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NOMINATION OF GUS P. COLDEBELLA

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON THE

NOMINATION OF GUS P. COLDEBELLA TO BE GENERAL COUNSEL, U.S. DEPARTMENT OF HOMELAND SECURITY

JULY 15, 2008

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NOMINATION OF GUS P. COLDEBELLA

TUESDAY, JULY 15, 2008

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

The Committee met, pursuant to notice, at 10:05 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Joseph I. Lieberman, Chairman of the Committee, presiding.

Present: Senators Lieberman, Akaka, Landrieu, McCaskill, and Collins.

OPENING STATEMENT OF CHAIRMAN LIEBERMAN

Chairman LIEBERMAN. Good morning. Welcome to the hearing, which we will now bring to order. We are here today to consider the nomination of Gus Coldebella to be General Counsel of the Department of Homeland Security (DHS).

We welcome you, Mr. Coldebella, and we welcome what I gather is your new bride.

Mr. COLDEBELLA. Yes, sir.

Chairman LIEBERMAN. Not that you had a previous one, but recently married. [Laughter.]

We congratulate you and welcome the rest of your family as well.

The position of General Counsel is obviously a critical one at the Department of Homeland Security, of which this Committee has oversight jurisdiction. The Department has made good progress in 5 years to strengthen our defenses here at home against terrorist attacks and natural disasters; but, of course, we have all got a long way to go, and it is a persistent challenge to make sure we defend the security of our Nation and our people.

First and foremost, the General Counsel must advise the Secretary and manage the legal functions of the Department. But it seems to me that it is important to say that the Counsel's role at the Department is not solely inward-looking. The General Counsel, for example, must ensure that Americans' fundamental rights are protected as the Department's mission is carried out. The General Counsel also occupies a unique position with respect to the interaction between the Department of Homeland Security and Congress. The General Counsel is responsible for counseling the Secretary on how the laws Congress passes are to be interpreted and properly implemented. The General Counsel also plays a central role in the relationship between the Department and Congress.

Mr. Coldebella came to the Department of Homeland Security in 2005 from the law firm of Goodwin Procter of Boston, where he was

a partner. In his almost 3 years at DHS, he has served in the Office of General Counsel as Deputy General Counsel, Principal Deputy General Counsel, and, since February 2007, as Acting General Counsel. He obviously comes with considerable personal experience, ability, and is acquainted with the responsibilities of the job and has a full record upon which the Senate can judge him.

I want to say very directly because of what I am going to say after it, that I have never, to the best of my recollection, met Mr. Coldebella before this morning. I believe that is right.

Mr. COLDEBELLA. Just once, Senator.

Chairman LIEBERMAN. Really? Was it a circumstance you care to divulge in public?

Mr. COLDEBELLA. It was actually in a classified briefing. So other than that, we can talk about it.

Chairman LIEBERMAN. Thank you. But my staff has had many interactions with him over the last 3 years, and I want to say directly and respectfully as a result have significant concerns about this nomination based on those interactions. And I think it is important and fair to deal with them directly both in these opening comments and in my questions.

The fact is that Mr. Coldebella joined the Department shortly after this Committee began its investigation into the government's response to Hurricane Katrina, and he was immediately asked to take a leadership role by the Department in its response to our inquiry. I was critical at the time of the Department's response, finding it often slow and ultimately incomplete. In fact, six Members of the Committee, including me, concluded in our "additional views" in the Committee's report on Hurricane Katrina, and "there is no doubt that the way in which the Department responded to the Committee's document, information, and witness requests significantly hampered the Committee's ability to conduct its investigation."

As Deputy General Counsel during this investigation, Mr. Coldebella arguably bears some responsibility for this inadequate response both by virtue of his position and through his direct personal involvement. During interviews he instructed Department witnesses, I gather, not to answer certain questions simply because they sought information about the role of the Secretary of the Department of Homeland Security or of the White House. During our review of his nomination, he conceded that his office had likely failed to turn over some boxes of documents submitted by DHS agencies, simply because his office did not have enough time to review them.

The Government Accountability Office has also periodically raised concerns about its ability to gain access to relevant information and materials at the Department and has complained about the Office of the General Counsel inserting itself unhelpfully into the process. Perhaps you are aware of that.

I am also concerned that the Department, with advice from the Office of General Counsel, has sometimes adopted legal interpretations at odds with congressional intent—and with the seemingly plain language of a statute. This has occurred, for example, with respect to various provisions of last year's 9/11 Commission Recommendations Act that originated in this Committee—including re-

quirements for the Visa Waiver Program, and at least one aspect of the homeland security grant provisions.

So your nomination comes to us with a great personal capability and experience, a record without accusations of unethical behavior or anything like that, but with serious questions that go to the extent to which you have and, if confirmed, would cooperate with Congress, certainly in this Committee's case, in the dispatch of our oversight responsibilities for the Department.

So I wanted to mention these directly so we have an opportunity to discuss them openly and honestly and in that sense reach a reasoned conclusion about these concerns and proceed with consideration of your nomination.

Senator Collins.

OPENING STATEMENT OF SENATOR COLLINS

Senator COLLINS. Thank you.

The Office of the General Counsel at the Department of Homeland Security is, as the Chairman has indicated, one of special interest for Members of this Committee. The General Counsel provides legal advice to the Secretary on the missions that Congress has assigned to DHS and on the Department's compliance with Federal laws on civil rights, employment, and many other matters. And the General Counsel serves as an important point of contact with Congress, especially with this oversight Committee.

The General Counsel's operating principle should be that the oversight and investigative committees of Congress, as well as the GAO, should always receive the maximum feasible departmental compliance and cooperation and to allow us to perform our constitutional duties. In that regard, let me respond briefly to some of the concerns that the Chairman has raised about the Committee's almost year-long investigation of Hurricane Katrina and the failed response by DHS and the Federal, State, and local officials who were involved.

I want to point out that this Committee held some 24 hearings, interviewed some 325 witnesses—and those were transcribed interviews—and received from the Administration more than 838 pages of documents. The Department of Homeland Security alone produced more than 350,000 pages of documents and made available 73 witnesses for formal interviews.

The Department, in my view, that was not cooperative with our investigation was not the Department of Homeland Security. It was the Department of Justice. And we were forced to issue five subpoenas to the Department of Justice personnel, who were then finally made available to the Committee staff.

I am not saying that the Department of Homeland Security's compliance was perfect. It certainly was not. There was a constant back and forth with the Department. We had to push in many cases. In many cases the Department was not as timely as it should have been in providing access to key witnesses and in producing documents. But, on balance, I believe that we had a very clear window into the functioning and role of the Department in the days before and after Hurricane Katrina made landfall.

So I have a little bit different view than the Chairman. It is not to say that it was an easy relationship. We constantly had to push

the Department. But I do believe that its compliance was, on the whole, acceptable.

I also want to point out the fact that Mr. Coldebella was not the General Counsel during the Hurricane Katrina investigation. It was, in fact, Phil Perry. I was not pleased with Phil Perry's compliance and cooperation with the Department on the chemical security bill, for example, or the ensuing regulations to implement that important law. But I want to make sure that we take recognition of who was in charge, who was General Counsel at that time, and