements for the record, if you'd like. You each are welcome to 5 minutes. And that may seem very trifling compared to how long you have listened and waited. But we appreciate that patience, and you may begin, Mr. Glassman.

STATEMENT OF JAMES K. GLASSMAN, RESIDENT FELLOW, AMERICAN ENTERPRISE INSTITUTE

Mr. GLASSMAN. Thank you, Madam Chairwoman and members of the committee. It is an honor to appear before you as a witness today.

The intense reaction to the transfer of shipping terminal operations at six U.S. ports raises disturbing questions about national security priorities and about America's commitment to her allies and to the process of globalization.

The response to the DP World-P&O deal has been wholly out of proportion to the possible risk involved. It has almost certainly damaged our relations not just with the UAE, but with Arabs and Muslims and others disposed to support American policies and values. That damage could hurt our overall national security efforts and threatens to disrupt capital flows to the United States at a time when those flows are desperately needed.

In my written testimony, I seek to correct the many inaccuracies about this transaction that have been raised publicly. In my short time, however, I want to concentrate on a discussion of economic consequences.

The United Arab Emirates has embraced the security and economic prescriptions of the United States. They've done what we want them to do. Our ships call at their ports. Our war planes use their airports. They turn over suspected terrorists. A news article in the Financial Times cited Dubai as "a pragmatic pro-Western and free market exception in a region often bristling with hostility to America."

The overreaction to the terminal transactions, coupled with Congress's recent thwarting of the purchase of Unical by a Chinese company, cannot help but deter other investments, especially by developing nations in this country. xenophobia, as the Economist magazine puts it, seems to be creeping into American politics. And xenophobia hurts an economy.

The arithmetic of foreign investment is not complicated. The current account deficit has been rising for the past decade and now is about $800 billion, indicating a wide gap between what we buy in goods and services from foreigners and what we sell to them. This deficit has not harmed the U.S. economy for a simple reason. The United States remains one of the best places in the world to invest, so dollars that flow abroad from our purchase of imports are recycled back to us as capital investments.

In recent years, important capital flows are coming from emerging markets, including Asia and the Middle East. These flows are crucial, and Dubai has been among "the most prominent recent buyers into the U.S. economy," as the Financial Times says. And

I could give you a list of some of the properties that Dubai has bought.

Now, however, the United States risks developing a reputation as a country that no longer welcomes some people's money. If that happens, other nations will attract capital that would have gone to the United States. The virtuous circle of global trade and investment risks being broken with disastrous consequences.

As a news story in the Wall Street Journal stated, "A successful move to block the ports deal could send a chilling signal about foreign investment in the United States at a time when such investment had been critical in sustaining growth.

This episode has been a sad one in many ways, but it could have positive results by helping to revive interest among policy-makers in getting serious about reducing the threat of seaborne weapons of mass destruction. That threat must mainly be attacked at the source in foreign ports before the WMD get here. Would withdrawing the P&O leases from DP World help national security? To the contrary. It could jeopardize Dubai's role as a loyal American ally.

Absolutely keep our ports safe. National security is job one. Trust our own law enforcement and military. They have not objected to this sale.

The United States benefits mightily from a globalized world. Our ties through trade, in fact, have made us more safe as our trading partners become more prosperous, open, and democratic.

But if we decide to deny firms from developing nations, Arab, Asian, and otherwise, from investing in the United States, those firms will go elsewhere. And we will pay the price in higher interest rates, higher mortgage rates, higher inflation, lower stock prices, and less participation in a world that is growing more and more creative and exciting.

Those in the public eye, public officials, press, and academics have an obligation to discuss complicated issues like this one in a dispassionate way to avoid exploitation and distortion. Unfortunately, in this case, the temptation for some has been too great, and that is why this hearing is so important. Thank you.

[The prepared statement of Mr. Glassman can be found on page 94 of the appendix.]

Chairwoman PRYCE. Thank you very much.

Mr. Malan.

STATEMENT OF TODD M. MALAN, PRESIDENT AND CEO, ORGANIZATION FOR INTERNATIONAL INVESTMENT

Mr. MALAN. Thank you very much, Madam Chairwoman and Ranking Member Maloney. My name is Todd Malan. I am president and CEO of the Organization for International Investment. OFII is an association representing the interests of U.S. subsidiaries of companies based abroad, or what we call insourcing companies. OFII has 140 member companies which range from mid-sized businesses to some of the largest employers in the United States, such as Honda, HSBC, Sony, AEGON Insurance, Nestle, Unilever, and L'Oreal.

As the representative of the largest collection of the companies that regularly seek review of acquisitions by the Committee on For-

eign Investment in the United States, we very much appreciate the opportunity to participate in this important hearing.

Some people view the business community skeptically when it comes to national security discussions. Unfortunately, this perspective ignores that the terrorists aim at our economic system, not just our political system. From the tragic events of September 11th to last week's foiled attack in Saudi Arabia, economic and business interests are prime targets.

Companies and the people that run them understand this fact of life. The business community works hard to cooperate with governments on all aspects of national security. My member companies take this national security mandate very seriously.

While national security is any nation's first priority, it must be maintained alongside other important national priorities. National security and economic strength are interdependent.

When Congress enacted the Exon-Florio statute, it struck a balance between two interrelated priorities: national security protection and the economic benefits of an open investment policy. According to the most recent government figures, the benefits of insourcing into the U.S. economy are quite clear. U.S. subsidiaries employ 5.3 million Americans. U.S. subsidiaries support an annual payroll of nearly $318 billion. Average compensation per employee is about $60,000, 34 percent more than compensation at all U.S. firms.

Contrary to many people's assumptions, these companies don't just invest here for our market. U.S. subsidiaries account for nearly 21 percent of U.S. exports.

I'd like to also add that to put the particulars of this case in perspective that we're talking about today, 94 percent of total assets owned by foreign companies are from OECD member countries. Ninety-eight percent of U.S. FDI is from private sector firms. Only 2 percent of total direct investment are from companies controlled by foreign governments.

In today's global economy, labels such as "foreign" or "domestic" are less and less relevant. Millions of Americans are shareholders in foreign companies. American shareholders now hold over $2.9 trillion in foreign equities. Millions of Americans either directly, or through their mutual funds and pension funds, are owners of these firms. Within my membership, there are numerous examples where American shareholders hold a majority in a "foreign company."

OFII believes that the Exon-Florio statute strikes the proper balance, and that CFIUS reviews are extremely rigorous procedures that yield important national security protections. However, we agree that there needs to be better mechanisms in place for consultation between the Congress and CFIUS. This process needs to be focused, perhaps, to committees of jurisdiction, as it is in other oversight responsibilities, and it needs to ensure that confidential business proprietary information is protected. There are numerous examples of other such procedures in monetary policy, trade policy, and trust review.

My written statement includes specific comments regarding attributes of CFIUS process and the current law, and our concerns about various proposals for changing the law. I'd be happy to answer any questions about those perspectives.

However, I'd like to leave you with a general observation about the relationship between national security and economic activity. When it comes to national security concerns arising from commercial operations of critical infrastructure, why should the nationality of the owners of the capital stock be the principal or sole concern? Certainly, there are many instances of foreign ownership that do raise special concerns, as in the case of government ownership of the acquirer, a situation where CFIUS already pays special attention.

However, if we agree that there are vulnerabilities in a particular area, like critical infrastructure, then the solution is to address the risk comprehensively, and not take the view that the risk lies only with the ownership. Mere ownership of such facilities does not mean the risk has been mitigated.

On the other hand, just because a firm is headquartered abroad doesn't mean it can't be a partner in national security. A disproportionate focus on nationality may, in fact, distract from accomplishing the real national security objectives.

Madam Chairwoman, thank you very much for calling this hearing. We look forward to working with you, your colleagues, and the Administration to enhance Americans' national security, because a more secure nation is one that will attract investment, encourage capital accumulation, and realize long-term economic growth. Thank you.

[The prepared statement of Mr. Malan can be found on page 118 of the appenidx.]

Chairwoman PRYCE. Thank you, Mr. Malan. And now we'll hear from Mr. David Marchick.

STATEMENT OF DAVID M. MARCHICK, PARTNER, COVINGTON AND BURLING

Mr. MARCHICK. Thank you, Madam Chairwoman, Ranking Member Maloney, and Mr. Scott. Thank you for the opportunity to be here today.

I'd like to cover four points with your permission. First, the fact that it is in the United States' national security interest to encourage foreign investment in the United States. Today more than ever, foreign investment is crucial for the vibrancy and vitality of the U.S. economy.

Second, the CFIUS process. I've frankly been struck by the assertions in the press and elsewhere that transactions breeze through CFIUS with alacrity. Nothing could be further from the truth. Just because a transaction is approved in the first 30 days doesn't mean the review is cursory. Just because the vast majority of cases are approved by CFIUS doesn't mean the process isn't tough. Just because the process is confidential, or as the press has suggested, secret, doesn't mean that it is suspect. And just because the President doesn't personally get involved in a review doesn't mean that the review lacks credibility.

The fact is that parties regularly consult and negotiate detailed security agreements with CFIUS well before the formal filing, which starts the 30-day process. In the vast majority of cases, this pre-filing period gives CFIUS ample time to review, analyze, and mitigate transactions within the first 30 days. In fact, since Sep-

tember 11th, CFIUS has applied greater scrutiny to foreign investments, imposed even tougher requirements as a condition for approval, and enhanced enforcement of security agreements negotiated through the Exon-Florio process.

The third issue, transparency. The concerns voiced by Members of Congress over the Dubai port transaction make it clear that Congress has serious questions about the CFIUS process. My view is that if Congress had more visibility into the process, you would have greater comfort in it, and knowledge that the process is already rigorous.

A few ideas for your consideration. First, the CFIUS agencies should spend more time on the Hill briefing you, your staff, and other committees on the activities, processes, and trends in filing. Second, the CFIUS agencies should issue regular reports to Congress regarding the number of cases filed, the sectors affected, the countries of origin of the investing parties, the number of withdrawals, and the number of proposed investments by foreign companies owned or controlled by foreign governments.

Third, and perhaps more importantly, the CFIUS agencies and this committee could explore ways for this committee and the Senate Banking Committee to receive classified briefings on substantive decisions made by CFIUS. Such classified briefings could be modeled on the process currently used in the intelligence committees. Some briefings for the big four, others for members of the committee, others that include staff.

However, given the national security and commercial sensitivity of the information that would be provided in these briefings, there need to be strict parameters. In addition, I would assume the criminal penalties, including SEC and insider trading sanctions, would apply for leaks of classified or confidential information.

Each of these important steps to create more transparency and more comfort in the process could be accomplished under the current legislative framework.

Let me also offer some ideas of what Congress should avoid doing. Congress should not create a public notice requirement for Exon-Florio reviews. A national security review process should, by its very nature, remain confidential. As part of virtually every CFIUS review, the Executive Branch conducts background checks on companies, on individuals, undertakes an intelligence assessment, and discusses highly classified national security issues.

CFIUS filings also include highly sensitive proprietary company information, information that companies' competitors would love to have.

A mandatory public notice requirement does not exist for Hart-Scott-Rodino processes. That is the anti-trust review process, as you know. The same rules should apply for Exon-Florio.

Second, Congress should not empower itself in the statute to vote on decisions made by CFIUS. Congress isn't organized to be a regulatory body. And in fact, if foreign investors thought that Congress would review each and every foreign investment, they simply would not make investments in the United States, period.

Fourth, the global impact of Exon-Florio. Tightening Exon-Florio could invite similar restrictions abroad. As we speak, Canada, Rus-

sia, and France are each considering new restrictions on investment. I want to give you one poignant example of this.

Recently, a major Indian telecommunications company called VSNL, a government-owned company, was forced to accept extremely burdensome security conditions in order to obtain CFIUS approval for a transaction. What did it do? Well, it went to the Indian Government and suggested that, "In the interest of a level competitive playing field, as well as regulatory symmetry, a similar security agreement process should exist in India for U.S. and other foreign carriers who desire a license in India." What did the Indian Government do? They issued draft regulations doing exactly that, which would impose burdensome regulatory restrictions on American companies investing in India.

The Dubai Ports transaction has ignited a passionate debate about CFIUS. But as we all learned in law school, bad facts lead to bad laws and bad precedent.

I hope this committee will take a deliberate measured approach in response to this controversy and refrain from amending Exon-Florio. Instead, I would recommend that the committee work with CFIUS agencies to improve any shortcomings or imperfections in the implementation of the agreement.

Thank you once again for the opportunity to appear before you.

[The prepared statement of Mr. Marchick can be found on page 128 of the appendix.]

Chairwoman PRYCE. Thank you.

Mr. Reinsch, president of National Foreign Trade Council.

STATEMENT OF WILLIAM A. REINSCH, PRESIDENT, NATIONAL FOREIGN TRADE COUNCIL

Mr. REINSCH. Thank you, Madam Chairwoman. It is a pleasure to be here. It is late and I don't want to be redundant. I'll trust you to put my entire statement in the record, and make some brief comments.

I am indeed one of the lobbyists that Mr. Frank referred to. But I think the other reason I am here is that I had some peripheral involvement in the statute when it was written when I was working on the other side of the Hill. And when I served in the last Administration, I had some involvement in administering it. And I am also really old, so I can take the long view on this and look not only at the pending case, but some others.

Let me make several points. First, I think that CFIUS made the correct decision in the instant case. I think the 45-day process that they're going to undertake, which is wise, will confirm it. I hope they address a number of the concerns that were raised here, particularly those that Mrs. Kelly raised, because I think they were questions that deserved answers. I think there will be some, but that is what the 45 days is for.

I also agree with the comments that a number of you made, particularly those most recently by Ms. Wasserman-Schultz about port security being a very serious issue. I think it is. I don't believe that ownership of terminal operators is the most important element of port security. There are a lot of other elements that make much more difference. And if you care, we can discuss that at a later point. But I think it is something that the Congress needs to look

at, not only from the standpoint of resources, which is probably front and center, but also from the standpoint of some other legislation.

I am particularly concerned, though, about the message we are sending moderate or cooperative Arab states through the actions on the Dubai Ports World case. I thought a good bit about the comments that Mr. Davis made a few minutes ago about that message. And I think where I disagree with him and what worries me about this is that we are, in attacking the proposed transaction, not distinguishing between Arab states that have been cooperative with the United States post-9/11, on the war against terrorism, terrorist financing, allowing our Navy to dock there and things like that, and states that have not.

And if we're not prepared to make that distinction, if we're not prepared to acknowledge the progress that these states are making in cooperating with us, then I think we're sending a very difficult signal to everybody in the Middle East about what is the point of cooperating with the United States if we're going to treat you all the same at the end of the day?

The UAE's record is not an unblemished one. There's no question about that. A lot of the information cited is pre-9/11. We had gaps in our procedures pre-9/11 as well. We've come a long way. I think they've come some way too. I would like to see a policy that acknowledges that progress.

Now, with respect to CFIUS reform, one of the issues that has not been extensively dealt with that my colleague Mr. Marchick just touched on is that the process is, in fact, more subtle and nuanced than it is being given credit for in this hearing. More often than not in these cases, the government and the acquiring party work out security arrangements that address the concerns that have been raised. There were some in this case that I think bear some study on the committee's part.

I recall in the IBM-Lenovo case last year, for example, there was considerable discussion about security procedures that would guarantee the acquiring company could not access technology that was not part of the acquisition but which was located in the same physical area.

In another earlier case that I was involved in, a separate board of directors was created to ensure continued American control of some sensitive military contracts that the acquiring company was taking over.

In other words, there are solutions to these problems that are presented. CFIUS has been adept over the years at dealing with them, and I hope the committee will look at that nuanced element.

Finally, let me comment on the question of transparency. CFIUS has historically made public very little information about its deliberations or decisions, and its record of consultation with the Congress is likewise limited, and I think it is fair to say that the process operated appropriately in this case. At this time, there's no question that CFIUS over a long period of time has demonstrated a tin ear for the politics of these cases.

The issue of how to address that, though, is complicated. If you want to have a more consultative process with the Congress while a case is pending, that is something that you need to think through

the implications of fairly carefully. On the one hand, failure to consult and provide information to Congress can lead to exactly what has happened in this case, and that is something I think we all would prefer to avoid in the future. On the other hand, providing information can often lead to leaks or to further Congressional demands for involvement in the decision-making process, which I think would be unwise.

I would also not minimize the risk of leaks. The information reviewed in a case is often highly sensitive in that it reveals internal details of corporate operation and finance that could have significant value to competitors. In addition, the agreements that I just referred to that are reached between the government and the applicant addressing new security procedures to be put in place, can also be sensitive, and could compromise the very security they're designed to provide were they to become public.

So I'd urge you to think long and hard about this before going down the road of more consultation, more transparency, and particularly more involvement in the decision-making process, which I think would be a level of micromanagement for the Congress that the framers of this provision back in 1986 and 1987 were wise to avoid.

I do have some other recommendations in my full statement, but I won't go into them at this time. Thank you, Madam Chairwoman.

[The prepared statement of Mr. Reinsch can be found on page 139 of the appendix.]

Chairwoman PRYCE. Thank you very much. We appreciate your insights and look forward to reading the rest of them.

And now finally, we will hear from Mr. Ervin. You're next.

STATEMENT OF CLARK ERVIN, DIRECTOR, HOMELAND SECURITY INITIATIVE, THE ASPEN INSTITUTE

Mr. ERVIN. Thank you very much, Chairwoman and Ranking Member. Thank you very much for this opportunity to testify this evening on an issue that I believe is of profound importance to the security of our homeland, whether a foreign government with, at best, a mixed record on terror should be allowed to operate terminals at six major American seaports, a vulnerable strategic asset through which, experts agree, a terrorist would be most likely to smuggle a weapon of mass destruction into our country. The stakes could not be higher.

Needless to say, a terrorist attack with a weapon of mass destruction could exceed the impact of 9/11 by several factors, resulting potentially in the deaths of millions of Americans, and bringing our economy to its knees.

In the last few weeks, we Americans have learned a number of troubling things. I would wager that most Americans did not know until now that port terminals in this country have been operated by foreign companies for quite some time. Likewise, of course, most Americans did not know of CFIUS, the secretive interagency group that has the unilateral power to approve the acquisition by foreign companies of key U.S. strategic commercial assets after a mere 30-day review, without being obliged so much as to inform the President, much less the Congress.

And I learned just today from testimony from the first panel, I was under the impression that the acquisition by foreign governments of key U.S. strategic assets was unique in this deal. If not that, then certainly unusual. But we heard today that if last year is representative, this happens rather regularly. We heard last year that there were 65 transactions subject to CFIUS review which were approved, 12 of which the acquirer was a foreign government.

In this instance, the already unduly rushed and lax CFIUS procedures were not followed. Even though the control of key operations by foreign government was at issue here, there was no investigation, the committee made the decision to approve the deal on its own, and the President was not even informed of the decision.

At a minimum, to talk about process to start, the CFIUS process has to be changed. The review period is too short, and the committee has too much unilateral power. Where the control of a component of the Nation's critical infrastructure or of a key strategic asset is concerned, and the acquirer is a foreign government, the law should require the committee to conduct a complete and lengthy investigation, which is to say more than 45 days, to determine whether permitting the deal to go forward could compromise national security. The committee may make a recommendation to the President, but then he should make his own decision based on his own independent review after, in my judgment, longer than 15 days. Then—and this is the most important point—rather than simply notifying Congress of his decision as a fait accompli, the President, in my judgment, should have to seek and obtain Congressional approval for the deal to be finally approved.

If treaties and trade agreements are important enough to require Congressional sign-off, as well as Presidential approval, certainly Congressional concurrence should be required before a foreign nation gains control of something as important as operating terminals at key seaports post-9/11.

As I said, the foregoing goes to process. In terms of substance, this deal should not be approved under any circumstances, even if it had the support of both the President and the Congress. In the post-9/11 age, we should have learned by now that there is no margin for error when it comes to the security of the homeland. Under these circumstances, now that we know that operations at many other key ports are controlled by foreign companies, perhaps consideration should be given to prohibiting such control in the future, even if the company at issue is one based in a rock solid ally like Great Britain. But certainly, we should not hand over control of port operations to a nation that has strong links to terrorism.

In the last few weeks—and I am closing—as this deal, the controversy over this deal has unfolded, I've listened carefully to the arguments of those who support this deal. Basically, they boil down to four. And over the course of the last 4 hours, we've heard all of them.

One argument is that it is nativist, xenophobic, Islamophobic, and even racist to oppose this deal. In fact, opposition to this deal has nothing to do with UAE's being an Arab and a Muslim country. If the acquirer here were the Government of Japan, whose people

are Asian and Buddhist, or the Government of Norway, whose people are Caucasian and Christian, and either of those countries had the same record on terror as the UAE, I for one would be as opposed to that deal as I am to this one. It is UAE's record that is at issue here, not the ethnicity or the religious affiliation of its people.

Another argument is that if this deal goes forward, the new owners won't have anything to do with security. This is flat out untrue. Yes, it is true that the Customs Bureau will inspect cargo, but only 6 percent of cargo containers are opened. Yes, the Coast Guard will be in charge of port security still, but that simply means that it sets standards that are left up to the port terminal operators to comply with on a day-to-day basis.

Key things, like hiring security personnel, patrolling the perimeter, and overseeing the unloading of cargo, will be handled by a port operator that is owned by the Government of UAE.

Third, UAE has been, at least recently, an ally in the war on terror. And that may well be true. But port terminals are not carrots that should be handed out as rewards for other nations' cooperation. If indeed our approval of such a deal is a quid pro quo for UAE's continued support in the war on terror, it seems to me that the price is too high, and we should not pay it.

The final argument, to my mind, is the most dangerous, and we heard it just a second ago. It would be ludicrous, it seems to me, if it were not so disturbing. According to some, our ports are already vulnerable because too little money has been spent to secure them, too few cargo inspections are conducted, we have too little radiation detection equipment, and the equipment we have is not that good. This is all true. But instead of agreeing to something that might make our ports more vulnerable, shouldn't we address the vulnerabilities we already have?

In closing, Chairwoman, you asked a very important question. I think it was the very first question. That was would this deal, if it goes forward, make our ports safer or less safe? No one on the other side of this question has been willing to say that this deal will make us more safe. Deputy Secretary Jackson's answer was, "Well, we won't be any less safe. We won't be any worse off than we are now."

Because of UAE's record on terror, because UAE is in control of this company, and because of the key security tasks that port terminal operators provide, it seems to me that a very good case can be made that we will be less safe. But the standard in the post-9/11 world should be approval of deals like this only if it makes it safe. And this deal does not pass that common sense test. Thank you.

[The prepared statement of Mr. Ervin can be found on page 91 of the appendix.]

Chairwoman PRYCE. Thank you all very much, gentlemen. You all have shed great light on this issue. And I am not sure which one of you was so amazed by the fact that there was so much questioning about the CFIUS process, and that it wasn't thorough, and it wasn't tough. And perhaps it is. But the fact remains that Americans don't realize that about the process.

And if you want to characterize this as a big PR bungle, you may, because that is about 50 percent of what has happened here. This all could have been much less devastating for America if they had been prepared for this, if it had been rolled out in a way that they could understand and appreciate.

And the same is true for those of us here on Capitol Hill. I don't think anybody would argue with that. I think our first panel realizes that now. But the fact remains that perception is reality, and this has gotten bigger than anybody certainly wanted it to. This is a situation that it is very hard to find a win in the end of this, no matter what happens.

And so I'd venture to guess that CFIUS will be reformed. We want to do that carefully. But I think that this—and some of you have suggested that should not happen at all. But it must be now. We have to. We're living in a post-9/11 reality, and these issues can't ever happen again. And we need to make sure that as oversight stewards that we're doing that right.

And so I guess my question is how can we change the process to make it as transparent as we can, to regain the trust of America in this process. Because Americans don't trust this process, and it is only as good as the trust that our citizens have in it. So I don't know if there's any right or wrong answer to that or anything that you might be able to provide to us today. But we will be looking at this, and we will be looking to you for suggestions. So anybody have any of them now? Mr. Marchick?

Mr. MARCHICK. Madam Chairwoman, thank you very much. I think there are improvements that can be made in the process, and I think that your comments hit the nail on the head in terms of creating more transparency and more openness so that you can do your job as an oversight chairman.

A few ideas to improve the process. First, I think that national security is not defined under the statute. That was an intentional design of the drafters of the legislation in 1988. It leaves the national security decisions to the President and to the President's—to the agencies. And I think that is appropriate.

What I do think could happen is that there could be guidance from Congress and greater clarity from the Administration as to the factors that the President and the CFIUS agencies will consider when evaluating a national security issue.

There are five statutory criteria in the Exon-Florio statute dating back to 1988. They primarily focus on two issues. One is securing the supply chain for DOD, and second is control of export—export control technologies. I think in today's day and age, the issues that CFIUS look at are much, much broader. They include protection of critical infrastructure, protection against espionage from foreign agents, protection of the Department of Justice and the FBI's ability to conduct law enforcement investigations. There's a broad array of much more comprehensive factors that the CFIUS agencies do consider, and those could be better articulated either by Congress or by the Administration.

Second is I think that there needs to be much more reporting to the Congress and to the public on the type of transactions that go through CFIUS, the type of mitigation measures that they use to

address national security concerns, the number of transactions that are withdrawn or abandoned.

Just to give you a couple examples, if you look at the data between 1988 and 2005, there were 1,593 transactions that went through CFIUS. Twenty-five of them went to investigation. Thirteen of them were withdrawn. Twelve of them were decided on by the President. That data obscures the real way that CFIUS works, which is a lot of transactions—and I've had clients that have had this experience—go to CFIUS. The parties go to CFIUS. They talk about the proposed transaction. And CFIUS will either say right up front, "It's not going to happen." Or after spending a lot of time reviewing the transaction and trying to find ways to mitigate a transaction, mitigate the national security concerns of a transaction, they'll say, "You can send this transaction to the President, but there's a unanimous view within CFIUS that the President will turn this down."

And it is pretty easy for a CEO of a company to make the decision "Do I want to withdraw this thing and have it go away quietly, or do I want the President of the United States to make a public decision that my acquisition is a national security risk to the United States?"

And so I think that much more detailed and comprehensive public data presented to you, Madam Chairwoman, would help the transparency of the process. And I would look to the type of reports the Department of Justice produces in Hart-Scott-Rodino, where they produce a very thick annual report, and you can have more frequent reports if you'd like.

Chairwoman PRYCE. Yes, you may briefly—my time has expired.

Mr. ERVIN. Yes. I laid out my recommendations, basically, in my statement. I don't know, frankly, that in my judgment an expansion of the definition of national security to encompass in the post-9/11 world critical infrastructure is required. To me, that is obvious. But I certainly would have no objection to such an expansion of the definition.

But I think the key thing, as I say, is certainly when the acquirer would be a foreign government, and perhaps even when the acquirer is a foreign company, and the asset to be acquired is a key element of our critical infrastructure, there should be a lengthier investigation conducted by CFIUS. The President should conduct his own lengthy investigation, longer than 15 days. And then at the end of the day, it seems to me Congress must give its approval.

I am quite confident if we had had that procedure here, the political pressures or such, that there would have been, just as there is now, bipartisan opposition to this deal such that it would not go forward.

Chairwoman PRYCE. Thank you. I recognize the gentlelady from New York.

Mrs. MALONEY. Thank you, and I thank all of the panelists. And I particularly want to welcome Clark Ervin. He served as the IG under the Bush Administration, the first appointee to the new committee that we formed for Homeland Security. And he's writing a book on the gaps in our national security, and he's a new father.

So we welcome him and congratulate him on all these new events in his life.

The GAO report came out with an extensive report that recommended steps to strengthen CFIUS. I'd like to place their report in the record, without objection. And I have authored a bill that embodies several of their recommendations, some of which have been mentioned by other panelists today.

All of the panelists said on the earlier one that the definition of national security should be expanded. And they all agreed on that. But I agree with our last panelist, Clark Erwin, that it is very clear in the law now. And the law said that if it involved national security, there would be an automatic 45-day review. And they did not see that handing over 20 ports of critical infrastructure importance involved national security, which is mystifying to me. Absolutely mystifying.

So I would want to change it that if a foreign country is buying the management—there have been foreign managers, particularly for their own lines, but as I understand it, this is the first time that a foreign government has control of the management of an entire port in the United States—in this case, 20—that certainly this criteria should trigger a longer review. And I would like to ask Mr. Ervin if he agrees.

Mr. ERVIN. I certainly do. There's no question about that.

Mrs. MALONEY. And you mentioned you were writing a book on closing the gaps. And I understand that Hong Kong reviews every cargo coming into their port. And it is a substantial report. They X-ray it, they review it, they inspect it. And we in the United States are only inspecting 5 percent of our cargo, and I think we should have the same standard. If Hong Kong can review all of the cargo coming in, certainly the United States of America should.

And I'd like to ask Clark Ervin, the report that came out from the Coast Guard, they came out with a report requesting $4.5 billion over the next 10 years for port security. And we put in the budget for this year roughly $175 million. Do you think that is an adequate commitment to port security in our country?

Mr. ERVIN. Well, I don't have a precise figure in my mind, Congresswoman—and by the way, thank you for your kind words—as to what I think the Coast Guard budget should be, but I would certainly make the larger point that we have not funded port security to the level that we should. We've spent something between $18- and $20 billion since 9/11 to secure aviation, and it seems to me we should have done that. And that is all to the good.

But as I said early on, it seems to me the most area of vulnerability is our ports. Everyone agrees. And the one thing that President Bush and Senator Kerry agreed on in the 2004 Presidential debates was that that is the number one vulnerability. And everyone knows that terrorists are most likely to smuggle a weapon of mass destruction, or attempt to do so through our ports. So we need to spend substantially more money. There's no question about that.

Mrs. MALONEY. And I believe you raised some very important issues that even though they are managing the port, there still is the opportunity for activities that an American company would not allow. And I think we should have a higher standard. I look for-

ward to this review. But it was testified by the former panel that there was absolutely nothing we could do about it, that if it was approved, it would go forward.

And many of my constituents, of all the things that have happened, they feel deeply that we need greater port security, and they feel that this does not reach the level of common sense for the critical infrastructure of our country.

Mr. ERVIN. Well, I certainly agree with that. There's no question. If I might just expand on one point that I touched on in my remarks, which has not been remarked on very much here. It is very, very important to understand what words really mean. It is really important to understand exactly what role port terminal operators play in security. It is not sufficient to say, as I said in my statement, that the Coast Guard remains in charge of port security, and that Customs will continue to conduct inspections. Too few inspections are conducted.

As you noted, Hong Kong is somehow capable of inspecting 100 percent of cargo. Perhaps that should be done in this country. Certainly, more inspections should be conducted. But the point is right now, only 6 percent are.

And it is one thing for Customs to set standards. The point is whether those standards are complied with. And whether those standards are complied with on a day-to-day basis, on an on-the-ground basis, is largely up to the port terminal operators. I do not want a country with such a record in charge of hiring security personnel, being privy to what the port vulnerabilities are, and to what the plans against which the Coast Guard is measuring security are. Obviously, if that information were in the hands of a terrorist, it could be easily exploited to perpetrate murder and mayhem in our country, and that is something that, needless to say, all of us should want and work very hard to try to avoid.

Mrs. MALONEY. Thank you.

Chairwoman PRYCE. The gentlelady's time has expired. Ms. Lee?

Ms. LEE. Thank you, Madam Chairwoman. Let me thank the panel again for being here. And I want to pose the same question I asked the previous panel. But first let me just once again remind you of what the 9/11 Commission said. The 9/11 Commission report concluded that terrorists have the opportunity to do harm as great or greater in maritime and surface transportation than the 9/11 attacks.

Several months ago, this report came out. And for the most part, the grades were primarily D's and F's in terms of the implementation of the follow-up. Given the fact that we all have to see domestic security, port security, and airline security as central in ensuring the protection of the American people from a terrorist attack, how do you see this deal in terms of the scoring now? Just a simple do we go from an F to a D, a D to a C, a C to a B, a B to an A? How would this fit now with the recommendations of the 9/11 Commission report? Because obviously, we need to do much more to enhance port security and airline security, and so we have to measure all of these transactions within the context of the world we live in now.

And so I'd just like to start asking each of you to kind of comment on what this does to the overall scoring of the recommendations of the 9/11 Commission report.

Mr. GLASSMAN. Ms. Lee, are you referring to this impending sale?

Ms. LEE. Yeah.

Mr. GLASSMAN. I think it has very little effect. This is a company that was just named the best container operator in the world last year by a peer group. It has a very good record. It is very well respected.

The real problem in security, protection against a seaborne WMD, is at the source. My colleague at the American Enterprise Institute, the real expert on this, Veronique DeRugy, says, number one, stop terrorists from acquiring fissile material for building a bomb. We only spent $250 million to do that.

Number two, stop such material from getting on the ships in the foreign ports. Last year, we only spent $139 million on that. And by the way, Dubai was—UAE was the first country in the Middle East to participate in the program that we do have, the Container Security Initiative. And third is protection in the ports itself, which is where we spend most of our money.

You know, it doesn't help us to detect a bomb in the Port of Philadelphia a few minutes before it goes off. The place to detect it is before it's been put on a ship, and that is really where we need to put our efforts.

Mr. MALAN. Ms. Lee, I don't represent either of the parties in this transaction, and I don't have a lot of understanding of the details of the transaction. The one comment I'll make is that obviously, everybody at the hearing has pointed to the fact that port security is incredibly important. In my testimony, I pointed out that it may not relate 100 percent to the ownership of the company on the port side.

Mr. Ervin pointed out that Hong Kong is screening 100 percent of the packages that come through the port. That doesn't relate to the capital—that is their decision to screen every single one that comes through their port.

So I would urge as we look at this that we not just look at ownership. We look at the vulnerability of the fact we've got vulnerabilities in our port, as you've pointed out, and as the 9/11 Commission pointed out.

Mr. REINSCH. Well, I think as far as U.S. ports are concerned, Ms. Lee, it wouldn't make a lot of difference. The important things for domestic port security are the recommendations that Mr. Ervin made, which I think are wise.

One of my colleagues on the NFTC staff has seen the Hong Kong operation, and it is an impressive one, and I think it is a fair question why we can't or don't do something similar.

I do think, however, that one of the things the committee might want to keep in mind with respect to this transaction is that, as Mr. Glassman said, a significant part of port security really is trying to stop things from being on-loaded at the port of embarkation, as well as checking them here when they come in. It is far better for us if we can catch people before they put bad things on board the ship. That demands a very high degree of cooperation, both

with port authorities overseas and with terminal operators overseas. Hence, the Container Security Initiative that the Administration has talked about and Congress has supported, as well as some other initiatives.

This company operates ports all over the world, not simply the ones they're going to acquire in the United States. In fact, these are the first facilities they'll have in the United States.

To the extent that we can extend and enhance and deepen our cooperation with this company, that will help us in our ability to detect and deter the on-loading of dangerous things in other ports.

Mr. ERVIN. Ms. Lee, Chairman Kean has spoken to just that point. And he, like I, for what it is worth, thinks that if this deal goes forward, that would be a step back with regard to port security. I don't recall what grade the 9/11 Commission assigned to port security today. It was either a D or an F. And whatever the next letter grade is below would be the grade, it seems to me, that would be earned if this deal were to go forward.

If I might just take 1 minute to just respond to the point that it is a good thing that the UAE is a participant, the first participant, as I understand it, in the Container Security Initiative. Everyone agrees, as has been said here, that it makes sense to push the borders out. It may well be too late to search a cargo container when it comes to the United States.

But the GAO did a report on the Container Security Initiative just last year. They pointed out that 35 percent of cargo is not targeted, is not assessed to determine whether it should be inspected or not. So one third, we have no idea whether it should have been inspected. Of the remaining two-thirds that might be inspected, the GAO reported that in these ports abroad, 28 percent of the time when we ask foreign inspectors to conduct inspections—and by the way, we don't do the inspections ourselves. We're dependent upon them to do it. Twenty-eight percent of the time, nearly one in three, they refused to do it.

I don't know what the specific record of UAE is in this regard, but I would urge the committee to obtain that information from the Department of Homeland Security. It might come out—

Chairwoman PRYCE. The gentlelady's time has expired. Thank you. Mr. Bachus?

Mr. BACHUS. Thank you. Gentlemen, let me ask this one question. I just want to clarify. I want to see if I've got this right in my mind. How many of you were for the ports deal? You're satisfied that it is a good deal? So one out of four? Or two. Okay.

Let me ask the two of you. I'll just address it to both you gentlemen. That is Mr. Glassman and Mr. Reinsch?

Mr. REINSCH. Reinsch.

Mr. BACHUS. Reinsch? Okay. One difference that I see is that, you know, it's been said that this is a transfer from one foreign corporation to another foreign corporation? Is that what basically is your understanding, that one foreign corporation owns—I mean is the terminal operator, and it is transferring to another foreign corporation?

Mr. REINSCH. That is factually correct in this case, yes.

Mr. BACHUS. You know, that is what I was—you know, to read the paper, that is what you would assume. But now, when you ac-

tually look at the legal documents, it appears to be that P&O Steam Navigation Company owns a wholly-owned U.S. subsidiary, P&O Ports North America. So really, the terminal operator right now is a wholly-owned American subsidiary. Is that not correct?

Mr. REINSCH. I think that is why CFIUS would have jurisdiction over the case, because they're taking over an American—

Mr. BACHUS. Right. So, I mean—

Mr. REINSCH. But the parent is British.

Mr. BACHUS. So right now, despite the fact that the press, I think, has pretty much said that this is, you know, a British company that is operating the ports, in fact, it is an American company, a wholly-owned United States subsidiary of a British company. But it is a U.S. entity, P&O Ports.

Now, the purchaser is not really—it is not—it is PCFC, but it is a wholly-owned subsidiary of Dubai Ports. But unlike the fact that it is not a U.S. subsidiary, it is a Dubai corporation. So you're transferring ownership from a U.S. subsidiary of a company to a foreign subsidiary of a company. And is that not significant?

Mr. MARCHICK. Sir, I am not familiar with the corporate structure, but I would be very surprised if Dubai goes forward with this deal that they would not set up their own U.S. subsidiary.

Mr. BACHUS. No, that is what they've done. It is Thunder—it is called Thunder FZE, a Dubai Corporation.

Mr. MARCHICK. And it is very common for—

Mr. BACHUS. And I am not even sure that it is a public corporation. I don't know. It may be a private corporation, which would even present problems that we don't have with—you know, obviously, there's control and visibility into a U.S. subsidiary that is not true of a private wholly-owned subsidiary, a foreign private-owned subsidiary of another foreign corporation.

Mr. MARCHICK. Well, it is typical for foreign companies to create a U.S. subsidiary, to own 100 percent of that U.S. subsidiary.

Mr. BACHUS. Sure.

Mr. MARCHICK. And the U.S. Government has jurisdiction over the entire U.S. subsidiary, whether the foreign company is public or private.

Mr. BACHUS. Exactly. And what Dubai Ports is doing is not creating a wholly-owned U.S. subsidiary. In fact, one of the mitigating agreements we could enter in is saying, "Okay. If you want to operate—if you want to own the terminal operator, you will create a wholly-owned U.S. subsidiary."

Mr. MARCHICK. Sir, for tax reasons, for other reasons, they have to create a U.S. subsidiary. I don't think they can operate this company without creating a U.S. entity for tax purposes and organizational purposes. And that U.S. subsidiary will be the subsidiary over which the United States has jurisdiction and with which—

Mr. BACHUS. The British did it, though.

Mr. MARCHICK. Yeah. I'd be surprised if the Dubai company—

Mr. BACHUS. Well, I'd be surprised too. But what I am saying to you is what seems to be missed in all this, and I have read in the paper today, yesterday, last week, that this is a British corporation, and a Dubai corporation is taking the place of a British corporation. And hey, you know, we let the British do it. Why don't we let

UAE do it? That is not what is happening here. And I don't know why there hasn't been more focus on that.

Now, I will say this. I come into this with a little different viewpoint. We have an Administration that has done everything right as far as terrorism in the last several years. So you can criticize them all you want to. We have not had a terrorist attack in our country, and I give the Administration an A-plus in that regard. And I think that we had a case here of the President not being fully advised by those around him. And that is just the opinion that I have. And I think that they were—

Mr. GLASSMAN. Mr. Bachus, could I just add to that?

Mr. BACHUS. Yes.

Mr. GLASSMAN. I completely agree with what you just said about the Administration, and I think we need to give the Administration the benefit of the doubt. They have a perfect record on security. And I think one of the reasons that the record is as good as it is on security is because after 9/11, the Administration put a lot of pressure on countries like the UAE. They said, "You cooperate with us, or else."

And in my opinion, the UAE has cooperated. It hasn't been perfect. But my gosh, you know, there are more port visits to the UAE than to any other port in the world. We fly our U2's, our reconnaissance planes, out of there. They turn over terrorists to us. Certainly, they didn't have a great record before, but we put pressure on them. And so I think this is of a—frankly.

Chairwoman PRYCE. The gentleman's time has expired.

Mr. BACHUS. Can I—just to respond.

Chairwoman PRYCE. Very quickly, please.

Mr. BACHUS. I think it is absolutely correct that there are going to be some negative implications if Congress stops this deal. There will be some national security implications working the other way. And I think we just have to decide it is a balancing act. There are some definite negatives to saying to Dubai after this deal is moving forward, no. I mean, there's going to be some consequences.

Chairwoman PRYCE. The Chair recognizes Mr. Sherman.

Mr. SHERMAN. Thank you. I would point out that we had a perfect record as far as preventing terrorists—for preventing international terrorism hitting the United States during the entire 1990's, at a time we were doing virtually nothing about terrorism and were absolutely awful in our national security. And the fact that we have not been hit again since 9/11 is, I think, if you look at the foreign policy situation, a case where bin Laden has decided that hitting America's allies better fits his strategy. In fact, hitting us on 9/11 increased our efforts against his operations. Hitting Spain decreased Spain's efforts against those who were allied with bin Laden.

And so it is a political decision. You certainly can't say that a decade without a terrorism attack on U.S. soil is a decade of great national security enforcement. Otherwise, we have had virtually half a decade since 9/11. We had a whole decade in the 1990's, and we were spectacularly poor in our anti-terrorism efforts then.

Mr. Glassman points out that it is important to prevent the terrorists from succeeding abroad, from getting their plans put together, from being able to bring in weapons of mass destruction

and getting their hands on nuclear material, etc. But then goes on to talk about how cooperative the UAE has been.

I would simply say—and I don't know if you were here to hear the first panel. But in July 2005, Hamas issued a press release thanking the UAE for its very generous financial support, its unstinting support, in the words of that press release. And, you know, the UAE didn't control that press release, but their response was to bask in the glory of associating themselves with Hamas, rather than to deny it.

And as I said before, many of those very close to the current president of the UAE, including the current president himself, had been involved in providing funds to terrorist organizations like Hamas and Islamic Jihad. It is hard to see how allowing this transaction is consistent with the idea of stopping the terrorists from being able to build their bombs in their sanctuaries abroad.

I've heard these comments about whether it is a separate corporation or not. I would point out that so far, Dubai Ports has simply said that it would be a separate business unit. And my guess is that once they talk to their tax lawyers, they'll set up a separate U.S. corporation. But I don't think we in the United States should be fooled that that which they do to dodge our taxes somehow makes us more secure.

The key is ownership, and the ownership in this case is in the UAE Government, a government which basks in the praise it receives from Hamas for its generous contributions to that terrorist organization's activities.

I don't know who to address this question to, but I'd want to shift gears to another issue, and maybe Mr. Ervin knows the answer. How do we finance our port security? Is it through fees on shippers, or is it from the general fund?

Mr. ERVIN. Well, I am not an expert in that particular aspect of port security, Congressman, but I believe it is a combination of things. But I believe that the lion's share of the financing comes from general appropriations to the Department of Homeland Security's component parts.

Mr. SHERMAN. And I would say that this whole process illustrates the tremendous political power of importers. We now have the largest trade deficit in history. We lose all the good manufacturing jobs. The dollar is precarious. And the possibility of worldwide depression is all there because of that enormous trade deficit.

But the power of the importers is not just here in Washington. It is at the ports, where we have under-funded port security, because we've been unwilling to impose fees on those bringing things in through our ports. Why? Not because we're doing a great job and we don't need to do anymore. Not because we've got all the money we need in the general funds, and we're happy to fund it that way. The reason we fail to collect fees adequate for a truly robust port security program, one that looks at the containers there as well as here, is the enormous political power of importers.

I have yet to see a circumstance where the economic interest of importers has been subordinates to national security. I am sure there's one or two cases where that has happened. I am just not aware of any.

It looks like my time has expired. Thank you.

Chairwoman PRYCE. The gentleman's time has expired. And Mr. Scott.

Mr. SCOTT. Thank you. I want to deal with a couple of issues. First of all, I'd like to set the record straight once and for all. Because I think that it is disingenuous of this Administration and those of you who are supporting this deal to play the race card. That is absolutely wrong. There's nothing racist about protecting this Nation's ports and national security.

We do business with Arab countries, Islamic countries. We do business with foreign countries. This is no direct attack on that, or indirect attack on this. We do so much business with investment from foreign countries that 90 percent of what we spend on our government comes from foreign investment. We borrow that money.

And just on the interest we're paying these foreign countries is more than we're spending on our own homeland security. This has nothing to do with that. It has everything to do with a country that has, at best, an extraordinarily mixed and checkered past of soaring magnitude when it comes to financing terrorists, working with terrorist organizations. A country that has that kind of a history, it is not healthy for us to engage in this type business. Maybe some other business.

And that needs to be put to rest. This Administration does itself a disservice, and it certainly does this country a disservice, to try to simplify this as being some kind of racist deal. And for the fact of them even bringing this up lets you know that this deal is very shallow.

I am very concerned that there may be something else rotten in the cotton in this deal. I can't understand it, when it is just so obvious that it is not a deal that should have been going forward in the first place with all of these holes in it.

And the President of the United States said many times in the war on terror, "If I err, let me err on the side of caution." This ain't caution here. This is throwing our security to the wind. And American people see it very, very clearly.

I want to talk about another point. I mentioned in my earlier points about Hong Kong and the fact that they check 100 percent of their duty, their cargo. 100 percent. And they handle 22 million cartons per year, 22 million pieces that they check, whereas we handle only 11 million, 12 million. They handle almost twice as much, check 100 percent of it, and they're not even a target of terrorists. Here we are, a target of terrorists, the number one target, and we don't check 6 percent of it.

These are the questions that we need to be grappling with, gentlemen. Clearly, to me, our first order of business is to put this bad deal behind us and run very quickly to secure our ports and put forward a reform package for CFIUS—I guess that is the way you pronounce it. I may be butchering it a bit, but your organization—not in any way to be destructive of it, but to help this process.

We need you. But there are some things broken here. And I think God works in strange and mysterious ways, and I think he sent this whole deal for us to wake this country up. I think this is a Paul Revere deal, an alarm bell. And I really thank God for

it, because it is exposing us to a need that we need to rapidly deal with.

Now, I just want to ask one point about a process within it, and I'll be brief, Madam Chairwoman. The critical point in the CFIUS process is this business of the mitigation. Once a deal, once something is happening, you see it, and it goes through this process. Then you have mitigation agreements or letters of assurance. They're negotiated between CFIUS and foreign companies to address the security concerns. But they're not monitored. They're not enforced. There's no agreement regarding which agency is responsible for monitoring these agreements. In addition, there's no mechanism for CFIUS to overturn a decision based on a failure to comply with the agreement.

Chairwoman PRYCE. The gentleman's time has expired. If you want to ask a brief question, please go ahead.

Mr. SHERMAN. Exactly. I'd like to get somebody's comment of that. And Mr. Clark, I just want to state that as Humphrey Bogart said to the police captain in Casablanca, "You got it right, my friend. You got it right." But could somebody just address the holes in the mitigation process, the point I just brought up? Thank you.

Mr. MARCHICK. Thank you, Mr. Scott. And thank you for the opportunity to engage with you on this. And we'd be happy to work with you and your staff to talk about reform ideas and share our thoughts and input with you.

First of all, I agree with you that there is good to come from this deal, and that there are two things. One is the focus on port security, and you and Mr. Ervin and the Chair have spoken eloquently about that. And I think this is a wake-up call, and I hope that we can use this to focus on strength in our ports.

The second is that I think this brings focus on this process and greater transparency, which I think is helpful. And I think, hopefully, future oversight hearings by you will continue that process.

The irony of this deal is that it has created a perception that CFIUS has too light a touch, that when they balance the security and economic factors, that the security factor is not given enough weight. In my experience—and I am not involved in this deal. I have no interest at all—since 9/11, the security side of the equation has so far outweighed the economic interest and the need for us to track foreign investment that it has created a process that is overbearing in many cases. And I'd be happy to brief you on the types of security requirements that have been imposed on foreign companies investing in the United States.

The Congress has not given Homeland Security and other agencies the authority to regulate security in a lot of these areas: chemical security, port security, etc. And so any time a foreign company comes to the CFIUS process, there's piling on. That is all the ideas and all the concerns that the agencies have about a particular industry, they pile on security requirements on one particular company.

Now, in terms of enforcement, the agreements—and I'd be happy to share with you some examples of agreements—are very clear in terms of who has the authorization and the responsibility to enforce them. It is typically the Department of Justice, the Department of Defense, or the Department of Homeland Security. They

have very, very tough enforcement provisions, criminal and civil. They have very, very tough follow-up. We have had clients where the FBI calls and says, "We're sending four agents down there. We'll be there tomorrow," and they stay for 3 days doing an audit. Talk about scaring a corporation. Talk about making sure people are focused.

Chairwoman PRYCE. I am going to have to stop you there. We will have an opportunity, Mr. Scott and members of the panel, for additional questions or additional responses, if you so desire. Without objection, the hearing record will remain open for 30 days. Remember to submit those, or for you to augment your statements with further information for us.

And with that, we have been at this very long and hard. Thank you very much for your insights and your perceptions and your patience, and we will be adjourned as this hearing concludes.

[Whereupon, at 6:17 p.m., the subcommittee was adjourned.]

A P P E N D I X

March 1, 2006

Opening Statement
of
House Financial Services Committee Vice Chair
Rep. Judy Biggert

DIMP Hearing on
"Foreign Investment, Jobs and National Security: The CFIUS Process."

Feb. 27, 2006

Thank you, Chairman Pryce.

I would like to associate myself with both Chairman Oxley and Chairman Pryce's remarks and add just a few comments.

Since September 11th, 2001, we all have maintained a heightened sense of awareness when it comes to anything or anyone crossing or operating within our borders. We also have formed alliances, both at home and abroad, that have strengthened our ability to track terrorists and their financing and dismantle their operations.

However, we have accomplished this primarily by opening the lines of communication within our borders and among our international partners. Communication is an exercise in education, trust, and coordination. When communication fails or there is no communication, there is mayhem, much like that surrounding this Dubai Ports World agreement.

One of the reasons that we are here today is to open those lines of communication to determine if CFIUS did its job. Should the head of CFIUS -- Treasury – have informed Congress about something as sensitive as foreign ownership of a company that manages our nation's ports? I believe that the answer is pretty clear. Recent reactions to the proposed agreement from Members of Congress and the American public should be enough of an indication that, at a minimum, Congress needs to be kept in the loop on deals involving national security.

Today's hearing also gives the American public an opportunity to learn first-hand about CFIUS and to get answers to other questions. Did CFIUS follow the letter of the law when reviewing the Dubai Ports World agreement? Is the law unclear? Should Congress require CFIUS to conduct a more rigorous review process?

As the Vice Chair of the Subcommittee with jurisdiction over CFIUS, I am pleased that our Subcommittee is taking action to educate ourselves and the American public on the specifics of this deal and the CFIUS process. I look

forward to hearing from our witnesses today and thank the Chairman for her leadership in holding this important hearing.

Statement of Congressman Michael N. Castle
Domestic and International Monetary Policy, Trade and Technology Subcommittee
Foreign Investments, Jobs and National Security: The CFIUS Process
March 1, 2006

Thank you Chairwoman Pryce for holding this very important and timely hearing. I would also like to thank our panel of distinguished witnesses for their presence here today.

Although port security is not an issue we as a committee have delved into very often, as the primary House Committee with jurisdiction over the Committee on Foreign Investment in the United States, or CFIUS, I believe it is crucial that we fully understand the implications of these decisions and, frankly, that we begin asserting our statutory oversight role when appropriate.

My office window in Delaware looks out over the Port of Wilmington and I can tell you firsthand how important these ports are to both the national and global economies. More than nine million marine containers come through U.S. ports each year, most of which are foreign owned and operated by foreign crews. On the Delaware River, the Port of Wilmington is among the busiest terminals, handling hundreds of vessels and millions of tons of cargo annually.

Since the terrorist attacks of September 2001, improving the security of the men and women who live and work along the Delaware River has been my top priority. In its comprehensive report to Congress, the 9/11 Commission characterized the federal emphasis on aviation security spending as "fight[ing] the last war," and noted that "opportunities to do harm are as great, or greater, in maritime or surface transportation."

As a result of these concerns, I believe it is crucial that we understand all of the potential implications of the Dubai Ports World acquisition of P&O Ports. As the House Committee directly responsible for oversight of foreign investment, it is absolutely necessary that we revisit the CFIUS process and ensure that its activities are attuned to the global security concerns of the 21st century.

In particular, I am very concerned that the current interpretation of the laws governing this process apparently allows CFIUS members to conveniently avoid Congressional oversight, while at the same time evading accountability. Our government's top responsibility is for the safety of American citizens and it has been my experience in these matters that greater transparency and cooperation always beat secrecy and concealment.

The way the Dubai Port World deal has been handled is troubling and I believe it is important that the CFIUS process follow the proper procedure for ensuring such sensitive transactions are reviewed at the highest level. That said, it is also very important to remember that the U.S. Coast Guard, the Customs Service, the harbor police, and the port authorities will continue to be responsible for all security duties at U.S. ports.

Rather than focusing solely on domestic port terminal management, we should be talking about ways to improve global port security. The majority of cargo entering the U.S. is loaded at foreign ports and overseen by foreign officials. This presents a serious security problem since most foreign countries are far behind the U.S. in terms of maritime security. The Government Accountability Office has also documented multiple vulnerabilities at international ports, underscoring the fact that U.S. port security is largely ineffective as long as foreign security remains lax.

Like many other transportation sectors, maritime shipping is designed for speed and efficiency. Container ships and other vessels carry approximately 80 percent of world trade and it is important that we not significantly impede the flow of commerce. Hopefully, this committee will succeed in working with the CFIUS participants to improve this process and ensure appropriate steps are being taken to protect Americans.

One key lesson learned from the mass confusion of September 11th and Hurricane Katrina is that our government has a significant information-sharing problem. Hopefully, timely information-sharing and improved communication between the individual agencies and branches of government will lead to a more effective system, with the ability to accurately identify and respond to threats.

Today's hearing is an important part of this process, and I look forward to hearing from each of our distinguished witnesses.

Thank you, I yield back my time.

TESTIMONY OF THE DEPARTMENT OF DEFENSE BEFORE THE HOUSE FINANCIAL SERVICES COMMITTEE REGARDING THE DUBAI PORTS WORLD CFIUS CASE

Mr. Chairman, Members of the Committee.

Thank you for the opportunity to appear before you today to discuss the Department of Defense's role in the Committee on Foreign Investments in the United States (CFIUS) and our review of the Dubai Ports World (DPW) and Peninsular and Oriental Stream Navigation Company (P&O) transaction.

As a formal member of the CFIUS process, the Department of Defense weighs a number of factors when it considers any individual proposed foreign acquisition of a U.S. company.

First and foremost, our primary objective in this process is to ensure that any proposed transaction does not pose risks to U.S. national security interests. To do this, the Department of Defense reviews several aspects of the transaction, including:

The importance of the firm to the U.S. defense industrial base (e.g., is it a sole-source supplier, and, if so, what security and financial costs would be incurred in finding and /or qualifying a new supplier, if required?);

Is the company involved in the proliferation of sensitive technology or WMD?

Is the company to be acquired part of the critical infrastructure that the Defense Department depends upon to accomplish its mission;

Can any potential national security concerns posed by the transaction be eliminated by the application of risk mitigation measures, either under the Department's own regulations or through negotiation with the parties?

Regarding this specific CFIUS transaction, the Departments of Treasury, Commerce, and Homeland Security met with the legal representatives of DPW and P&O for CFIUS pre-filing notification consultations on October 31, 2005. On December 6, 2005, the companies held a pre-filing briefing for all CFIUS agencies. The Defense Technology Security Administration (DTSA) attended the meeting for DoD. On December 16, 2005, the Department of Treasury received an official CFIUS filing. On the same day, Treasury circulated the filing to all CFIUS member agencies for review and DTSA staffed the filing to sixteen other Department of Defense (DoD) elements or agencies for review and comment.

The review conducted by the Department of Defense on this transaction was neither cursory nor casual. Rather, it was in-depth and it was comprehensive. This transaction was staffed and reviewed within the DoD by 17 of our agencies or

major organizations. In this case, DoD agencies reviewed the filing for impact on critical technologies, the presence of any classified operations existing with the company being purchased, military transportation and logistics as well as other concerns this transaction might raise. During the review process (December 21, 2005 through January 6, 2006), DoD did not uncover national security concerns that warranted objecting to the transaction or requiring a 45-day investigation. Positions were approved by staff that ranged from staff-matter experts up to a Deputy Under Secretary of Defense, as appropriate to the office undertaking the review. All who were consulted arrived at the same position: "do not investigate further."

The DoD organizations that reviewed this and all other CFIUS transactions bring to bear a diverse set of subject matter expertise, responsibilities and perspectives. The organizations included, for example, the Office of the Under Secretary for Intelligence; the Office of the Under Secretary for Acquisition, Logistics, and Technology; the Military Departments (Army, Navy and Air Force); U.S. Transportation Command; the National Security Agency; and the Defense Intelligence Agency. The Army, for example, reviewed the case in the following manner: Army Materiel Command (AMC) Headquarters and Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA(AL&T)) staff gave a preliminary review, immediately upon receipt of the case. AMC staffed the

filing to their subordinate readiness commands responsible for acquisition and logistics, including the Military Surface Deployment and Distribution Command (SDDC). For this case, the Army's review criteria included the question of assured shipping, and the Army's final position was "no objection."

The Defense Technology Security Administration, which reviews, coordinates and analyzes the recommendations from all the DoD components, as well as assessing export control and sensitive technology issues, ultimately "signed off" on the transaction for the Department. Therefore, we had a comprehensive and in-depth review of this transaction, and no issues were raised by any agencies or departments within the Department of Defense. We are comfortable with the decision that was made.

I do want to provide a perspective from the Department of Defense regarding our relationship with the United Arab Emirates and their support, as a friend and ally, in the Global War on Terrorism. In the War on Terrorism, the United States needs friends and allies around the world, and especially in the Middle East, to help in this struggle. A community of nations is necessary to win this Long War.

In our recently published Quadrennial Defense Review, we highlight that in conducting this fight to preserve the security of the American people and our way of life, it is important that we strengthen the bonds of friendship and security with our friends and allies around the world. We must have the authority and resources to build partnership capacity, achieve unity of effort, and adopt indirect approaches to act with and through others to defeat common enemies.

The United Arab Emirates is an outstanding example of the kind of partner critical to winning this Long War. Dubai was the first Middle Eastern entity to joint the Container Security Initiative – a multinational program to protect global trade from terrorism. It was also the first Middle Eastern entity to join the Department of Energy's Megaports Initiative, a program aimed at stopping illicit shipments of nuclear and other radioactive material. The UAE has also worked with us to stop terrorist financing and money laundering by freezing accounts, enacting aggressive anti-money laundering and counter-terrorist financing laws and regulations, and exchanging information on people and entities suspected of being involved in these activities.

As you may know, the UAE provides the United States and our coalition forces with important access to their territory and facilities. General Pace has

summed up our defense relationship by saying that "in everything that we have asked and work with them on, they have proven to be very, very solid partners."

The UAE provides excellent access to its seaports and airfields like al Dhafra Air Base, as well as overflight through UAE airspace and other logistical assistance. We have more Navy port visits in the UAE than any other port outside the United States. Last year, US Naval warships and Military Sealift Command ships spent over 1400 days in the ports of Dubai, Jebel Ali, Abu Dhabi and Fujairah. And, by the way, the port at Jebel Ali—which is the only carrier-capable port in the Gulf—is managed by DPW. Coalition partner ships also used the UAE ports last year. The U.S. Air Force has operated out of al Dhafra Air Base since the Gulf War in 1990. Today, al Dhafra is an important location for air refueling and aerial reconnaissance aircraft supporting operations in Iraq and Afghanistan.

And we should note that our most important commodity—our military men and women—were frequent visitors to the UAE. In fact, over 77,000 military men and women were on liberty or leave in the UAE in 2005. So we rely on the Emirates for our security in their country, and I appreciate and thank them for that.

Our close military-to-military relationship with the UAE also includes the use of the UAE Air Warfare Center, established in January 2004, where our pilots train with pilots from countries across the Middle East.

Finally, the United Arab Emirates have been very supportive of our efforts in Iraq and Afghanistan. They have provided military and operational support to OPERATION ENDURING FREEDOM in Afghanistan and financial and humanitarian aid to Afghanistan and its people. The UAE has provided monetary and material support to the Iraqi government, including a pledge of $215M in economic and reconstruction assistance.

Mr. Chairman, this concludes my formal statement. I would be happy to answer any further questions you may have regarding this subject.

TESTIMONY OF CLARK KENT ERVIN, FORMER INSPECTOR GENERAL OF THE U.S. DEPT. OF HOMELAND SECURITY, BEFORE THE HOUSE SUBCOMMITTEE ON DOMESTIC AND INTERNATIONAL MONETARY POLICY, TRADE & TECHNOLOGY HEARING ON "FOREIGN INVESTMENT, JOBS, AND NATIONAL SECURITY: THE CFIUS PROCESS," MARCH 2, 2006

Thank you for your invitation to testify today on an issue that I believe is of profound importance to the security of our homeland – whether a foreign government with a mixed record on terror should be allowed to operate terminals at six major American seaports, a vulnerable strategic asset through which, experts agree, a terrorist would be most likely to smuggle a weapon of mass destruction into our country. The stakes could not be higher. Needless to say, a terrorist attack with a weapon of mass destruction could exceed the impact of 9/11 by several factors, resulting potentially in the deaths of millions of Americans and bringing our economy to its knees.

In the weeks since the proposed acquisition by Dubai Ports World, a company owned by the government of the United Arab Emirates, of the American port terminal operations of British based, P & O, became widely known, we have learned a number of troubling things. I would wager that most Americans did not know until the controversy over this deal arose that port terminals in this country have been operated by foreign companies for quite some time. Likewise, most Americans did not know that a secretive interagency group, the Committee on Foreign Investment in the United States, has the unilateral power to approve the acquisition by foreign companies of key U.S. strategic commercial assets after a mere 30-day review, without being obliged so much as to notify the President or the Congress.

To make bad matters worse, in this instance, the acquiring entity is effectively a foreign nation, a nation that has recently been supportive of us in the war on terror, but a nation that also has a relatively recent history too closely tied to terrorism for comfort. The UAE was one of only three countries in the world that recognized the Taliban regime in Afghanistan that sheltered Osama bin Laden and provided his Al Qaeda network with a base of operations in the years prior to the September 11 attacks; two of the 9/11 hijackers were UAE nationals; much of the financing for the attacks coursed through the UAE banking system; and Pakistan nuclear scientist A.Q. Khan smuggled components to Libya, North Korea, and Iran through the UAE.

Where the acquirer of an asset with national security implications is a foreign power, the committee is required by law to follow its 30-day preliminary review with a 45-day "investigation." After the investigation is completed, the decision as to whether the deal goes forward is not the committee's to make. It must then make a recommendation to the President, who then has an additional 15 days to study the matter on his own and make his own decision. Thereafter, the President is to inform the Congress of what he has decided.

In this instance, the already unduly rushed and lax CFIUS procedures were not followed. Even though the control of key operations was at issue, there was no investigation, the committee made the decision to approve the deal on its own, and the President was not even informed of the decision.

At a minimum, as I argued in a New York Times opinion editorial last week, the CFIUS process must be changed. The review period is too short, and the committee has too much unilateral power. Where the control of a component of the nation's critical infrastructure or of a key strategic asset is concerned, and the acquirer is a foreign government, the law should be changed to require the committee to conduct a complete and lengthy (longer than 45 days) investigation to determine whether permitting the deal to go forward could compromise national security. The committee may make a recommendation to the President, but he should then make his own decision after his own review of the matter (for longer than 15 days). Then, rather than simplifying notifying Congress of his decision as a fait accompli, the President should have to seek and obtain Congressional approval for the deal to be finally approved. If treaties and trade agreements are important enough to require congressional sign-off as well as presidential approval, certainly congressional concurrence should be required before a foreign nation gains control of something as important as operating terminals at key seaports.

The foregoing goes to process. As to substance, this deal should not be approved under any circumstances, even if it had the support of both ends of Pennsylvania Avenue. In the post 9/11 age, we should have learned that there is no margin for error when it comes to the security of the homeland. Under these circumstances, now that we know that operations at many other key ports are controlled by foreign companies, perhaps consideration should be given to prohibiting such control in the future, even if the company at issue is one based in a rock solid ally like Great Britain. But, certainly, we should not hand over control of port operations to a nation that has strong links to terrorism.

In the last few weeks as this controversy has unfolded, I have listened carefully to the arguments of those who support this deal. Basically, they boil down to four, none of which stands up to scrutiny.

One argument is that it is nativist, xenophobic, and even racist to oppose this deal. In fact, opposition to this deal has nothing to do with UAE's being an Arab and Muslim country. If the acquirer here were the government of Japan or the government of Norway and either of those countries had the same record as the UAE on terror I, for one, and doubtless others as well, would oppose this deal just as strongly. It is UAE's record that is at issue here, not the ethnicity or religious affiliation of its people.

Another argument is that, if this deal goes forward, the new owners won't have anything to do with security. This is just flat out inaccurate and untrue. Yes, the Customs bureau of the U.S. Department of Homeland Security would continue to be responsible for inspecting cargo containers coming into these ports, and yes, the Coast Guard would

remain "in charge" of security at these ports. But, of the tens of thousands of cargo containers that enter our ports each year, only about 6% are physically inspected to determine definitively whether they contain weapons of mass destruction or other threat items. And, the Coast Guard's being in charge of port security simply means that it promulgates security standards and reviews ports' security plans to determine whether, on paper, those plans conform to the standards. The actual day-to-day, on-the-ground implementation of those standards and plans is left up to the terminal operators. It is they who perform critical security tasks like vetting, hiring, and supervising security guards; securing the terminal area, guarding the cargo; and overseeing the cargo unloading process. Furthermore, the terminal operator is, of course, privy to key intelligence like ports' various security vulnerabilities, and those Customs and Coast Guard port security plans and procedures to address these vulnerabilities, information that would be invaluable to a terrorist bent on murder and mayhem.

A third argument is that UAE is, at least now, a key ally in the war on terror, and turning down this deal would alienate them and others in the Middle East whose support is essential if we are to prevail against our enemies. UAE may well be a key ally, but that is no reason to turn over the control of a key strategic asset to them. Port terminals are not carrots that should be handed out as rewards for other nations' cooperation. If, indeed, our approval of such a deal is a quid pro quo for UAE's continued support, the price is too high and we should not pay it.

The final argument is, to my mind, the most dangerous. It would be ludicrous if it were not so disturbing. According to some, our ports are already vulnerable because too little money has been spent to secure them, too few cargo inspections are conducted, we have too little radiation detection equipment, and the equipment we have is not all that good. This is all true, but instead of agreeing to something that might make our already vulnerable ports even more vulnerable shouldn't we address the vulnerabilities we already have?

This brings me to my final point. No one, and I do mean no one, has argued that agreeing to this deal will make our ports safer. At most, those on the other side say that it won't make us any less safe than we presently are. Is this the standard we are setting for ourselves now, five years after 9/11? For my part, in the post 9/11 world, we should do only that which inarguably enhances homeland security. This deal, manifestly, does not past this commonsense test.

Clark Kent Ervin
Former Inspector General
U.S. Department of Homeland Security

Testimony of James K. Glassman
"Threats to Security, Threats to Economy"
March 1, 2006

Mme. Chair, members of the Subcommittee:

It is an honor to appear before you as a witness today for this important hearing on "Foreign Investment, Jobs, and National Security: The CFIUS Process."

My name is James K. Glassman. I am a resident fellow at the American Enterprise Institute, where I specialize in matters of financial and economic policy. I am also host of TCSDaily.com, an international online journal that focuses on technology, economic and public policy. In addition, I am chairman of Investors Action Alliance, an organization that educates small investors and stands up for their interests.

The feverish reaction of much of the media and many public officials to the imminent transfer of shipping-terminal operations at six U.S. ports raises disturbing questions about national-security priorities and about America's commitment to her staunchest allies and to the process of globalization.

At the heart of this reaction is a frightening specter: a dirty radioactive bomb or a full-fledged nuclear device shipped into a major city in one of the nine million trailer-sized containers that enter U.S. ports annually.

The fear of such an attack is a real concern, but the notion that a sale of assets to a Dubai company will increase the threat of such an attack is, emphatically, not.

The recent uproar is puzzling in that it does not appear to fit the facts. For example, one member of the U.S. House wrote President Bush:

"In regards to selling American ports to the United Arab Emirates, not just NO – but HELL NO!"[1]

Actually, no American ports will be sold to the United Arab Emirates. The ports are owned by state and local authorities. A company called Dubai Ports World, based in the United Arab Emirates and currently doing business in such nations as Germany, Australia and the Dominican Republic, will, if the deal is fully consummated, take over terminal operations – the loading and unloading of trailer-sized containers – currently conducted by Peninsula & Oriental Steam Navigation Co., based in London.

In another example, a U.S. Senator stated:

"Why in the world should we let this rogue government control ports in the United States?"[2]

[1] Rep. Sue Myrick, letter to the Hon. George W. Bush, Feb. 22, 2006.

But the United Arab Emirates, formed in 1972 by seven small Persian Gulf states, is not a "rogue government." It is a nation of 2.6 million people with, according to the CIA Factbook, "an open economy with a high per capita income." The United States government has had close and friendly relations with the UAE, especially since the attacks of Sept. 11, 2001. Indeed, the UAE has been a model citizen in the region, recently entering into an important trade agreement.

Gen. Peter Pace, chairman of the Joint Chiefs of Staff, says that the U.S. has a "superb" military relationship with the UAE. "In everything that we have asked and worked with them on [including providing a base for U-2 spy planes and unmanned surveillance aircraft for fighting in Iraq and Afghanistan], they have proven to be very, very solid partners." It's doubtful that the U.S. would have sold 80 of the most sophisticated versions of the F-16 fighter jet to a "rogue government."

As a final example, another member of the U.S. House stated:

> **"Recently, the Bush Administration approved the takeover of six United States ports' security by Dubai Ports World.... The Bush Administration has been outsourcing jobs for five years, and now they want to outsource our national security."[3]**

In reality, primary responsibility for port security in the United States lies with the U.S. Coast Guard, the U.S. Customs, and Border Protection officials. In addition, most ports have their own law-enforcement authorities as well as local police. DP World also has responsibility for security, but its record globally indicates no more cause for concern than there would be with any other terminal operator – probably less.

As my colleague at the American Enterprise Institute, Veronique DeRugy, has written: "Foreign operation of American ports is nothing new. At least 30 percent of terminals at major U.S. ports are operated by foreign governments and businesses.... Ownership does not affect in any substantive way the dynamics of terrorist infiltration." Shipping security experts know that what is crucial is preventing nuclear material from being placed on vessels in foreign ports in the first place.

Recommendations

Fact-based or not, the criticism led, on Feb. 26, to a decision by DP World to request a 45-day re-examination of the American portion of its transaction.

In my view, the response to the DP World-P&O deal is wholly out of proportion to the possible risk involved. It has damaged our relations not just with the UAE but with Arabs and Muslims and others disposed to support American policies and values. That damage could hurt our overall national security efforts.

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[2] Sen. Frank Lautenberg, press release, "Lawmakers Begin Push for Thorough Federal Review of United Arab Emirates-Owned Company Taking Control of Major U.S. Ports in NY, NJ and East Coast," Feb. 16, 2006.

[3] Rep. Sherrod Brown, Feb. 24, 2006, www.huffingtonpost.com.

Perhaps worst of all, the near-hysteria threatens to disrupt capital flows to the United States at a time when those flows are desperately needed.

I urge this subcommittee and the Congress to use put this episode to positive use in the following way:

1. Re-examine and, if necessary, change the process of approving strategic foreign purchases of assets in the United States so that the process can enjoy a high level of public confidence and congressional respect.

2. Assess the true nature of the terrorist threat as it involves shipping. That threat has little to do with the unloading of container vessels in U.S. ports and practically everything to do with the loading of such vessels in foreign ports.

3. **Re-assert this nation's commitment** to the free flow of trade in all its manifestations: goods, services, and investment.

4. Repudiate any semblance of racial and religious bigotry. As President Bush said in connection with this sale: "What I find interesting is that it's okay for a British company to manage some ports, but not okay for a company from a country that is a valuable ally in the war on terror."

Background

The Sale of P&O

Tomorrow, March 2, Dubai Ports World is scheduled to complete its purchase of Peninsula & Oriental Steam Navigation Co., the venerable shipping firm, founded in 1837, based in Pall Mall, London, and long associated with the eastern reaches of the British Empire, celebrated in the works of Rudyard Kipling and Somerset Maugham.

Over the past century, P&O evolved from the largest global steamship company to a firm whose main business is operating container terminals – 29 of them around the world, handling the equivalent of 22 million 20-foot-long trailer-loads of goods a year and ranking fourth in the world, with a 6 percent market share.

Six of P&O's terminal operations are in the United States, in areas leased from public port authorities in Philadelphia, New Orleans, New York, Newark, Miami, and Baltimore. Typically, P&O is only one of the operators in such ports. Such an operator has a landlord-tenant relationship with the actual port owner, usually a public authority. In New Orleans, for instance, P&O leases about one-fifth of the loading area.

DP World, the world's six-largest terminal operator, prevailed in a bidding war for P&O with Temasek Holdings, the Singapore government's holding company, which controls the number-two terminal firm. DP World is also a state-controlled entity, owned by the ruler of Dubai, Sheikh Mohammed bin Rashid al-Maktoum.

The Committee on Foreign Investment in the United States (CFIUS) -- comprising representatives of the departments of the Treasury, State, Defense,

Homeland Security, Commerce, the Attorney General and other U.S. agencies -- reviewed and, on Jan. 23, approved the acquisition of the six American terminal operations by DP World. According to published reports, U.S. intelligence agencies also supported the transaction,[4] and, as part of the process, DP World agreed to additional security measures. "What had been voluntary is now a mandatory program," said Stewart Baker, an assistant secretary at the Department of Homeland Security. "There are more safeguards in this transaction than in any past port" deal.

In mid-February, members of Congress of both parties and local officials in the states involved began objecting heatedly to the transfer of assets. One governor called the sale a threat to both state and "national sovereignty."[5]

Critics in Congress introduced legislation to delay or prohibit the sale. On Feb. 26, DP World responded by requesting a 45-day re-examination of its deal. Meanwhile, the company agreed to separate the six U.S. terminal operations from the rest of its purchase, and P&O's North American-based executives would continue to run port operations after DP World formally takes control of P&O tomorrow. Some members are proposing as well that Congress have 30 days after the re-examination to give final approval to the transaction.[6]

Dubai Ports World

After the sale, Dubai Ports World will become the second-largest terminal operator in the world. Currently, DP World operates container terminals in Germany, South Korea, Australia, Malaysia, Hong Kong, China, India, Romania, the Dominican Republic and other countries.

DP World's sister company, the Dubai Ports Authority, also operates ports in the UAE. These ports, which can accommodate aircraft carriers, are being extensively used by the U.S. Navy.

DP World, according to Business Week, is "a well-respected company with global reach." Just last week, DP World was named "container terminal operator of the year," by Lloyd's List, the shipping newspaper.

In 2004, DB World bought the operations of Jacksonville, Fla.-based CSX Corp. for $1.2 billion. (None of those terminals is in the United States.) DP World is paying $6.8 billion for P&O, with about half the funds raised in a convertible bond issue in January. Several of the company's top officials are American. They include DP World's chief operating officer, Ted Bilkey, who was previously vice president of the largest container terminal operator in the New York area; senior

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[4] "U.S. Intelligence Agencies Backed Dubai Port Deal," Washington Post, Feb. 25, 2006. The Post said that "the intelligence studies were coordinated by the Intelligence Community Acquisition Risk Center, a new organization under the office of the Director of National Intelligence."

[5] Gov. Jon Corzine of New Jersey.

[6] This week, it was broadly reported that the Coast Guard raised concerns that, because of U.S. intelligence gaps, it could not determine whether DP World might support terrorist operations. This story produced lurid headlines. The very last paragraph of the Associated Press report, however, read: "In a statement, the Coast Guard said the assessment was part of a broader classified Coast Guard analysis that concluded that DP World's pending takeover 'in and of itself, does not pose a significant threat to U.S. assets in [continental United States] ports." AP, at www.Forbes.com, Feb. 28, 2006.

vice president Michael Moore; and Dave Sanborn, who was nominated in January by President Bush to be U.S. Maritime Administrator. DP World's chairman, Sultan Ahmed bin Sulayem, is American-educated. Currently, P&O employs only 430 workers in the United States – all or nearly all of them American. Another 6,000 longshoremen are hired on a daily basis. Those hiring practices are not expected to alter with DP World's purchase.

"In practical terms, nothing is going to change at U.S. ports in day-to-day operations," said Tim Power of Drewry Shipping Consultants. "DP World's taking over P&O does not mean a lot of people are suddenly going from Dubai to the U.S. to manage the ports."

U.S. ports in recent years have grown outdated, and the best technology – and most activity – has moved elsewhere, especially to Asia. DP World may be the best thing to happen to the American shipping scene in decades. It has a track record of spending money to make money and of bringing in top management talent.

United Arab Emirates

Prior to the attacks of 9/11, the UAE was one of only three governments (the others were Pakistan and Saudi Arabia) that recognized the Taliban in Afghanistan. After the attacks, all three countries immediately cut their ties. The UAE was home to two of the 9/11 hijackers, and the FBI has said that the UAE banking system was used to transfer funds to the hijackers. In addition, according to The Economist, "A.Q. Khan's Pakistani nuclear-smuggling network...was hidden behind a Dubai front."

In the past four and a half years, however, since the war on terror began, the UAE has been a staunch U.S. ally, providing "significant assistance both in passing along terrorism tips and in helping to apprehend suspects."[7]

The UAE has provided services for 700 U.S. Navy ships a year at its ports, including the DP World-operated terminal of Jebel Ali. In fact, the UAE hosts more U.S. Navy visits than any port outside the United States, and Dubai is a popular port for sailors on leave. As former secretary of the Navy Will Ball recently wrote on TCSDaily.com: "In a region of the world not previously known for "liberty ports" that compete with their Mediterranean and Western Pacific counterparts, the new Dubai is fine, fine indeed, according to the sailors of today. Harbormasters, citizens and yes, even port security officials there afford an especially warm welcome to American warships -- aircraft carriers in particular."

DP World is also the primary support contractor for U.S. Air Force assets at Al Dhafra Air Base, where refueling and reconnaissance flights originate for southwest Asia.

Economic Implications

[7] "Bush and Congress Clash Over Dubai Ports Deal," Wall Street Journal, Feb. 23, 2006. The terrorists apprehended "were not small fries," said a former U.S. ambassador to the UAE.

By any objective analysis, the United Arab Emirates has embraced the security and economic prescriptions of the United States. "Dubai," says a news article in the Feb. 26 edition of the Financial Times, "has gone out of its way to project an image as a pragmatic, pro-Western and free-market exception in a region often bristling with hostility to America."

Al-Maktoum, Dubai's ruler, not only has developed Jebel Ali into a huge free port, one of the largest in the world. He has also created one of the world's largest airlines, Emirates, and launched what Business Week calls "a new financial center that is attracting the cream of the world's banks."

At the very least, the reaction to the purchase of P&O has similarly pro-Western business leaders in the Arab and Muslim world scratching their heads in bewilderment and wondering whether racial prejudice, misinformation or paranoia is behind the hysteria.

One could argue that the UAE is at least as strong an ally of the U.S. in the war on terror as France. Yet a French company, Suez, owns plants in 17 states that provide seven million Americans with drinking water daily. An article in Lloyd's List, the shipping newspaper, noted: "Venezuela's Hugo Chavez, whose opinions about President George W. Bush and Secretary of State Condoleezza Rice would make a lesser man and woman blush, controls Citgo, and its terminal and refinery in Philadelphia." While it's true that two 9/11 terrorists came from the UAE, it's also true that the man who attempted to set off a shoe bomb on a transatlantic flight was a British citizen, and several U.S. citizens have been arrested as terrorist suspects as well.

Meanwhile, DP World's purchase of terminal operations in Germany and Australia – countries that have concerns about terrorism similar to those in the United States (more Australian civilians have been killed by terrorists since 9/11 than American civilians) – produced no notice at all.[8] "I can't really see the security question coming up as DP World is a well established, respectable company," said Patrick Verhoeven, secretary general of the European Sea Ports Organization.

The over-reaction of many public officials in the United States to the terminal transactions, coupled with Congress's recent thwarting of the purchase of Unocal by a Chinese company, cannot help but deter other investments, especially by developing nations, in this country.[9] "Xenophobia," as The Economist put it, "seems to be creeping into American politics."

The arithmetic of foreign investment is not complicated. The current account deficit has been rising for the past decade and now is 6 percent of GDP, indicating a wide gap between what we buy, in goods and services, from foreigners and what we sell to them. This deficit has not harmed the U.S. economy for a simple reason: the United States remains one of the best places in

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[8] To take the flawed logic of the critics further, Ivan Eland of the Independent Institute wrote, tongue in cheek, on Feb. 20, 2006: "Perhaps even airlines from Arab countries should be banned from landing at U.S. airports because they might be used in terrorism or bring terrorists to the United States – in spite of the fact that the planes used on 9/11 were all U.S. airliners." (www.independent.org)

[9] As a news story in The Wall Street Journal, "Bush, Congress Head for Clash Over Ports Deal," Feb. 22, 2006, stated: "More broadly, a successful move to block the deal could send a chilling signal about some foreign investment in the U.S. at a time when such investment has been critical in sustaining growth."

the world to invest. So dollars that flow abroad from our purchase of imports are recycled back to us as capital investments.

At the end of 2004 (the most recent figures), foreigners owned about $12 trillion in U.S. assets: $6 trillion in stocks and bonds, $3 trillion in debt to banks and other lenders and $3 trillion in hard assets, like factories. These capital flows employ Americans, raise their paychecks and keep interest rates down.

In recent years, important capital flows are coming from emerging markets, including Asia and the Middle East. These flows are expected to continue – and not just because of oil. As Jeremy Siegel writes, demographic imbalances mean that older people in the U.S. and other developed nations will have to live off the sale of assets to younger people in developing nations.

At any rate, the continuing free flow of capital into the United States is crucial. Dubai has been among the "most prominent recent buyers into the U.S. economy,"[10] with, for example, Dubai International Capital buying a two percent stake in Daimler Chrysler last year.

Now, however, the United States risks developing a reputation as a country that no longer welcomes some people's money. If that happens, other nations – Japan, Britain, Germany, Australia – will attract capital that would have gone to the U.S. The virtuous circle of global trade and investment risks being broken, with disastrous consequences.

That is the real danger here. We shouldn't flatter ourselves. We aren't the center of the world. Look at shipping terminals. The action is not in New York or Los Angeles. It's in Singapore, Hong Kong, and new ports in Shanghai, South Korea and India.

Security

This episode has been a sad one in many ways, but it could help revive interest among policy makers in getting serious about reducing the threat of seaborne weapons of mass destruction. That threat must be attacked at the source. "Our first priority," writes Veronique DeRugy of AEI, "should be to stop terrorists from acquiring fissile material to build a bomb." But just $250 million is spent in these efforts. Our second priority should be to stop such material from getting on ships in foreign ports. DHS's Container Security Initiative, in which the Dubai participates, inspects cargo for WMD before it is shipped. But only $139 million was spent on this program last year. The third priority is security in U.S. ports themselves, where $360 million in spent on in-port detection devices. Far more resources – human, technological and financial – must be devoted to preventing WMD from ever being loaded on a ship.[11]

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[10] "Dubai Ports Row Breeds Bad Feeling Among Arab Businesses," Financial Times, Feb. 26, 2006.

[11] As DeRugy writes: "If a nuclear bomb explodes at the port of Philadelphia, it would kill many of the city's 1.5 million residents. It is cold comfort to know the detector's alarm might go off five minutes before you're dead." From "Security Begins Abroad," Wall Street Journal, Feb. 27, 2006.

Would withdrawing the P&O leases from DP World help national security? That's a dubious proposition. It would certainly jeopardize Dubai's role as a loyal American ally – if that role has not been jeopardized already.

Conclusion

Absolutely, keep our ports safe. Trust no one to do that – not the Brits, not the Singaporeans, not the Arabs – but our own law enforcement and military. Their job is to keep the lanes of commerce and communication and travel open, and, so far, they have done a spectacular job. It is now four and a half years since 9/11, and there has not been an attack on U.S. soil. Yes, we can do better, but our efforts should be concentrated abroad.

The United States benefits mightily from a globalized world. Our ties through trade, in fact, have made us more safe as our trading partners become more prosperous, open and democratic. But our politicians and pundits should know that we can't pick and choose. If we decide to deny firms from developing nations – Arab, Asian or otherwise – from investing in the United States, those firms will go elsewhere. And we will pay the price – in higher interest rates, higher mortgage rates, higher inflation, lower stock prices, less participation in a world growing more and more creative and exciting.

Thank you.

TESTIMONY OF DEPUTY SECRETARY MICHAEL JACKSON

BEFORE THE COMMITTEE ON FINANCIAL SERVICES, SUBCOMMITTEE ON DOMESTIC AND INTERNATIONAL MONETARY POLICY, TRADE, AND TECHNOLOGY

U.S. HOUSE OF REPRESENTATIVES

MARCH 1, 2006

Chairman Pryce, Ranking Member Maloney, and Members of the Committee, I am pleased to be here today to help discuss the critically important issue of port security and help clarify any questions you have about DHS's role in the Committee on Foreign Investment in the United States (CFIUS) and both DHS's consideration of the Dubai Ports World (DP World) acquisition of the British-owned Peninsula and Oriental Steam Navigation Company (P&O) and P&O's wholly owned U.S. subsidiary, P.O. Ports North America, Inc.

As Deputy Secretary, I share responsibility with Secretary Chertoff for DHS's ongoing efforts to continue to strengthen port security and overseeing DHS's role in the CFIUS process. Based on a thorough review, meetings with the company that began more than six weeks before the company filed for review, and the binding nature of an assurances agreement between DHS and the company to ensure security at U.S. ports, I fully stand behind the decision DHS made in January 2006 not to further investigate this transaction.

Developments in the DP World Case

Nevertheless, DP World has announced that it is requesting an additional review by CFIUS. According to press reports, the company is likely to file a request for CFIUS review this week and seek an additional 45 day review.

DHS, as one of 12 CFIUS agencies, will be a full and active participant in that review, and welcomes the opportunity to review the transaction anew. As I explain in more detail below, DHS will once again consult widely with its experts in the Department, including those at Coast Guard and Customs and Border Protection (CBP) who have primary responsibility for port and cargo security.

Before getting into the specifics of the DP World transaction, I would like to provide a general overview of DHS's participation in the CFIUS process.

Overview of DHS Participation in CFIUS

DHS is the newest member of CFIUS, added by Executive Order in 2003, after DHS was created. DHS has participated in the CFIUS process actively, and has placed a significant focus on nontraditional threats, as DHS has broad responsibility for protecting a wide variety of critical infrastructures. DHS is often joined in raising these concerns by our partners at the Department of Justice and Department of Defense, and others. DHS is proud to work in close cooperation with these sister Cabinet agencies.

There are dozens of transactions in a year that require CFIUS review. In 2005, for example, CFIUS considered 65 discrete filings. DHS conducts a thorough review of each CFIUS case, and raises its concerns where issues arise.

The three most important questions DHS considers before deciding to seek an investigation are –

(1) Does DHS already have sufficient legal or regulatory authority to eliminate any threat to homeland security that might be raised by the transaction?
(2) Does DHS have homeland security concerns about the parties or nature of the transaction?
(3) If DHS has homeland security concerns, can they be resolved with binding assurances from the parties to the transaction?

Only after answering these questions does DHS decide whether to seek an investigation in CFIUS. DHS examined those questions in the DP World case and, as I will explain in more detail, made the judgment not to object to the transaction. All of the other 11 CFIUS member agencies made a similar decision after conducting their own independent reviews of the transaction.

DHS Legal Authority at the Ports

Congress has granted DHS sufficient legal authority to regulate the security of America's ports and the cargo that passes through each of those ports.

Under the Magnuson Act, the Ports and Waterways Safety Act, and, most recently, the Maritime Transportation Security Act of 2002 (MTSA), the U.S. Coast Guard has great authority to regulate security in all American ports. This includes the security for all facilities within a port, including terminal operators and vessels intending to call at a port or place subject to the jurisdiction of the U.S.

The Role of Terminal Operators like P&O and DP World

Let me first clarify what terminal operators do.

They do not run ports.

They certainly don't provide or oversee security for the entire port complex. That is the responsibility of the government and the local port authority, which is usually a government agency.

Terminal operators also do not obtain a comprehensive window into the breadth and depth of security measures that DHS employs to protect our ports and the cargo that enters those ports. The public fears that the DP World transaction have generated on this point are misplaced and lack a firm factual foundation, as I will explain later.

Terminal operators ordinarily sign a long-term lease for waterfront property in the port. They build a pier for ships, cranes to unload the ship, a parking lot to store the containers they unload, and perhaps a small management office. They make their money lifting containers out of ships and holding them for shippers.

That's what we're talking about here. Through its acquisition of P&O, DP World is hoping to take over the leases at twenty-four terminals in the U.S. That's a relatively small part of the operations in the six ports where they would operate terminals, including New Orleans, Houston, Miami, Newark, Baltimore, and Philadelphia. Their filings indicate that DP World will also take over the P&O equities at other ports, but these consist of stevedoring and labor operations where P&O is not the designated terminal operator.

I understand from the Coast Guard that there are more than 800 regulated port facilities in the six ports where P&O operates terminals in the U.S. So the twenty-four terminals in question here constitute less than 5% of the facilities in those six ports.

MTSA requires each terminal operator - because they operate inside the port – to file a facilities security plan with the Coast Guard that specifically details their compliance with all of the security measures required by Federal law, including those enforced by the Coast Guard. The Coast Guard inspects the terminal and can check the terminal operator's plan at any time, and require more effective measures if the Coast Guard deems they are necessary.

These MTSA requirements for U.S. port security do not turn on the nationality of the terminal operator. U.S., British, Chinese, and UAE terminal operators are all subject to the same legal requirements, and the Coast Guard Captains of the Port can tailor each security plan to address the particular circumstances of each location.

Coast Guard Actions under MTSA

The Coast Guard has inspected and approved facility security plans for some 3,200 facilities regulated by MTSA. In addition, Coast Guard has completed Port Security Assessments and Port Threat Assessments for all 55 military and/or economically critical ports.

Forty-four Area Maritime Security Committees have been formally chartered and have developed Area Maritime Security Plans for the purpose of detecting, deterring, and preventing terrorist attacks as well as responding in the event of an incident. These committees are chaired by a local Coast Guard official, the designated Federal Maritime

Security Coordinator, and include port authority, vessel, facility, labor interest as well as federal, state and local agencies.

The Coast Guard established an International Port Security Program to assess the effectiveness of anti-terrorism measures in place in overseas ports. Thirty-seven of the 44 countries assessed to date have substantially implemented the International Ship and Port Facility Security ("ISPS") Code. These 44 countries are responsible for over 80% of the maritime trade to the United States. The seven countries that are not in substantial compliance have been or will be notified shortly to take corrective actions or risk being placed on a Port Security Advisory and have Conditions of Entry imposed on vessels arriving from their ports.

The Coast Guard has conducted 16,000 foreign flag vessel boardings for security compliance with the ISPS Code since July 2004. These boardings were conducted either offshore or in port, depending on the risk assessment completed prior to each vessel's arrival in a U.S port.

DHS Role in Cargo Security

The Administration recognized after September 11 that more was needed to protect the United States from terrorist attack, and it immediately identified the vulnerability posed by the millions of cargo containers entering our ports each year. DHS plays a primary role in strengthening port and cargo security, and with the support of the Administration, we have made dramatic increases in these areas. Since September 11, funding for port and cargo security has increased by more than 700%, from $259 million in FY 2001 to $2.164 billion in FY 2004 and $2.183 billion in FY 2005. This upward trend continues with $2.455 billion for DHS port security allocated in FY 2006, and an addition 35% increase to $3.172 billion in the President's Budget request for FY 2007.

This money has of course funding port security grants of more than $870 million. It has also built a layered security strategy that pushes our security measures overseas. The reason is simple. The Federal Government realized after the 9/11 attacks that it would be far better to detect and interdict a threat to the U.S. when that container was thousands of miles away, rather than sitting in a U.S. port. So we pushed our borders out to do much more inspection and screening of cargo before it ever arrives at our shores.

The 24-Hour Rule and CSI

Our authority over shipping containers begins even before the container is loaded in a foreign port – and long before that container arrives in the U.S. We require foreign companies to send us a list of the contents of a container 24 hours before the container is loaded on board the ship *in the foreign country.*

If Customs and Border Protection (CBP) concludes that the contents of a particular container may be high risk, we can have it physically inspected or x-rayed in cooperating foreign ports.

This program, known as the Container Security Initiative (CSI) depends on the voluntary cooperation of foreign governments and foreign companies. We've gotten that cooperation around the world – including in Dubai, the United Arab Emirates. The CSI currently operates in 42 of the world's largest ports. By the end of this year, the number of cooperating ports is expected to grow to 50, covering approximately 82 percent of maritime containerized cargo shipped to the U.S.

Twenty-four hours before a ship is loaded, and therefore prior to departing the last foreign port for the United States, DHS receives a complete manifest of all the cargo that will be on that ship when it arrives in a U.S. port. This includes all cargo information at the bill of lading level, whether the cargo is destined for the U.S., or will remain on-board while in a U.S. port but destined for a foreign country. This rule applies to all containerized sea cargo whether departing from a CSI port or not.

Mandatory Advance Notice of Crew Members to DHS

Depending upon the length of the voyage, DHS receives additional notice concerning the crew of the vessel 24 to 96 hours before the vessel arrives in the U.S. This is full biographic data identifying the crewmembers and passengers, if any, so that DHS can screen them against risk indicators, the terrorist watch list and other databases.

We also get information from the importer describing the declared value and description of the goods being imported.

Risk Analysis of Cargo and Crew

Thus, long before a cargo ship arrives at any U.S. port, DHS has the shipper's information, the ship's information, and usually the buyer's information about what is in the container. The data is compared to ensure that it matches, and is also compared against historical information to detect anomalous patterns.

This data is all scrutinized and processed through a complex program that runs against hundreds of risk indicators to assign the ship and its cargo a risk score. The crew and passengers are all vetted prior to arrival.

DHS has full information about the vessel, its contents, and the people on-board.

If DHS has a concern about the cargo, the Coast Guard and CBP meet and decide an appropriate course of action, which may include boarding the vessel at sea or at the entrance to the ship channel, or meeting the vessel dockside and immediately inspecting the suspect containers.

Coast Guard has established a process to identify and target High Interest Vessels. This process has resulted in 3,400 at sea security boardings, and 1,500 positive vessel control escorts since 2004 to ensure that these vessels cannot be used as a potential weapon

What the Terminal Operator Knows about U.S. Security Measures

I noted earlier that ownership of a terminal operation does not give the terminal operator – foreign or domestic – a unique insight into the breadth and depth of DHS security measures nor provide a crafty terminal operator with ill intent access to inside information to avoid or evade DHS scrutiny.

The first time a terminal operator at a U.S. facility sees any of the law enforcement and security measures that DHS has in place concerning the vessel and cargo is when the ship arrives in the U.S. Even then, all the terminal operator knows is that CBP has selected certain containers for examination. The operator is simply instructed to unload the containers, under DHS supervision, and deliver them to CBP for inspection. They are not told why.

CBP Examines 100% of Risky Containers

As I have noted already, CBP screens 100% of containers for risk. All containers that DHS determines to be of risk are examined using a variety of technologies. These technologies include: radiation screening, non-intrusive x-ray inspection, and as appropriate, physical examination.

This screening and examination is carried out by DHS employees tasked with the security of our seaports. They are assisted by longshoreman and stevedores in moving the containers, and by local law-enforcement authorities and port police to ensure the security of the port facilities.

All a terminal operator knows is that a container has been selected for examination, but not why the container was selected. The inspections and radiation detections are performed by CBP, not by the operator. Security is provided by a variety of government programs, agencies, and local law enforcement officials, not the terminal operator.

Special Measures to Detect Radioactive Devices

DHS component agencies and the DHS Domestic Nuclear Detection Office have worked closely with the Department of Energy to deploy radiation detection technology at domestic and foreign seaports. The Department of Energy is providing technical support to Dubai Customs to install four Radiation Portal Monitors in their main port in June. Some of this equipment is specifically dedicated to "in-transit cargo" passing through the Dubai port on its way to places like the U.S.

In the United States, we have deployed 181 radiation portal monitors at seaports to date, which allows us to screen 37 percent of arriving international cargo, and that number will continue to grow through the remainder of this year and 2007. CBP also has the ability to use portable devices to detect the presence of radiation at additional facilities, and CBP has issued over 12,000 hand-held devices to its officers. The President's FY 2007 budget

requests $157 million to secure next-generation detection equipment at our ports of entry.

Since there is often confusion on this point, I want to restate it. CBP subjects 100% of all containers shipped to the U.S. to a risk assessment analysis and subjects 100% of any container over a certain risk threshold to further inspection.

In short, DHS already has a large number of measures in place relating to port and cargo security that are designed to ensure the security of our ports. These measures, and additional measures taken by local port authorities, greatly reduce the risks presented by the presence of any foreign terminal operator in a U.S. port.

CFIUS Review of the DP World Transaction

DHS always examines the backgrounds of parties to a CFIUS transaction, and we did so in this case. DHS agencies – the Coast Guard and CBP -- had previously worked with both DP World and its management and found them to be cooperative and professional. Demonstrating this is the fact that DP World met with senior officials of DHS and DOJ on October 31 – more than six weeks before they filed on December 16 and our review began on December 17, to provide confidential notice of their plans and begin answering questions. At the conclusion of this thorough review,

DP World

DP World has played an invaluable role in the establishment of the first foreign-port screening program that the U.S. started in the Middle East. That's because Dubai also volunteered to help in this innovative approach to security. DP World has voluntarily agreed to participate in screening of outbound cargo for nuclear material, and it has worked closely with CBP and the Dubai Customs Authority to target high-risk containers destined for the U.S. These screening programs could not have been successfully implemented without the cooperation of Dubai Port World.

P&O's Participation in the Customs-Trade Partnership Against Terrorism (C-TPAT)

British-based P&O, the owner of the U.S. facilities DP World is seeking to acquire, is and was a voluntary participant in CBP's Customs-Trade Partnership Against Terrorism (C-TPAT). C-TPAT establishes voluntary best security practices for all parts of the supply chain, making it more difficult for a terrorist or terrorist sympathizer to introduce a weapon into a container being sent by a legitimate party to the U.S. DP World has committed to maintaining C-TPAT participation for all of the P&O ports subject to this acquisition.

C-TPAT covers a wide variety of security practices, from fences and lighting to requiring that member companies conduct background checks on their employees, maintain current employee lists, and require that employees display proper identification.

C-TPAT's criteria also address physical access controls, facility security, information technology security, container security, security awareness and training, personnel screening, and important business partner requirements. These business partner requirements oblige C-TPAT members, like P&O, to conduct business with other C-TPAT members who have committed to the same enhanced security requirements established by the C-TPAT program.

In Newark, New Jersey, all eight of the carriers who use P&Os Port Newark Container Terminal are also members of C-TPAT which increases the overall security of the Newark facility.

The DP World CFIUS Transaction

As I noted towards the beginning of my testimony, DHS considers three important questions in any CFIUS transaction: (1) does DHS already have sufficient legal or regulatory authority to eliminate any threat to homeland security that might be raised by the transaction?; (2) does DHS have homeland security concerns about the parties or nature of the transaction?; and (3) if DHS has homeland security concerns, can they be resolved with binding assurances from the parties to the transaction?

I have addressed the first two of those questions, now let me turn to the third.

As part of its CFIUS review, DHS considers whether it should obtain any further commitments from the companies engaging in the transaction to protect homeland security. DHS has been aggressive in seeking such assurances as part of CFIUS reviews. The assurances are carefully tailored to the particular industry and transaction, as well as the national security risks that we have identified.

The Assurances Agreements

DHS had never required an assurances agreement before in the context of a terminal operator or a port. But after analyzing the facts, DHS decided that we should ask for and obtain binding assurances from both companies.

The companies agreed after discussions to provide a number of assurances, two of which are particularly important.

First, both parties agreed that they would maintain their level of participation and cooperation with the voluntary security programs that they had already joined. This means that, for these companies, and these companies alone, what was previously voluntary is now mandatory.

In the U.S., the parties are committed to maintaining the best security practices set out in C-TPAT. In Dubai, the parties are committed to continued cooperation in the screening of containers bound for the U.S., including the radiation screening discussed above.

Second, the parties agreed to an open book policy in the U.S. DHS is entitled to see any records the companies maintain about their operations in the United States -- without a subpoena and without a warrant. All DHS needs to provide to DP World is a written request and we can see it all. DHS can also see any records in the U.S. of efforts to control operations of the U.S. facilities from abroad.

Because C-TPAT requires a participating company to keep a current record of its employees, including Social Security Number and date of birth, this open-book assurance also allows us to obtain up-to-date lists of employees, including any new employees. DHS will have sufficient information about DP World employees to run the names against terrorist watch lists, to do background checks of our own, or to conduct other investigations as necessary.

These agreements were negotiated and obtained during the 30-day period the transaction was under CFIUS review, and DHS conditioned its non-objection to the transaction on the execution of those agreements.

The Assurances Letters to DHS are Binding and Legally Enforceable

The assurances that DHS obtained from the companies are binding and legally enforceable, so that DHS and the U.S. Government could go into court to enforce them.

The companies also agreed in the assurances letters that DHS could reopen the case, which could lead to divestment by the foreign company if the representations the companies made to DHS turned out to be false or misleading.

DHS believes that DP World will adhere to both the letter and the spirit of the assurances letter, because the worst thing that can happen to a terminal operator's business is to lose the trust of the CBP officials who decide how much of that operator's cargo must be inspected every day. If we lose faith in the security and honesty of these parties, we will have to increase government scrutiny of the cargo they handle. That means more inspections and more delays for their customers.

And that is very bad for business.

That is why DHS is confident that the companies will work hard to continue to earn and retain our trust – and to fulfill their assurances -- every day.

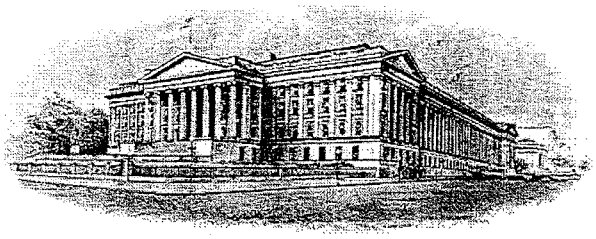
Conclusion

In short, after examining this transaction with care, DHS concluded that: (1) we have legal authority to regulate the U.S. security practices of these parties, including the ability to assess the maritime threat and intervene, at the foreign port of origin or on the high-seas, before potentially problematic cargo arrives at a U.S. port to be serviced by the parties; (2) DP World's track record in cooperating with DHS on security practices is already very good; and (3) DHS obtained assurances that provide additional protection

against any possible future change in the cooperative spirit we have seen so far and that allow us to do further checks on our own.

Based on all those factors, DHS concluded that it would not object to the CFIUS transaction or seek an additional 45-day investigation.

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



U.S. TREASURY DEPARTMENT
OFFICE OF PUBLIC AFFAIRS

EMBARGOED UNTIL: 2:00 pm EST on March 1, 2006
Contact: Tony Fratto (202) 622-2910

Testimony of Robert M. Kimmitt, Deputy Secretary
U.S. Department of the Treasury

Before the House Financial Services Subcommittee on Domestic and International Monetary Policy, Trade and Technology

Ms. Chairman, Ranking Member Maloney, and distinguished members of the Committee, I appreciate the opportunity to appear before you today to discuss the Committee on Foreign Investment in the United States (CFIUS) and the Committee's review of DP World's acquisition of P&O. I am here speaking on behalf of the Administration, the Treasury Department, and CFIUS.

CFIUS

Exon-Florio

CFIUS was established in 1975 by Executive Order of the President with the Secretary of the Treasury as its chair. Its main responsibility was "monitoring the impact of foreign investment in the United States and coordinating the implementation of United States policy on such investment." It analyzed foreign investment trends and developments in the United States and provided guidance to the President on significant transactions. However, it had no authority to take action with regard to specific foreign investments.

The Omnibus Trade and Competitiveness Act of 1988 added section 721 to the Defense Production Act of 1950 to provide authority to the President to suspend or prohibit any foreign acquisition, merger, or takeover of a U.S. company where the President determines that the foreign acquirer might take action that threatens to impair the national security of the United States. Section 721 is widely known as the Exon-Florio amendment, after its original congressional co-sponsors.

Specifically, the Exon-Florio amendment authorizes the President, or his designee, to investigate foreign acquisitions of U.S. companies to determine their effects on the national security. It also authorizes the President to take such action as he deems appropriate to prohibit or suspend such an acquisition if he finds that:

(1) There is credible evidence that leads him to believe that the foreign investor might take action that threatens to impair the national security; and

(2) Existing laws, other than the International Emergency Economic Powers Act (IEEPA) and the Exon-Florio amendment itself, do not in his judgment provide adequate and appropriate authority to protect the national security.

The President may direct the Attorney General to seek appropriate judicial relief to enforce Exon-Florio, including divestment. The President's findings are not subject to judicial review.

Following the enactment of the Exon-Florio amendment, the President delegated to CFIUS the responsibility to receive notices from companies engaged in transactions that are subject to Exon-Florio, to conduct reviews to identify the effects of such transactions on the national security, and, as appropriate, to undertake investigations. However, the President retained the authority to suspend or prohibit a transaction.

The Secretary of the Treasury is the Chair of CFIUS, and the Treasury's Office of International Investment serves as the Staff Chair of CFIUS. Treasury receives notices of transactions, serves as the contact point for the private sector, establishes a calendar for review of each transaction, and coordinates the interagency process. The other CFIUS member agencies are the Departments of State, Defense, Justice, and Commerce, OMB, CEA, USTR, OSTP, the NSC, the NEC and the newest member, the Department of Homeland Security. Additional agencies, such as the Departments of Energy and Transportation or the Nuclear Regulatory Commission are routinely invited to participate in a review when they have relevant expertise.

The CFIUS process is governed by Treasury regulations that were first issued in 1991 (31 CFR part 800). Under these regulations, parties to a proposed or completed acquisition, merger, or takeover of a U.S. company by a foreign entity may file a voluntary written notice with CFIUS through Treasury. Alternatively, a CFIUS member agency may on its own submit notice of a transaction. If a company fails to file notice, the transaction remains subject to the President's authority to block the deal indefinitely.

The CFIUS process starts upon receipt by Treasury of a complete, written notice. Treasury determines whether a filing is in fact complete, thereby triggering the start of the 30-day review period. CFIUS may reject notices that do not comply with the notice requirements under the regulations. Upon receiving a complete filing, Treasury sends the notice to all CFIUS member agencies and to other agencies that might have an interest in a particular transaction. CFIUS then begins a thorough review of the notified transaction to determine its effect on national security. In some cases, this review prompts CFIUS to undertake an "investigation," which must begin no later than 30 days after receipt of a notice. The Amendment requires CFIUS to

complete any investigation and provide a recommendation to the President within 45 days of the investigation's inception. The President in turn has up to 15 days to make a decision, for a total of up to 90 days for the entire process.

CFIUS Implementation

Although the formal review period commences when CFIUS receives a complete filing, there is often an informal review that begins in advance. Parties to a transaction may contact CFIUS before a filing in order to identify potential issues and seek guidance on information the parties to the transaction could provide to assist CFIUS' review. This type of informal consultation between CFIUS and transaction parties enables both to address potential issues earlier in the review process. The pre-filing consultation allows the parties to answer many of CFIUS' questions in the formal filing and allows for a more comprehensive filing. In some cases, CFIUS members negotiate security agreements before a filing is made. In addition, the pre-filing consultation may lead the parties to conclude that a transaction will not pass CFIUS review, in which case they may restructure their transaction to address national security issues or abandon it entirely.

During the initial 30-day review, each CFIUS member agency conducts its own internal analysis of the national security implications of the notified transaction. In addition, the U. S. Intelligence Community provides input to all CFIUS reviews. The Intelligence Community Acquisition Risk Center (CARC), now under the office of the Director of National Intelligence (DNI), provides threat assessments on the foreign acquirers. CFIUS will request a threat assessment report from CARC as early as possible in the review process. In order to facilitate reviews, CFIUS may request these reports before the parties to the transaction have made their formal filing. Further, additional agencies such as the Departments of Energy and Transportation and the Nuclear Regulatory Commission actively participate in the consideration of transactions that impact the industries under their respective jurisdictions.

During the review period, there are frequent contacts between CFIUS and the parties to the transaction. The transaction parties respond to information requests and provide briefings to CFIUS members in order to clarify issues and supplement filing materials. Although the CFIUS agencies may meet collectively with the parties as an interagency group, meetings also often occur between the parties and the agency or agencies that have a specific interest in the transaction. Typically, certain members of CFIUS will identify a concern early in the review and then assume the lead role in examining the issue and providing views and recommendations on whether the concern can be addressed. For example, if there are military contracts, the Department of Defense would lead the CFIUS review and recommend a course of action.

Depending on the facts of a particular case, CFIUS agencies that have identified specific risks that a transaction could pose to the national security may, separately or through CFIUS auspices, develop appropriate mechanisms to address those risks when other existing laws and regulations alone are not adequate or appropriate to protect the national security. Agreements implementing security measures vary in scope and purpose, and are negotiated on a case by case basis to address the particular concerns raised by an individual transaction. Publicly available examples of some of the general types of agreements that have been negotiated include: Special Security

Agreements, which provide security protection for classified or other sensitive contracts; Board Resolutions, which, for instance, require a U.S. company to certify that the foreign investor will not have access to particular information or influence over particular contracts; Proxy Agreements, which isolate the foreign acquirer from any control or influence over the U.S. company; and Network Security Agreements (NSAs), which are used in telecommunications cases and often are imposed in the context of the Federal Communications Commission's (FCC) licensing process.

CFIUS operates by consensus among its members. A decision not to undertake an investigation is made only if the members agree that the transaction creates no national security concerns, or any identified national security concerns have been addressed to the satisfaction of all CFIUS agencies. The daily operation of CFIUS is conducted by professional staff at each agency. Each agency sends the filing to multiple groups in its agency depending on the issues involved in the filing. CFIUS staff report to the policy level, which is the Assistant Secretary level. A decision can be elevated to the Deputy Secretary level and on to the Cabinet officials, if necessary. If within the initial 30-day period there is consensus that the transaction does not raise national security concerns or any national security concerns have been addressed, Treasury, on behalf of CFIUS, writes to the parties notifying them of that determination. This concludes the CFIUS review of the acquisition.

If one or more members of CFIUS believe that national security concerns remain unresolved, then CFIUS conducts a 45-day investigation. The additional 45 days enables CFIUS and the parties to obtain additional information from the parties, conduct additional internal analysis, and continue addressing outstanding concerns. Upon completion of a 45-day investigation, CFIUS must provide a report to the President stating its recommendation. If CFIUS is unable to reach a unanimous recommendation, the Secretary of the Treasury, as Chairman, must submit a CFIUS report to the President setting forth the differing views and presenting the issues for decision. The President has up to15 days to announce his decision on the case and inform Congress of his determination. The last report sent to Congress occurred in September 2003, when the President sent a classified report detailing his decision to take no action to block the transaction between Singapore Technologies Telemedia and Global Crossing.

The Exon-Florio amendment requires that information furnished to any CFIUS agency by the parties to a transaction shall be held confidential and not made public, except in the case of an administrative or judicial action or proceeding. This confidentiality provision does not prohibit CFIUS from sharing information with Congress. Treasury, as chair of CFIUS, upon request of congressional committees or subcommittees with jurisdiction over Exon-Florio matters, has arranged congressional briefings on transactions reviewed by CFIUS. These briefings are conducted in closed sessions and, when appropriate, at a classified level. CFIUS members with equities in the transaction under discussion are invited to participate in these briefings.

Since the enactment of Exon-Florio in 1988, CFIUS has reviewed 1,604 foreign acquisitions of companies for potential national security concerns. In most of these reviews, CFIUS agencies have either identified no specific risks to national security created by the transactions or risks have been addressed during the review period. However, to date 25 cases have gone through investigation, twelve of which reached the President's desk for decision. In eleven of those, the

President took no action, leaving the parties to the proposed acquisitions free to proceed. In one case, the President ordered the foreign acquirer to divest all its interest in the U.S. company. In another case that did not go to the President, the foreign acquirer undertook a voluntary divestiture. Of those 25 investigations, seven have been undertaken since 2001 with one going to the President for decision. However, these statistics do not reflect the instances where CFIUS agencies implemented security measures that obviated the need for an investigation or where, in response to dialogue with CFIUS agencies, parties to a transaction either voluntarily restructured the transaction to address national security concerns or withdrew from the transaction altogether.

DP World

Contrary to many accounts, the DP World transaction was not rushed through the review process in early February. On October 17, 2005, lawyers for DP World and P&O informally approached Treasury Department staff to discuss the preliminary stages of the transaction. This type of informal contact enables CFIUS staff to identify potential issues before the review process formally begins. In this case, Treasury staff identified port security as the primary issue and directed the companies to DHS. On October 31, DHS and the Department of Justice staff met with the companies to review the transaction and security issues.

On November 2, Treasury staff requested a CARC intelligence assessment from the Office of the DNI. Treasury received this assessment on December 5, and it was circulated to CFIUS staff. On December 6, staff from CFIUS agencies with the addition of staff from the Departments of Transportation and Energy met with company officials to review the transaction and to request additional information. On December 16, after two months of informal interaction, the companies officially filed their formal notice with Treasury, which circulated the filing to all CFIUS departments and agencies and also to the Departments of Energy and Transportation because of their statutory responsibilities and experience with DP World.

During the 30-day review period, members of the CFIUS staff were in contact with one another and the companies. As part of this process, DHS negotiated an assurances letter that addressed port security concerns. The final assurances letter was circulated to the committee on January 6 for its review, and CFIUS concluded its review on January 17. In total, far from rushing their review, members of CFIUS staff spent nearly 90 days reviewing this transaction. There were national security issues raised during this review process, but any and all concerns were addressed to the satisfaction of all members of CFIUS. By the time the transaction was formally approved, there was full agreement among the CFIUS members.

Another misperception is that this transaction was concluded in secret. Although the Exon-Florio amendment prohibits CFIUS from publicly disclosing information provided to it in connection with a filing under Exon-Florio, these transactions often become public through actions taken by the companies. Here, as is often the case, the companies issued a press release announcing the transaction on November 29. In addition, beginning on October 30, dozens of news articles were published regarding this transaction, well before CFIUS officially initiated, much less concluded its review.

On Sunday, February 26, DP World announced that it would make a new filing with CFIUS and request a 45-day investigation. Upon receipt of DP World's new filing, CFIUS will promptly initiate the review process. The additional time and review at the company's request will enable Congress to obtain a better understanding of the facts.

Conclusion

Madame Chair, we believe that the review surrounding the DP World transaction was thorough from a substantive standpoint, as reflected by the unanimous approval of the members. Nonetheless, it is clear that improvements are still required. In particular, we must improve the CFIUS process to help ensure the Congress can fulfill its important oversight responsibilities. Although CFIUS operates under legal restrictions on public disclosures regarding pending cases, we have tried to be responsive to inquiries from Congress. I am open to suggestions on how we foster closer communication in the future. I think that we can find the right balance between providing Congress the information it requires to fulfill its oversight role while respecting the deliberative processes of the executive branch and the proprietary information of the parties filing with CFIUS.

Let me stress in closing, Madame Chair, that all members of CFIUS understand that their top priority is to protect our national security. As President Bush has said: "If there was any doubt in my mind, or people in my administration's mind, that our ports would be less secure and the American people endangered, this deal wouldn't go forward."

I thank you for your time this afternoon and am happy to answer to any questions.

-30-

Testimony

of

Todd M. Malan

President and CEO

Organization for International Investment (OFII)

March 1, 2006

Before the

House Financial Services Committee

Subcommittee on Domestic and International Monetary Policy, Trade, and Technology

Foreign Investment, Jobs and National Security: The CFIUS Process

Good morning Madam Chairman, Congresswoman Maloney and members of the Committee, my name is Todd Malan and I am President and CEO of the Organization for International Investment or OFII.

OFII is an association representing the interests of U.S. subsidiaries of companies based abroad or "insourcing" companies. OFII has 140 member companies, which range from mid-sized businesses to some of the largest employers in the United States, such as Honda, HSBC, Sony, AEGON Insurance, Nestlé, Unilever and L'Oreal.

Collectively, insourcing companies employ 5.3 million Americans, pay 34% higher compensation than at all U.S. firms, support 21% of all U.S exports and in 2004 reinvested $45 billion in profits back into the U.S. economy.

As the representative of the largest collection of companies that regularly seek review of acquisitions by the Committee on Foreign Investment in the United States (CFIUS) under the Exon-Florio Amendment to the Defense Production Act, we very much appreciate the opportunity to participate in this important hearing.

I am pleased to share my organization's views on each of the topics that are enumerated in the hearing title: national security, foreign investment and the jobs it provides, and the CFIUS process that Congress created to balance the benefits of the one against the absolute necessity of the other.

At the outset, let me make clear that neither DP World nor P&O are member companies. I cannot comment about the particulars of that transaction, as I am not aware of its details, its review by CFIUS, or any agreements made as part of the CFIUS process.

National Security is the Priority

Some people view the business community skeptically when it comes to national security discussions. Unfortunately, this perspective ignores that the terrorists are aiming at our

economic system, not just our political system. From the tragic events of September 11th, to last week's foiled attack in Saudi Arabia -- economic and business interests are prime targets. Companies and the people that run them understand this fact of life. The business community works hard to cooperate with governments on all aspects of national security. My member companies take this national security mandate very seriously.

The statute that is the focus of today's hearing is ultimately about national security. Our respect for the law, the CFIUS process, the government officials who participate in it and the debate about possible changes to the process are all grounded in the recognition that national security is the first priority. We also respect Congress's role in providing meaningful oversight.

The Benefits of Foreign Investment In The U.S.

In carefully crafting the Exon-Florio Amendment, and the narrow changes to it since then, Congress recognized that foreign investment in the United States makes a positive contribution to the economy. This law is a scalpel, not a meat cleaver. Congress could have chosen to create a more rigid, restrictive system that would have resulted in steeper barriers to foreign direct investment. It did not. This flexibility is testament that the United States has long welcomed and benefited from foreign investment. According to the most recent government figures, the benefits of insourcing's contribution to the economy are clear:

- U.S. subsidiaries employ 5.3 million Americans and operate in all 50 states.
- U.S. subsidiaries support an annual payroll of $317.9 billion.
- Average compensation per employee is $60,527 – 34% more than compensation at all U.S. firms.
- U.S. subsidiaries heavily invest in the American manufacturing sector. Thirty-four percent of the jobs at U.S. subsidiaries are in manufacturing.
- Contrary to many people's assumptions, these companies don't just invest here to access our market. U.S. subsidiaries account for over 21% of all U.S. exports.

- New foreign direct investment (FDI) in the U.S. totals $79.8 billion, an increase of $16.2 billion or 26 percent over the previous year.
- U.S. subsidiaries reinvested $45 billion in their U.S. operations. In other words, profits earned here, stay here.
- U.S. subsidiaries spent $29.5 billion on U.S. research and development activities, up $2 billion from the previous year.
- Ninety-four percent of total assets owned by foreign companies are from OECD countries.
- Ninety-eight percent of U.S. FDI is from private sector firms -- only two percent of total direct investment (*assets*) is owned by companies that are controlled by foreign governments.

In today's global economy, labels such as "foreign" or "domestic" are less and less relevant. In my 11 year experience working with insourcing companies at OFII, I have seen a number of changes in business practices and trends that in my mind blur the clear demarcation between foreign and domestic firms. I think some of this experience is useful for Members to keep in mind as they contemplate the benefits of our open investment policy and possible changes to the national security screening regime.

Many foreign multinationals have moved U.S. personnel into very senior global positions. For instance, many CEOs of U.S. subsidiaries, most of whom are American citizens, have recently gone on to become the CEO of the global company.

Also, I see a trend in which many foreign companies are moving key functions and senior personnel ***into*** the U.S. These functions often have world wide responsibility for a business unit or function.

This type of global leadership activity for U.S. personnel or operations is highly beneficial to the U.S. economy and should also be taken into account when thinking about the behavior of "foreign" companies vis-à-vis national interests.

In addition, more and more Americans are shareholders in "foreign" companies. In an effort to diversify their investments, Americans now hold over $2.9 trillion in foreign equities. Millions of Americans, either directly or through their mutual funds and pension funds are "owners" of these firms. Within my membership, there are numerous examples where American shareholders hold a majority of shares in a "foreign" company.

Exon-Florio Strikes A Balance: National Security & Foreign Investment

While national security is any nation's first priority, it must be managed alongside other important national priorities. Maintaining national security and economic strength are interdependent.

When Congress enacted the Exon-Florio statute in 1989, it struck a balance between two interrelated priorities: national security protection and the economic benefits of an open investment policy.

I believe that Members of the Committee have been briefed extensively on the workings of CFIUS and the previous panel testified at some length about its function. As such, I will not repeat what others have already outlined.

However, I would like to focus on those aspects of the law and current CFIUS practice that OFII believes demonstrate a positive balance between national security protection and the economic benefits of foreign direct investment:

- Each transaction is reviewed on a case-by-case basis;
- The 12 members of CFIUS bring a diversity of experience and perspective to the review of a transaction;
- CFIUS members can initiate requests for reviews;

- The full resources of the U.S. government intelligence capabilities are used in the review;

- The ability of CFIUS to invite other agencies with particular expertise to participate in a review;

- The authority that CFIUS has to require parties to adopt measures that CFIUS members believe are necessary to protect national security;

- The ability of CFIUS, in most instances, to work without political intervention, preventing a competitor with a financial motive, not a national security motive, to seek to influence a less resolute process;

- The recognition by CFIUS agencies that, as a general matter, foreign investment in the United States is a positive contribution to our economic health;

Finally, I would point out that CFIUS has blocked or deterred certain transactions. While we can never know exact figures, we do know that the CFIUS process has led to one transaction being denied by the President, resulted in the withdrawal of 13 transactions, and no doubt dissuaded some parties from attempting to make certain US acquisitions.

Does CFIUS Need To Be Changed?

In many respects, CFIUS has changed over time. For instance, the President altered the CFIUS membership to reflect new capabilities and structures by adding the Department of Homeland Security in 2003. As technology and our interfaces with it have changed, CFIUS has adjusted its scope to heighten its review of transactions in critical infrastructure areas such as telecommunications.

However, in OFII's view, CFIUS is not broken and does not need wholesale reform.

Admittedly, there needs to be better mechanisms in place for consultation between the Congress and CFIUS. This process needs to be focused (perhaps to committees of jurisdiction) as it is in other oversight responsibilities and it needs to ensure that confidential, business proprietary information is protected. There are numerous examples of other such procedures in monetary policy, trade policy or anti-trust reviews.

On the other hand, some of the proposals for amending CFIUS would have profound negative impacts on vital economic interests. I would like to share a few brief thoughts on some of those proposed changes:

Increasing the Time Periods for Reviews and Investigations: The GAO study that was conducted in September of last year suggested that the CFIUS process may need more time for its reviews. OFII believes that the current structure of 30 days for review and 45 days for the investigation phase is adequate. Expanding the time frame would mean that CFIUS could be viewed as a major impediment to closing cross-border transactions and could require insourcing companies to pay premium prices or be excluded from some potential transactions. I would note that the addendum to the GAO study, which was a consensus view of CFIUS members, supported the view that timeframes for review and investigation are adequate.

Mechanisms for Congressional Disapproval of President's Decision: Members of Congress have a strong interest in the CFIUS process and its decisions. The process relates to national security and Members are accountable to their constituents in that regard. But this is also an administrative process based in law. There is no other instance in commercial administrative procedures where a formal mechanism exists for Congress to change or disapprove of a specific outcome. In other contexts, Congress has realized that it is not best equipped for making sensitive fact-based, case-by-case decisions. In all other contexts, Congress creates the law, creates an administrative procedure, and conducts oversight to ensure the law is being appropriately implemented and enforced. Congress does not second guess the process in regard to specific anti-trust reviews, International Trade Commission decisions or patent and trademark awards. It shouldn't start here.

Expanding the Scope of CFIUS to Include Economic Security: Some have suggested that the scope of CFIUS should include the concept of "economic security." This would be a huge mistake that emulates the very worst of other nation's restrictive policies regarding foreign investment – policies that we have long encouraged those nations to change.

Theoretically, economic security is a concept that can be used as a rationale to prevent any and all foreign investment. It has been used many times to justify blocking U.S. based firms' investments in other countries where the competitiveness of a domestic industry is linked to "economic security."

Expanding the scope of CFIUS reviews will significantly overload the CFIUS review process with transactions that have nothing to do with true national security. If CFIUS members have to examine the extent to which a European consumer food products company's acquisition of a major U.S. ice cream maker impacts the "economic security" of the U.S. dairy industry, then they have less time and resource to focus on true national security related transactions. We should not take CFIUS's focus off national security.

Also, one of OFII's major concerns in the past has been the extent to which a domestic competitor, who loses out in mergers and acquisitions competition, can use the CFIUS process to lobby to block the deal and achieve in the legislative process what they couldn't achieve in the marketplace. I do not perceive that to be the case in this most recent transaction, but we have seen it in plenty of other cases. If economic security were an aspect of CFIUS review, domestic firms will try to use the process to block new entrants to the market, to the detriment of U.S. consumers and our economy generally.

And finally, one of the key benefits of the current law is that it is flexible. If an agency within CFIUS is concerned about a transaction, CFIUS can initiate a request for a review. Adding economic security to the scope of CFIUS will significantly distract from the core national security function.

Moving the Chair of CFIUS from Treasury: Some have suggested that the Chair of CFIUS should be moved from Treasury to another agency such as the Departments of

Defense or Commerce. This issue is a diversion. In a "first among equals" Committee structure, the chair does not enjoy extraordinary power. At the end of the day, each member has one vote. All of the agencies that participate in CFIUS are experienced in the interagency process and are generally adept at representing their perspective. If DOD, DHS or Commerce opposes a transaction, I doubt very seriously that they are cowed by an opposing view from Treasury.

National Security and Capital Ownership

As the Committee considers this important topic, I wanted to offer a more general observation about the relationship between national security and economic activity.

When it comes to national security concerns arising from commercial operations of critical infrastructure, why should the nationality of the owners of the capital stock be the principal or sole concern? Certainly, there may be instances of foreign ownership that do raise special concerns as in the case of government ownership of the acquirer -- a situation where CFIUS already pays special attention. But the national security risks arising from certain activities -- such as infrastructure operations -- are present whoever owns the capital stock and should be addressed on their merits, not only in the context of an acquisition. If we agree that there are vulnerabilities in a particular area, the solution is to address the risk comprehensively and not take the view that the risk lies only with ownership.

U.S. ownership of such facilities does not mean the risks have been mitigated. A disproportionate focus on nationality may in fact distract from accomplishing the real national security objectives. U.S. ownership is not an inoculation from bad actors or bad events.

On the other hand, just because a firm is headquartered abroad doesn't mean it shouldn't be a partner in national security. OFII encountered an odd example in the period after September 11th. The FBI started a program with the business community to create a task force on critical infrastructure. The idea was to compile a list of key personnel at business sites that could be terrorist targets and create a network to share developments in

the event of suspicious activity. While a useful idea, the task force had one major shortcoming: the FBI excluded the U.S. operations of foreign-owned companies from the task force, apparently deeming them less trustworthy than U.S. companies. Yet one of America's largest petroleum refineries is a California facility owned by a European-based firm – a plant that employs hundreds and serves the entire nation. A security risk at one of these facilities is certainly as important to American safety as any other U.S. business. This glaring omission has since been rectified but it is an example of how linear, "us vs. them" thinking can yield results that are not in our national interest.

While the Committee is focused on this area, it is constructive to step back and consider some of our fundamental assumptions about national security, and how best to address the risks in commercial activities. It may be time to modernize our perspective in today's global economy and with today's cunning enemy, to come up with approaches that turn less on nationality and more on comprehensive risk assessment.

Conclusion

The enormous public focus that the DP World transaction has brought to this area will have both positive and negative effects. We welcome the focus on the CFIUS review process and the role that foreign investment plays in the U.S. economy. We believe that if both are better understood, they will be more appreciated.

Madam Chairman, thank you again for calling this hearing. We look forward to working with you, your colleagues and the Administration to enhance America's national security because a more secure nation is one that will attract investment, encourage capital accumulation, and realize long-term economic growth.

Testimony of

David Marchick

Before the House Financial Services Committee

On Foreign Investment, Jobs and National Security: The CFIUS Process

March 1, 2006

Chairman Pryce, Ranking Member Maloney and Members of the Committee:

Thank you for the opportunity to testify before the House Committee on Financial Services on the subject of the Exon-Florio Amendment. It is a privilege to appear before you.[1]

I applaud your leadership, Madame Chairman, and that of the Committee for calling these hearings. Protecting U.S. national security has to be the United States' top priority. Notwithstanding the current debate over the acquisition of P&O by Dubai Ports World, I believe we can protect our security interests and simultaneously maintain an open investment policy, including through the effective implementation of the Exon-Florio Amendment.

You have already heard the testimony by the distinguished panel of Executive Branch officials. I am here to offer the perspective of a private sector advisor who works closely with the twelve members of the Committee on Foreign Investment in the United States (CFIUS). Since issues related to the Dubai ports controversy have been discussed extensively by others, I will not comment on this case but would be pleased to answer questions on the subject. My written testimony focuses on four particular issues:

- First, the critical importance of foreign investment to the U.S. economy. Encouraging inward investment is essential to both our economic security and our national security.

- Second, trends in the application of the Exon-Florio Amendment. Since September 11, 2001, CFIUS has applied greater scrutiny to foreign investments on national security grounds, imposed even tougher security requirements as a condition for approving specific transactions, and has enhanced enforcement of security agreements negotiated through the Exon-Florio process.

- Third, the myriad initiatives to amend Exon-Florio. Simply put, the Exon-Florio Amendment in its present form is more than adequate to protect our national security and still preserve our economic interests. Many of the changes being discussed in Congress would risk chilling inward investment and encouraging other governments to erect new obstacles to U.S. investment abroad. At the same time, there can and should be greater transparency with Congress while protecting proprietary business information.

- Fourth, the global implications of Exon-Florio. Many countries around the world are considering changes to their own investment review processes. Politicization

[1] David Marchick is a partner at Covington & Burling, a Washington-based law firm. He has an active CFIUS practice and is co-authoring a book on Exon-Florio with Edward M. Graham, Senior Fellow at the Institute for International Economics.

of the CFIUS process will encourage other countries to impose restrictions on U.S. investors abroad.

Before getting into each specific issues, allow me to try to clarify some facts about CFIUS. I have been struck by the assertions in the press that transactions breeze through the CFIUS process with alacrity. Nothing could be further from the truth.

Just because a transaction is approved in the first 30 days doesn't mean it received a cursory review. Just because the vast majority of cases are approved by CFIUS doesn't mean that the process isn't tough. And just because the President doesn't personally get involved in a review doesn't mean that the review lacks credibility.
Finally, I have seen the dozens of references to the "secret" panel. The process is supposed to be confidential. It deals with national security and intelligence issues.

The Importance of Foreign Investment to the U.S. Economy

Few would disagree that foreign investment plays a critical role in the U.S. economy. Today more than ever, the vibrancy and vitality of the U.S. economy depends on the inflow of direct foreign investment. Foreign investment supports approximately 5.3 million jobs in the United States. These typically are highly skilled, well-paying jobs; indeed, U.S. affiliates of foreign firms on average pay wages higher than the U.S. industrial mean.[2] Foreign investors also invest heavily in manufacturing operations in the United States -- investment that is critically important given the present competitive pressures on the U.S. manufacturing base. It is precisely for these reasons that each of our 50 governors devotes a significant amount of time and resources to attract foreign investment to their states.

Perhaps most important, because the United States spends more than it produces and saves, and because of the deteriorating current account deficit ($197 billion in the second quarter of 2005, or some 6.3% of annualized GDP), our country is now *literally* dependent on inflows of direct and portfolio investment to cover the gap between what we consume and produce.

Of course, if foreign investors make investments in the United States, it is preferable that they do so in plant, equipment and other fixed assets that drive economic activity than solely in the debt market. Subjecting our economy to the whims of foreign central banks -- which today hold more than one-third of the overall public U.S. debt-- creates much more risk than does foreign ownership of fixed assets in the United States.

The United States has long embraced a policy of encouraging foreign investment. Indeed, Presidents Carter, Reagan and George H.W. Bush each issued executive statements of policy on the subject and President Clinton actively promoted inward investment. In 1983, President Reagan issued the first public statement in which a U.S.

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[2] See Edward M. Graham and Paul R. Krugman, Foreign Direct Investment in the United States 71-72 (Institute for International Economics 1995).

President expressly welcomed foreign investment. In this statement, President Reagan said "the United States believes that foreign investors should be able to make the same kinds of investment, under the same conditions, as nationals of the host country. Exceptions should be limited to areas of legitimate national security concern or related interests."[3]

U.S. foreign investment policy has long been consistent with President Reagan's statement of policy more than two decades ago. In fact, apart from the narrow exception of a few World War I-vintage restrictions on foreign investment in aviation, shipping and the media, the U.S. has maintained an open investment policy. For the rare instances when U.S. national security is threatened by a particular foreign acquisition or involvement in the U.S. economy, laws such as the Exon-Florio Amendment, the International Emergency Economic Powers Act and, previously, the Trading with the Enemy Act, have empowered Presidents to block foreign investment (or to seize foreign owned assets, as the U.S. did in World Wars I and II).

As a result, with the exception of 2003, when China was the largest recipient of direct foreign investment, the U.S. has for many years attracted more foreign investment than any other country in the world. In addition to our open investment policy, the size of the U.S. market, the quality of our workforce and the ease with which foreign investors can operate here have all contributed to this remarkable record.

The vast majority of foreign acquisitions do not implicate U.S. national security interests in any respect. For the rare transaction that genuinely implicates U.S. national security interests, the Exon-Florio Amendment provides the President with ample authority to block the acquisition or otherwise mitigate the national security concerns it raises. CFIUS agencies have demonstrated their willingness to use the full authority of the law.

Trends Toward Greater Scrutiny of Transactions in the Exon-Florio Review Process

The Exon-Florio Amendment created a statutory framework that is unique in a number of respects. First, there is no time bar on Exon-Florio reviews; CFIUS can review a transaction at any time, including after a transaction has closed. Second, Presidential decisions pursuant to Exon-Florio are not reviewable by U.S. courts because they involve national security, an inherently "Presidential" function. Third, the statute gives the CFIUS agencies broad discretion to interpret several key statutory criteria, including "foreign control," "credible evidence," and "national security." In my experience, particularly in the past few years, CFIUS has chosen to interpret these terms very broadly.

CFIUS has significantly broadened the scope of its "national security" reviews since September 11, 2001 -- a development that partly reflects the addition of the Department

[3] President Ronald Reagan, Statement on International Investment Policy, Sept. 9, 1983. *Available at* http://www.reagan.utexas.edu/archives/speeches/1983/90983b.htm.

of Homeland Security to the Committee and the attendant strengthening of the security focus within CFIUS. More importantly, whereas prior to September 11 CFIUS focused primarily on (i) the protection of the U.S. defense industrial base, (ii) the integrity of Department of Justice investigations, and (iii) the export of controlled technologies, CFIUS has intensified its focus on an additional goal: the protection of critical infrastructure.

Some of the criticism of CFIUS has focused on the fact that the President has formally blocked only one transaction out of more than 1600 reviewed by CFIUS. However, this statistic obscures the manner in which CFIUS actually operates and ignores the larger number of transactions abandoned or substantially modified by parties because of the CFIUS process. There have been more investigations and withdrawals *in just the past three years* than there were during the previous 10 years combined. In the last three years, I personally have been involved in three investigations, one proposed investment that was withdrawn when it became clear that CFIUS approval would not be forthcoming, and multiple negotiations of extremely tough security agreements with CFIUS agencies.

The tougher terms now imposed by CFIUS as a condition for approving particular transactions are another indicator of the enhanced scrutiny applied to recent transactions. For many years, the security agencies within CFIUS (DOJ/FBI, DOD and now DHS) have negotiated agreements designed to mitigate the national security impact of a particular transaction. These security agreements have traditionally been negotiated by DOD for foreign acquisitions of defense companies, by the DOJ and FBI for foreign acquisitions of telecommunications companies, and by multiple agencies for acquisitions in other sectors. Since 2003, DHS has joined DOJ, DOD and the FBI in playing a central role in the negotiation and enforcement of security agreements

By way of illustration, take the Network Security Agreements ("NSAs") negotiated to mitigate the risk of foreign investment in the telecommunications sectors. (Unlike security agreements negotiated in other sectors, NSAs in the telecommunications sector are made public via the grant of FCC licenses, which often are conditioned on the agreements.)

Before September 11, NSAs for foreign acquisitions of U.S. telecommunications companies typically focused on the ability of US law enforcement to conduct electronic surveillance and wiretaps and prevent foreign governments from accessing call-related data. In the last few years, NSAs have become much tougher. Some recent NSAs have become more intrusive, limiting foreign-owned telecommunications firms' freedom of action in key areas in which American-owned telecommunications firms face no similar restrictions.

For example, to varying degrees, recent NSAs have:

- permitted only US citizens to serve in sensitive network and security positions (e.g., positions permitting access to monitor and control the network);

- required third party screening of senior company officials and personnel having access to critical network functions;
- restricted or prohibited the outsourcing of functions covered by the NSA, unless such outsourcing is approved by the Department of Homeland Security;
- given US government agencies the right to inspect US-based facilities and to interview US-based personnel on very short notice (as short as 30 minutes);
- required third party audits of compliance with the terms of the NSA;
- required the implementation of strict visitation policies regulating foreign national access (including by employees of the acquiring company) to key facilities; and
- required senior executives of the US entity, and certain directors of its board, to be US citizens approved by the US government and responsible for supervising and implementing the NSA.

Many of these provisions reflect concepts typically utilized by the US Department of Defense to mitigate security concerns associated with foreign-owned companies that have classified contracts with the Pentagon. In other words, CFIUS now imposes on foreign companies handling non-classified telecommunications work many of the same requirements that DOD has traditionally required for foreign companies handling the government's most sensitive defense-related classified contracts. These security commitments for companies not handling classified contracts can impose substantial costs. For global communications companies, for example, the limitations on outsourcing, routing of domestic calls, storage of data, and location of network infrastructure can create significant competitive burdens.

Finally, I should note that the CFIUS security agencies have increased the vigor with which they monitor and enforce these agreements. Unfortunately, some provisions required by CFIUS in these agreements can be overly intrusive and regulatory, unnecessarily limit companies' operations, and impose significant costs without commensurate security benefits.

Notwithstanding this concern, it is important for the Committee to know that in the past few years, CFIUS's scrutiny of transactions has increased, security agreements have become tougher and enforcement and monitoring has been more rigorous.

Recent Proposals to Amend Exon-Florio

Recent proposals to amend Exon-Florio would, among other things:

- expand the definition of national security to include economic and/or energy security;

- give Congress the power to force an investigation or block a transaction already approved by the President;
- extend the statutory time limits for CFIUS reviews, and,
- transfer chairmanship of the process from the U.S. Treasury to the Department of Defense or Department of Commerce.

In my view, these proposals not only are unnecessary to protect U.S. national security, they would have a negative impact on the U.S. economy and therefore U.S. national security. More specifically, they would chill foreign investment, slow job creation, and provide other countries with a pretext for imposing similar restrictions on U.S. investment abroad. By chilling inward foreign investment, which fuels competition and innovation, we would be harming the vitality of the U.S. economy. A strong economy is essential for U.S. national security.

Let me take each of the proposals in turn:

First, expanding Exon-Florio's criteria to include "economic security," or variations thereof, has been proposed close to a half-dozen times since 1988, including when Exon-Florio became law.[4] Indeed, the original bill offered by Senator Exon would have authorized the President to block transactions that threaten the "essential commerce" of the United States. President Reagan threatened to veto the Omnibus Trade and Competitiveness Act of 1988 because of the "essential commerce" clause in the Exon bill; proposals to expand Exon-Florio to cover "economic security" should similarly be rejected.

It would be difficult for CFIUS to implement a statutory requirement to protect "economic security." The term is extraordinarily vague. I am reminded of the late Commerce Secretary Malcolm Baldridge, who argued against a similar provision in the original Exon bill, saying "you are trying to kill a gnat with a blunderbuss."[5] Indeed, there is good reason to believe that an "economic security" test would simply become a vehicle for domestic industries seeking to block foreign competition.

Second, the proposals to allow Congress to force an investigation or to override, through a joint action by Congress, Presidential approval of a particular transaction raise serious

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[4] See, for example, H.R. 3, "The Foreign Investment, National Security and Essential Commerce Act of 1987," 100th Congress, (introduced by Senator James Exon); H.R. 2386 ("The Foreign Investment and Economic Security Act of 1991," 102nd Congress (introduced by Rep. Mel Levine); H.R. 2394, "The Steel and National Security Act," 107th Congress (introduced by Rep. Dennis Kusinich); H.R. 5225, 101st Cong. (1990), H.R. 5225 (1990, 101st Congress) (introduced by Rep. Greg Waldron); and H.R. 2624, "The Technology Preservation Act of 1991", 102nd Congress, (introduced by Rep. Cardiss Collins).

[5] *Foreign Acquisitions of Domestic Companies: Hearing on H.R. 3 Before the Senate Committee on Commerce, Science and Transp.*, 100th Cong. 3 (1987), at 17.

separation of powers issues under the U.S. Constitution.[6] In addition, these proposals, if enacted, would create so much uncertainty about the prospect of Congressional involvement in the review process that a substantial number of foreign investors would simply not make investments in the United States. Congress has a legitimate and important oversight role ensuring that the Exon-Florio statute is implemented correctly. But Congress should not itself become a regulatory agency. Congress has not, and would not, override Hart-Scott-Rodino decisions made by the Department of Justice or the FTC. It should not assume that power here.

Third, I would recommend against extending the time limits for a CFIUS review. The existing time limits work well because they balance the need for the agencies to have sufficient time to conduct reviews with the concomitant need for parties to an acquisition to have the certainty that they will receive a decision -- up or down -- from CFIUS within a reasonable period of time. In addition, most companies that file with CFIUS -- thereby starting the statutory clock -- do so only after engaging in informal consultations with CFIUS. Through these informal consultations, CFIUS agencies have additional time to assess the national security risks and design mitigation strategies, if necessary. Indeed, it is common for security agreements to be hammered out before the parties file.

In the vast majority of transactions reviewed by CFIUS there is either no national security risk or the national security threat can readily be mitigated. These transactions can appropriately be approved by CFIUS in the 30 day initial review period provided by statute. These investments typically come from companies located in countries that are our closest allies. There is no good reason to prolong the timeframe for approving these transactions -- a timeframe, by the way, that currently corresponds with the initial review period under Hart-Scott-Rodino. Only a small number of transactions require additional scrutiny through an "investigation." The 45 additional days allowed in the current statutory framework for such investigations -- plus the informal, pre-filing consultation period -- are sufficient for CFIUS to do its job in the rare cases raising significant national security concerns.

Fourth, just as there has been with respect to "economic security," there have been a number of proposals over the years to transfer the chairmanship of CFIUS away from Treasury to the Department of Defense or the Department of Commerce. Indeed, the original Exon bill placed the responsibility in the Department of Commerce. Then-Secretary Baldridge stated bluntly that he did not want the authority.[7] While multiple agencies could competently lead the CFIUS process, placing the Chairmanship at Treasury sends an important positive signal to the rest of the world. Exon-Florio was intended to give the President a tool to block those rare transactions that truly threaten national security, not to change our overall open approach toward foreign investment. Under Treasury's leadership, the presumption is - and should remain - that foreign

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[6] See *INS v. Chadha,* 462 U.S. 919 (1985).

[7] Foreign Acquisitions of Domestic Companies: Hearing on H.R. 3 Before the Senate Committee on Commerce, Science and Transp., 100th Cong. 14 (1987).

investment is welcome unless it threatens national security. If CFIUS were chaired by an agency with a security mission, the presumption would be reversed.

Fifth, I believe that significant improvements can be made within the current legislative framework in the area of transparency. The concerns voiced by Members of Congress over the Dubai Ports transaction makes it clear that Congress has serious questions about the CFIUS process. I believe if Congress had more visibility into the process, you would have greater comfort in, and knowledge that, the process is already rigorous. A few ideas for improved transparency:

- The CFIUS agencies could spend more time on the Hill briefing members of this Committee and other relevant oversight committees on their activities, processes and trends in filings.

- The CFIUS agencies could issue regular reports to Congress regarding the number of cases filed, the sectors affected, the countries of origin for investments and the number of proposed investments by foreign companies owned or controlled by foreign governments.

- The CFIUS agencies could collect and publish more aggregate and trend data. For example, CFIUS could keep better data on the number of withdrawals, including withdrawals in the first 30 days. Currently, CFIUS only collects data on the number of withdrawals after an investigation has started. In my view, this undercounts the number of transactions that are abandoned because companies realize that CFIUS approval will not be forthcoming.

- The CFIUS agencies and this committee could explore ways for this committee to receive classified briefings on substantive decisions made by CFIUS. Such classified briefings could be modeled on the process currently utilized in the Intelligence Committees: some briefings for the Big 4, others that include select staff, still others that include all Members. However, given the national security and commercial sensitivity of the information that would be provided in these briefings, there needs to be strict parameters on who would be briefed. In addition, I would assume that criminal penalties, including SEC and insider trading sanctions, would apply for leaks of classified or confidential information. CFIUS should keep sacrosanct proprietary, business confidential information.

Each of these important steps to create more transparency could be accomplished under the current statute without legislative changes.

Let me also offer some thoughts on what Congress should avoid:

- Congress should not create a public notice requirement for Exon-Florio reviews. A national security review process, because it affects U.S. national security, should by its very nature remain confidential. As part of virtually every CFIUS review, the executive branch conducts background checks on companies and individuals, undertakes an intelligence assessment and discusses highly classified

national security issues. Our national security would be negatively affected if these issues were discussed or even notified to the public. Further, CFIUS filings also include highly sensitive, proprietary company information. This often includes market sensitive information that competitors would love to have. A mandatory public notice component does not exist for Hart-Scott-Rodino. The same rules should apply to Exon-Florio. com

- Congress should avoid transparency measures which facilitate the politicization of individual CFIUS reviews. It is fairly easy for domestic competitors to dream up national security arguments against a foreign acquisition of a U.S. company. The CFIUS process is and should remain a serious, sober inquiry into the national security implications of a particular acquisition, insulated from politicization in the same way as filings under Hart-Scott-Rodino.

The Global Implications of Exon-Florio

Congressional action to tighten restrictions on foreign investment in the United States could invite similar action abroad, limiting opportunities for outward investment by American companies. This is not an idle concern:

- This past summer, French politicians balked at mere rumors of PepsiCo potential interest in acquiring Danone, the French yogurt and water company. French Prime Minister Dominique de Villepin made the extraordinary statement that "The Danone Group is one of the jewels of French industry and, of course, we are going to defend the interests of France."[8] Since then, the French government has announced that it will establish a list of "strategic industries" that will be shielded from foreign investment. It is hard to see how yogurt is a strategic industry.

- In his State of the Union speech last April, President Putin called for a new law to protect "strategic industries" in Russia, including the oil sector. A draft of that law is expected to be put forward shortly.

- The Canadian Parliament is now considering amendments to the Investment Canada Act to permit the review of foreign investments that could compromise national security.

- China continues to restrict investment in a number of important sectors.

Let me give you a more recent, and more troubling, example in which a foreign government's proposed restrictions on U.S. investors seems to be directly linked to security commitments imposed by CFIUS on a company from that country. Specifically, the Indian government, spurred on in part by a domestic company that *itself* had a difficult time clearing CFIUS, announced its intention to impose extremely broad security

[8] LCI News, July 20, 2005, located at http://np.www.lci.fr/news/economie/0,,3232812-VU5WX0lEIDUy,00.html.

restrictions on foreign investments in the telecommunications sectors. These security restrictions were announced in the context of a proposal to raise the ceiling on permitted foreign investment in the telecommunications sector, from 49% foreign ownership to 74% foreign ownership. In this specific case, it appears that the Indian government responded to a request by the Indian company VSNL, which itself has signed an NSA related to one of their investments in the United States, to impose similar security restrictions on U.S. and other foreign investors. Specifically, in a letter publicly filed with Indian regulatory officials, VSNL wrote, "[we] propose that TRAI [the Indian regulatory authority] consider whether, in the interests of a level competitive playing field as well as regulatory symmetry, a similar security agreement process should exist in India for U.S. and other foreign carriers who desire a license to provide domestic or international services."[9] VSNL further wrote, "While we certainly do not recommend that the Indian Government force foreign carriers to wait as long as VSNL has been made to wait for its license to enter the U.S. telecommunications market, we believe that the existence of these agreements in India and other countries will have a beneficial result by moderating the willingness of the U.S. government to impose burdensome conditions and requirements in their own security agreements, which of course hinder the ability of VSNL and other foreign carriers to compete fairly against U.S. carriers who are not subject to such requirements."

Madam Chairman, this letter proves the old maxim, "what comes around, goes around." While we should never compromise national security, the Executive Branch and Congress need to realize that restrictions imposed on foreign companies in the United States will invite similar restrictions in foreign countries against U.S. companies. We need to be careful not to encourage other countries to impose restrictions that hurt American investors, nor should we chill the foreign investment that is so vital to the American economy.

Conclusion

The Dubai ports transaction has ignited a passionate debate about CFIUS. But as we all learn in law school, bad facts lead to bad law. I would hope that this committee would take a deliberate, measured approach in response to the controversy and refrain from amending Exon-Florio. Instead, the Committee could work with the CFIUS agencies to improve any shortcomings in the implementation of the Amendment.

Thank you for the opportunity to appear before you today.

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[9] See http://www.trai.gov.in/VSNL.pdf (at Appendix D).

Foreign Investment, Jobs and National Security: The CFIUS Process

Testimony before the House Committee on Financial Services, Subcommittee on Domestic and International Monetary Policy, Trade, and Technology

William A. Reinsch, President, National Foreign Trade Council
March 1, 2006

Thank you for the opportunity to appear today to discuss the CFIUS process. I am the President of the National Foreign Trade Council, a trade association of some 300 global companies that supports an open, rules-based trading system and opposes unilateral sanctions. My comments today will address the current acquisition involving Dubai Ports World and a number of proposals to amend current law.

With respect to Dubai Ports World, the Administration has explained in some detail the reasons for its decision to approve the transaction. The National Foreign Trade Council supports that decision and welcomes the further 45-day review which we expect, based on available information, to confirm it. Rather than repeat arguments that have already been presented, let me make two brief points.

First, the American business community yields to no one in its support of national security and particularly port security. We have an enormous amount at stake in protecting our ports and the cargo transiting through them. There are serious issues relating to port security, but we do not believe that this issue of ownership over the operation of port terminals is one of them. We believe Congress should take a hard look at our real port security problems, and would be happy to work with the relevant committees in that regard.

Port security is the province of the Coast Guard and Customs and Border Protection in the Department of Homeland Security. Without question, they cannot succeed without close ongoing cooperation with terminal operators. All indications are that DP World has a good record of cooperation, that it has committed not to change that, and that the United Arab Emirates government likewise has a good record of cooperating with the United States government both on port security and on the war against terrorism generally. The business community is no position to second-guess the Department of Homeland Security, the Department of Defense, the Department of State, and the intelligence community on those issues.

Second, port terminal operations have been substantially foreign-owned for some time without complaint. It appears that the problem this time is not with foreigners in general but with specific foreigners. That is the main reason why the NFTC has spoken out in support of the President on this issue -- this is a terribly negative message we are sending to the Arab nations in the Middle East. Simply put, those who oppose this acquisition are implying that it doesn't matter if you cooperate with us on fighting terrorism and on other matters; it doesn't matter if you are negotiating a free trade agreement with us; it doesn't

even matter if you have donated $100 million to Katrina relief as I understand the UAE has; we're going to treat you as a terrorist-supporting nation anyway.

It is a fair point that the UAE's record is not unblemished, particularly if one looks only at the pre-9/11 period. Many nations, including our own, had lax practices then. We have gotten better since then, and I would like to think others have as well. In evaluating our current relationships, we should place greater weight on whether a government has made changes and cooperated with us since 9/11. Failing to distinguish between nations that have been helping us since 9/11 and those that have not sends a troubling signal to the world and the region that would be a major setback to our efforts to promote peace and economic growth in the Middle East.

The NFTC has worked hard in support of the President's proposal for a Middle East Free Trade Agreement (MEFTA) and for a U.S.-UAE FTA as an integral part of that. The attacks on this acquisition make reaching those agreements more difficult. Blocking it could well put them out of reach entirely. In doing so, we would pass up a chance to promote jobs, economic growth, and ultimately peace in the region.

CFIUS Reform

With respect to CFIUS reform proposals, let me make a few comments on the current process and then address several proposed reforms.

From the perspective of someone who was involved in this process in the last Administration, it appears to me that it continues to work effectively and as Congress originally intended, although it would be fair to say that CFIUS has repeatedly demonstrated a tin ear for the politics of these cases.

Normally, when a proposed acquisition is notified to CFIUS, relevant agencies are advised and the appropriate officials in each of them analyze the case from their perspective. Meetings are held, and if no one identifies a problem, that is normally the end of it. If problems are raised, further investigation, interagency discussion, and conversation with the applicant generally ensue. That effort is usually led by the agency that identified a problem. Often, the applicant is willing to make commitments that address any concerns the government has raised. In the IBM-Lenovo case last year, for example, there was considerable discussion about security procedures that would guarantee the acquiring company could not access technology that was not part of the acquisition but which was located in the same physical area. In another earlier case, a separate Board of Directors was created to ensure continued American control of some sensitive military contracts that the acquired company was undertaking.

One of the results of these negotiations is that most cases do not go to the President; nor should they if there are no problems or if they have been resolved. It does not appear that the DP World case deviated significantly from this model. In retrospect, the difference is that this case took on a degree of public controversy that was clearly unanticipated by CFIUS.

While the way this case has played out has been unfortunate and probably avoidable, that does not by itself make a compelling case for a different relationship between CFIUS and the public or the Congress. The United States has historically followed – and benefited greatly from – an open investment policy. The CFIUS process was created to permit government intervention for compelling national security reasons. Congress wisely chose to insulate the process from politics and publicity both because of the sensitivity of the data about an acquisition the government would be obtaining and because of the sensitivity surrounding any national security issues that were identified and any solutions proposed to address them.

Changing that approach should be undertaken only with the greatest care. While the United States remains an attractive location for both portfolio and direct investment, the investment community, both here and abroad, is notoriously sensitive to political winds and rumors. Ill-considered or poorly drafted proposals could easily have a significant negative impact on future investment. With a current account deficit projected at about $900 billion this year, this concern should not be taken lightly. We will find more and more foreign investment coming here, and we will find it increasingly as equity investment. That will make the CFIUS process a more prominent one, but it will also make the consequences of negative signals to the markets all the greater.

CFIUS has historically made public very little information about its deliberations or decisions, and its record of consultation with the Congress is likewise limited. The issue of whether it should do more either while a case is pending or after a decision has been made has always been a difficult one. On the one hand, failure to consult and provide information to Congress and the public can lead to exactly what has happened in the DP World case. On the other, providing information can often lead to either leaks or Congressional demands for involvement in the decision making process, which would open the process to political pressures and, in my judgment, would be unwise.

The risk of leaks should not be minimized. The information reviewed in a case is often highly sensitive in that it reveals internal details of corporate operation and finance that could have significant value to competitors. In addition, agreements reached between the government and the applicant on new security procedures to be put in place, for example, can also be sensitive and could compromise the very security they are designed to provide were they to become public.

Having worked on Congressional staffs in both the House and the Senate for more than twenty years, I understand and have a great deal of sympathy for Congress' desire for full disclosure and extensive consultation. In this circumstance, however, I believe it would be a mistake, both because of the possibility of sensitive information becoming public and because it would likely produce calls in the Congress – which appeared even before the DP World case – for a role in the decision making process.

That would be an even bigger mistake than consultation. This provision was written during a period of paranoia about Japanese acquisitions, but its drafters nevertheless

understood very well that it made no sense for Congress to review and opine on specific investments. That would be micro-management in the extreme that would guarantee the injection of political criteria into a process that should be based strictly on national security.

At the same time, it is also true that Congressional oversight of the process has been sadly lacking since 1987, and I would encourage the Committee to study the process and past cases more closely – not simply in the context of the current case but over the life of the provision.

These comments reflect my concern about many of the proposals that are currently floating around – required submission of reports and findings to Congress, giving Congress additional time to vote on a resolution revoking the transaction, permitting Congress to order an investigation, requiring periodic reporting on all reviews. The only one I believe would not be damaging would be the last one – regular reporting annually or semi-annually of cases CFIUS has reviewed.

Other proposals have sought to broaden the definition of what constitutes a national security threat. That was one of the hardest fought issues when the process was created, with a number of the conferees arguing vigorously for a broader definition that specifically included "economic" security within the definition of national security. In the end that position did not prevail, and I believe with respect to that issue the Executive Branch has interpreted the law consistent with Congressional intent at that time.

As one of those who argued then for a broader definition, I will not take the opposite view now. One of the characteristics of a globalized economy is that the line between economics and national security is blurred, something that is clear to me from my time in the last Administration running the Department of Commerce's dual use export control program. A narrow definition that focuses only on short term military requirements or homeland security may not be adequate in today's environment.

Any expansion, however, needs to be carefully crafted. Simply adding the word "economic" invites demands that any acquisition be studied from the standpoint of how it would affect that particular industry, even if it were candles or candy. The health of industries that are, however, directly related and essential to national security deserves consideration from a longer term perspective than simply whether the Defense Department's short term needs can continue to be met.

Finally, there have been proposals to change the chairman.. I will not defend – or attack – Treasury's work as chair, but I will say it does not make much difference who is chairman. The process tends to operate consistently – the agency with a problem takes the lead. Originally that was usually the Department of Defense. More recently, it has been the Department of Homeland Security. As long as agencies that identify problems are free to pursue them, and as long as you have a competent neutral convener of the group, then the intent of Congress is being well-served.

Statement by Assistant Secretary of State
for Near Eastern Affairs
C. David Welch

House Financial Services Subcommittee on Domestic and International Monetary Policy, Trade, and Technology

March 1, 2006

The United Arab Emirates (UAE) is a longstanding friend and ally of the United States, and a key partner in the Global War on Terror. Secretary Rice reiterated this during her February 22 visit to the UAE. The UAE provides U.S. and Coalition forces with critical support for our efforts in Iraq and Afghanistan, including unprecedented access to its ports and territory, overflight clearance, and other critical logistical assistance. As a moderate Arab state, the UAE has long supported the Israeli-Palestinian peace process and shares our goal of a stable economic, political and security environment in the Middle East.

The UAE actively cooperates with us on a host of nonproliferation and law enforcement issues. It has enacted aggressive counter-terrorist financing and antimoney-laundering laws, frozen accounts, and exchanged information with us on people and entities suspected of being involved in terrorist financing and proliferation activities.

The UAE provides substantial assistance to its friends around the world, including military and financial support to the Iraqi government, humanitarian relief for the people of Afghanistan, housing and hospitals for the Palestinian people, and $100 million for victims of the Pakistan earthquake. The UAE was one of the first nations to offer financial aid to the U.S. after Hurricane Katrina struck the Gulf Coast, and provided one of the largest donations ($100 million).

Importantly, the UAE is an established partner in protecting America's ports. Dubai's port was the first in the Middle East to join the Container Security Initiative (CSI). Under CSI, a team of U.S. Customs and Border Protection officers is permanently stationed inside Dubai's ports, where they work closely with Dubai Customs to screen containers bound for the United States. Dubai also was the first Middle Eastern port to join the Department of Energy's Megaports Initiative aimed at detecting and stopping illicit shipments of nuclear and other radioactive materials.

The purpose of the interagency CFIUS review process, in which the Department of State is an active participant, is to establish whether a transaction could affect national security. The fact that the UAE is a friend and ally of the United States did not, and will not, diminish the rigor of that process.

We are confident that the additional time now available will provide an opportunity to review the concerns expressed over this transaction and to confirm that it does not jeopardize in any way the national security of the United States.

INFORMATION REQUESTED BY THE HOUSE FINANCIAL SERVICES COMMITTEE

In Connection with the March 1, 2006 Testimony of
Deputy Secretary of the Treasury Robert M. Kimmitt

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1. Rep. Castle asked for the number of transactions that do not occur because companies abandon transactions that could result in an adverse finding by CFIUS.

On a number of occasions since the enactment of the Exon-Florio amendment, prospective acquirers that have filed with the Committee on Foreign Investment in the United States ("CFIUS" or "the Committee") have abandoned transactions because they have concluded that there was no way to mitigate national security concerns raised by the proposed transactions. In such cases, CFIUS made clear to the companies that it would recommend that the President suspend or prohibit the transaction under Exon-Florio. In the past eighteen months, three companies that filed notices with CFIUS have abandoned transactions because of national security issues.

Occasionally, lawyers who frequently handle cases before the Committee have informed CFIUS staff that parties decided not to pursue a transaction because they believed that the transaction would not be favorably reviewed by CFIUS. The Committee monitors such transactions, and we are not aware of any transaction that has closed after a withdrawal due to unmitigated national security concerns.

2. Rep. Sanders requested information providing assurance that individuals with links to Osama Bin Laden would not be operating port facilities in the United States.

In examining the DP World transaction, CFIUS carefully considered the possibility that the proposed transaction could contribute to a heightened risk of terrorism and carefully considered the UAE's position on terrorism. The UAE has addressed terrorist financing issues since September 11, and has worked with the United States in shutting down terrorist finance networks. The UAE has strengthened its banking laws and regulations to prevent the misuse of its financial institutions by money launderers and terrorist financiers. The UAE has taken numerous steps to curb and block financial flows to terrorists. We continue to encourage the UAE government to take further steps to strengthen its financial defenses and to vigorously enforce its existing Anti-Money Laundering/ Counter-Terrorist Financing (AML/CFT) laws and regulations. The UAE also has worked closely with us to disrupt proliferation activities. The UAE was the first state in the Middle East to have one of its ports join the Container Security Initiative, which is an effort to screen containers destined for the United States. It was also the first state in the Middle East to have a port join the Megaports Initiative, which seeks to stop the illicit movement of nuclear and radiological sources.

CFIUS thoroughly reviewed the proposed DP World transaction and uncovered no credible evidence that any DP World executive has contributed funds to terrorist organizations. In connection with the March 3 filing, CFIUS also requested and received a fully coordinated threat assessment produced by the National Intelligence Council, which incorporated judgments based

on terrorist-related name traces of senior DP World personnel conducted by the intelligence and law enforcement communities, and CFIUS agencies with counterterrorism responsibilities thoroughly analyzed the available information. This thorough interagency process did not produce any credible evidence of any terrorism-related activity by DP World or its senior officers and directors.

3. Rep. Maloney requested certain documents related to the DP World transaction.

Treasury's Office of the General Counsel is working on this request.

4. Rep. Kelly noted that a man is now under indictment for using the Dubai branch of Bank Saderat to sell missile-related equipment to Iran. She asked whether links exist between Bank Saderat and the Dubai Islamic Bank and whether CFIUS had considered that possibility.

Iranian-based Bank Saderat is an institution of concern to the U.S. government. Under the current Iranian sanctions program, all U.S. persons are prohibited from having unlicensed dealings directly with Bank Saderat—just as they are prohibited from such dealings with other Iranian financial institutions. The U.S. government is monitoring Iran's and Bank Saderat's current banking relationships.

In its thorough review of the DP World transaction, CFIUS gave due consideration to the possibility that the acquisition of P&O by DP World would create an added risk of terrorist activity. CFIUS did not uncover any evidence that any DP World executive has contributed funds to terrorist organizations. CFIUS also considered the UAE's position on terrorism. The UAE has addressed terrorist financing issues since September 11, and has worked with the United States in shutting down terrorist financing networks. The UAE has strengthened its banking laws and regulations to prevent the misuse of its financial institutions by money launderers and terrorist financiers. The UAE has taken steps to curb and block financial flows to terrorists. We continue to encourage the UAE government to take further steps to strengthen its financial defenses and to vigorously enforce its existing laws and regulations against money laundering and terrorist financing. The UAE also has worked closely with us to disrupt proliferation activities. The UAE was the first state in the Middle East to have one of its ports join the Container Security Initiative, which is an effort to screen containers destined for the United States. It was also the first state in the Middle East to have a port join the Megaports Initiative, which seeks to stop the illicit movement of nuclear and radiological sources.

In connection with DP World's March 3 filing, CFIUS requested and received a fully coordinated threat assessment produced by the National Intelligence Council, which incorporated judgments based on terrorist-related name traces of senior DP World personnel conducted by the intelligence and law enforcement communities, and CFIUS agencies with counterterrorism responsibilities thoroughly analyzed the available information. This thorough interagency process did not produce any credible evidence of any terrorism-related activity by DP World or its senior officers and directors.

5. **Rep. Kelly asked whether CFIUS discussed the case of Victor Bout, a U.S.-designated terrorist financier operating in the UAE.**

As noted above, CFIUS considered issues related to terrorist financing in its thorough review of the DP World transaction and found no ties between DP World and known terrorist activity.

6. **Rep. Kelly requested information on how DP World financed the transaction and who would hold the company's debt. She asked whether the U.S. government had information on the bond purchasers from Barclays and Dubai Islamic Bank.**

As described in publicly available sources, Thunder FZE, a subsidiary of DP World, financed its $6.8 billion acquisition of P&O primarily through a $6.5 billion syndicated loan. On November 29, 2005, Thunder FZE and two other DP World affiliates—Dubai Ports Authority and Jebel Ali Free Zone Authority—entered into a credit agreement with Barclays Bank plc and Deutsche Bank Luxembourg SA. Barclays and Deutsche Bank agreed to make available a term loan facility in an aggregate amount equal to $6.5 billion. Syndication began in the final week of February, and approximately 30 banking institutions were expected to participate in the syndicate.

As a condition of the credit agreement, DP World's corporate parent, the Ports, Customs, and Free Zone Corporation (PCFC) agreed to provide Thunder FZE with $2.8 billion through a subscription for shares. On November 28, 2005, PCFC entered into arrangements with Barclays Bank plc and Dubai Islamic Bank (DIB) for the sale of $2.8 billion of Sukuk Notes, which are convertible instruments with a two-year term designed to be compliant with Islamic law. DIB is a public joint stock company incorporated in Dubai in 1975 to provide banking services based on Islamic principles. Barclays committed to subscribe for $1.8 billion, and DIB committed to subscribe for the balance. Barclays and DIB listed the notes on the Dubai International Financial Exchange on January 26, 2006 and received a strong response from local and international investors. The issue was oversubscribed.

7. **Rep. Kelly asked for clarification on the relationship of the bondholders to DP World. She asked if bondholders would be entitled to one-third of the equity of the company if it were to go public, making them "shadow partners."**

This question relates to the holders of the $2.8 billion of Sukuk Notes described above. As described in publicly available sources, the Sukuk Notes are to be redeemed by the proceeds of a listed initial public offering (IPO) by any member of the DP World group, and holders of the Notes are entitled to exchange up to 30% of their notes for shares in the IPO entity. However, Sukuk Note holders will be limited to a total of 25% of any IPO. The balance of the offering will be widely distributed to domestic and international investors. In addition, the $6.5 billion credit agreement with Barclays and Deutsche Bank requires PCFC to retain absolute control over DP World in terms of ownership and day-to-day management.

8. **Rep. Kelly asked whether the Dubai Islamic Bank's sharia board would have a legal obligation under Dubai law to enforce Islamic legal principles with respect to all of the DP World port operations financed in the transaction.**

The Department of the Treasury cannot competently comment on Dubai law. As with any entity that operates in the United States, DP World's port operations in the United States would need to comply fully with U.S. law. In responding to this question, it is also worth noting that DP World has agreed publicly to operate P&O's U.S. businesses independently until it is able to sell those operations to a U.S. entity.

9. Rep. Bachus requested information on the individuals who were involved in the review process of the DP World transaction.

CFIUS was designated as a Cabinet level committee when it was established by Executive Order in 1975. CFIUS consists of six Departments and six White House agencies. In addition, CFIUS invites other federal agencies to participate in reviews and investigations on a case-by-case basis when they have expertise relevant for a particular case. Each CFIUS agency reviews transactions according to its own internal procedures. Typically, policy level discussions and decisions take place at either the Deputy Secretary or Assistant Secretary level. Day-to-day operations typically are handled at the staff level. The appropriate experts in CFIUS member agencies participate in the review of transactions and consult with and advise higher-level officials as appropriate. The decision to undertake an investigation is made at the Deputy Secretary level. This is established procedure and was followed in the DP World transaction. All CFIUS members agreed that this particular transaction did not require further investigation.

10. Rep. Bachus asked whether Dubai retained any lobbyists in connection with DP World's notification to CFIUS and whether such lobbyists were involved in the negotiations to mitigate national security concerns related to the transaction.

We are not aware of any lobbying firm having been retained in connection with the DP World filing with CFIUS or in any negotiations that the companies had with CFIUS. As with most parties filing notice to CFIUS, DP World retained private outside counsel to represent it. We are aware that lobbyists were retained to represent the interests of DP World and the Emirate of Dubai after the conclusion of the first CFIUS review, when the matter began to garner media attention. The question regarding whether DP World engaged lobbyists at an earlier stage would best be directed to DP World.

11. Rep. Bachus requested copies of mitigation agreements entered into by U.S. agencies in connection with the CFIUS process.

We have attached the assurances letter between DHS and the companies.

12. Rep. Bachus asked whether the UAE permits investment in the maritime sector to the extent that the U.S. does.

The UAE permits 100% foreign investment in the maritime sector and other companies organized in one of the country's free zones, including the Jebel Ali Free Zone Authority, which contains the port of Dubai. The free zone allows foreigners to invest 100% in maritime sector companies in the port of Dubai and Jebel Ali Free Zone, which already serves as the base for

nearly 4,000 companies from over 100 countries. The free zone also allows for full repatriation of capital and profits. Other free zones contain the ports of Sharjah, Fujairah, and Ras al Khaimah, which are important ports in the UAE.

In addition to its 16 existing free zones, which contain a number of the country's important ports, airports, and other attractive industries, the UAE plans 12 more free zones in the near future. Over 4,000 companies operate in the UAE's free zones, which have attracted over $4 billion in investment.

Outside of the free zones, U.S. investment in the UAE's maritime sector and other industries is governed by the Federal Companies Law, which requires that companies established in the UAE have a minimum of 51 percent UAE national ownership. The Federal Companies Law applies to all commercial companies established in the UAE and to branch offices of foreign companies operating in the UAE. Profits may be apportioned differently. All general partnership interests must be owned by UAE nationals, and foreign shareholders may hold up to a 49 percent interest in limited liability companies. Other aspects of the investment climate in the UAE are described in the State Department's "2005 Investment Climate Statement" on the UAE, which is available online at www.state.gov/e/eb/ifd/2005/42194.htm.

The Administration is committed to further opening the UAE to U.S. investors outside of the country's numerous and growing free zones. In March 2005, the Administration entered into free trade agreement negotiations with the UAE. One of our key objectives is to reduce or eliminate remaining restrictions on foreign ownership of UAE companies.

13. Rep. Barrett requested comments on how CFIUS can improve communications with Congress.

The Administration is committed to improving communications with Congress concerning the CFIUS process. Treasury is promptly notifying Congress of all reviews upon completion. To keep Congress informed adequately and regularly about the CFIUS process, I have also offered that Treasury, on behalf of CFIUS, orally brief the Senate Banking and House Financial Services Committees generally every quarter on completed reviews. Indeed, it is important to note that these briefings were scheduled to begin before the issues with respect to the DP World transaction garnered media attention. Where appropriate, CFIUS may suggest that its oversight committees invite other potentially interested members and committees with jurisdiction over areas affected by decisions under Exon-Florio to attend these briefings. The Administration shares the view that Congress should receive timely information regarding transactions in order to help meet its oversight responsibilities.

14. Rep. Davis asked whether the Treasury Department or Department of Justice has performed an analysis of how many money-laundering prosecutions have occurred in the UAE since it amended its money-laundering laws.

In January 2002, the UAE passed a new anti-money laundering law called the "Criminalisation of the Laundering of Property Derived From Unlawful Activity." The Treasury Department has analyzed the UAE's progress on combating money laundering over the past several years, both

before and since the new law's adoption. From December 2000 to year-end 2005, the UAE Anti-Money Laundering and Suspicious Case Unit (AMLSCU) has received and investigated 3,031 suspicious transaction reports and issued 27 account freeze orders. Twelve money laundering cases are currently under prosecution. In addition, the UAE Central Bank has referred 108 cases to foreign financial intelligence units since 2000.

QUESTIONS FOR THE RECORD

Hearing on the "Foreign Investment, Jobs, and National Security: The CFIUS Process"
House Financial Services Domestic and International Monetary Policy, Trade, and Technology Subcommittee – March 1, 2006

Questions for The Honorable Robert Kimmitt, Deputy Secretary of the Treasury and The Honorable David C. Welch, Assistant Secretary of State for Near Eastern Affairs

Representative Moore:

With respect to the September 2005 General Accounting Office report on the implementation and effectiveness of the Exon-Florio amendment to the Defense Production Act of 1950...[1]

1. **First, do you see the September 2005 report as accurate in characterizing how CFIUS characterizes national security risks relating to foreign acquisitions or takeovers of our nation's critical infrastructure?**

As indicated in the Administration's response to the GAO report, a response that was coordinated among all CFIUS agencies, the Committee's decisions are informed by a broad range of factors and not by a narrow definition of national security. Any narrow definition would inappropriately limit the President's necessary discretion to protect national security. CFIUS member agencies take an expansive view of national security, and members' views of national security have evolved appropriately over the years as national and international conditions have changed.

This open-ended approach allows the President maximum flexibility to respond on a case-by-case basis to the unique facts and circumstances of each case. As stated in the portion of the regulations that discusses their scope: "The principal purpose of section 721 is to authorize the President to suspend or prohibit any merger, acquisition, or takeover by or with a foreign person engaged in interstate commerce in the United States when, in the President's view, the foreign interest exercising control over that person might take action that threatens to impair the national security." Only the President ultimately decides what constitutes a threat to the national security and what actions are in the interest of U.S. national security in making such a determination under Exon-Florio.

As the GAO report notes, "national security" is not defined in the statute or in the implementing regulations governing CFIUS. The Committee considers a broad range of issues in conducting national security reviews of proposed acquisitions of U.S. companies, including the special risks that may be associated with a proposed foreign acquisition of our country's critical infrastructure. CFIUS reviews are guided—but not limited—by the factors that the President may consider under Exon-Florio. These factors are:

a. Domestic production needed for projected national defense requirements;

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[1] Specifically, Representative Moore's letter noted: "the GAO reported that CFIUS has a narrow definition of what constitutes a threat to national security, limiting it to export-controlled technologies or specific derogatory intelligence of the foreign company. The GAO stated that 'this definition is not sufficiently flexible to provide for safeguards in areas such as protection of critical infrastructure, security of defense supply, and preservation of technological superiority in the defense arena.'"

b. The capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
c. The control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the U.S. to meet the requirements of national security;
d. The potential effects of the transaction on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and
e. The potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security.

CFIUS also evaluates other issues, including but not limited to the acquisition's potential impact on U.S. critical infrastructure; the acquiring foreign entity's compliance record with U.S. laws and regulations; the shareholders and others with influence over the foreign entity, including foreign governments; the plans and intentions of the foreign acquirer for the U.S. target company; the risk of diversion of sensitive technology of the U.S. target company; and whether the U.S. company is the last or sole producer of products or provider of services important to the national security.

Each transaction that comes before CFIUS has unique characteristics, and agencies are not constrained in examining all facets of a transaction that could affect national security. In addition, CFIUS engages other agencies with relevant experience to participate whenever a transaction raises issues that fall within their technical expertise. The intelligence community also provides a thorough threat assessment of every transaction based on the full range of national security considerations.

2. **Second, following the release of the September 2005 GAO report, what steps, if any, did the CFIUS take to implement the recommendations in this report, particularly with regard to how the interagency panel defines national security?**

CFIUS has taken specific measures to address some of the concerns raised by the GAO and to improve the CFIUS process. I have worked with my colleagues in other CFIUS agencies to improve the Committee's process. In addition, the Administration has expressed its commitment to enhance the transparency of the CFIUS process by conducting quarterly briefings for Congress, and Treasury is promptly notifying Congress of all reviews upon completion. Indeed, it is important to note that these quarterly briefings were scheduled to begin before the issues with respect to the DP World transaction garnered Congressional and media attention. The Administration shares the view that Congress should receive timely information regarding transactions in order to help meet its oversight responsibilities.

With respect to the Committee's view of national security, CFIUS continues to consider a broad range of issues when assessing the potential national security implications of a proposed transaction. The President added the Department of Homeland Security to CFIUS in 2003 to ensure that the Committee would continue to consider the full range of national security issues. As discussed in my response to your previous question, the Committee deliberately does not define national security, so the President's broad authority to protect national security is not limited. Member agencies consider a broad range of factors in connection with a proposed transaction, and as one would expect, agencies' views of national security have evolved considerably over the years in light of changes in the domestic and international environment.

3. **Third, do you feel that given this GAO report and the additional security concerns related to Dubai Ports World operating ports at six major U.S. cities, that CFIUS should have**

used a broader definition of what constitutes a national security risk, and therefore, initially triggered an additional 45-day investigation into this deal?

I would first note that DP World was seeking to operate specific terminals within ports and not the ports themselves. Ports in the United States are operated by local entities, and overall port security is the responsibility of the appropriate security agencies. As noted in the answer to your preceding question, CFIUS always considers a broad range of potential national security concerns when reviewing a proposed transaction, following the guidance set out in the Exon-Florio amendment. The CFIUS review of the DP World case was very thorough, and the effects of the proposed acquisition were evaluated against a broad conception of national security. The GAO report recommended a 75-day review period for transactions, which is roughly the same period of time that CFIUS had to examine the proposed DP World acquisition of the Peninsular & Oriental Steamship Navigation Company (P&O). In fact, DP World provided the Committee with a pre-filing notification in October, two months before it filed notice of the proposed transaction with CFIUS on December 15. Therefore, CFIUS had approximately 90 days to review the proposed acquisition. The Committee's decision to conclude its review and not to proceed to an extended investigation was based on a comprehensive consideration of potential risks that the acquisition could pose to national security. CFIUS received thorough intelligence assessments from the Community Acquisition Risk Center, which is part of the Office of the Director of National Intelligence, and from the Defense Intelligence Agency. The Committee also included the Departments of Energy and Transportation in the review process given their relevant expertise in this area. In addition, the Department of Homeland Security received a letter from DP World and P&O Ports North America that provided certain assurances with respect to law enforcement, public safety and national security.

Representative Fossella:

1. **Just four years ago, the UAE recognized the Taliban but did not recognize Israel, and has connections to supporting the terrorist group Hamas who now controls the Palestinian Authority. It is U.S. policy to isolate Hamas, but now the U.S. is approving a company owned by a country that supports Hamas to operate in America. In the original 30 day review, was this contradiction in policy ever considered?**

Consistent with the Exon-Florio amendment, CFIUS considers a broad range of factors when reviewing proposed foreign acquisitions of U.S. companies. The Committee takes an expansive view of national security and consistently examines the prospective acquirer's country of origin, as well as U.S. relations with the acquirer's country of origin. The Committee gives particular attention to this factor when reviewing proposed transactions with foreign government-controlled entities. As part of its broad review of the proposed DP World acquisition of P&O, CFIUS carefully considered the relationship between the United States and the United Arab Emirates. The Committee unanimously agreed that the acquisition did not present a threat to national security.

CFIUS also considers the possibility that a transaction could facilitate terrorist activity. In addition to carefully reviewing intelligence community assessments with respect to each transaction, individual CFIUS member agencies take appropriate action within their respective authorities to determine whether an acquiring entity has links to terrorist groups or other criminal organizations. This includes checking the names of key officials and entities against the relevant federal databases. After a thorough interagency review of DP World's proposed acquisition of P&O, CFIUS found no credible evidence of ties between DP World and any terrorist entity.

2. **Does anyone that works at the executive level of DP World contribute to Islamic charities that give money to support the terrorist party Hamas?**

In its thorough review of the proposed DP World transaction, CFIUS did not uncover any evidence that any DP World executive has contributed funds to terrorist organizations. CFIUS carefully considered the possibility that the proposed transaction could contribute to a heightened risk of terrorism. In addition to thorough assessments provided by the DNI's Community Acquisition Risk Center and the Defense Intelligence Agency in connection with DP World's December 15 filing, CFIUS requested and received a fully-coordinated threat assessment by the National Intelligence Council (NIC) upon receipt of DP World's March 3 filing. The NIC assessment incorporated judgments based on terrorist-related name traces of senior DP World personnel conducted by the intelligence and law enforcement communities, and CFIUS agencies with counterterrorism responsibilities thoroughly analyzed the available information. This thorough interagency process did not produce evidence of any terrorism-related activity by DP World or its senior officers and directors.

3. **The government of Dubai, who owns 100% of DP World, enforces a boycott of Israel – a boycott that is illegal under U.S. law. How will the State Department deal with a company doing business in the U.S. that backs a ban of Israeli products in apparent violation of U.S. law?**

As this question is directed to the State Department, we defer to that department's response.

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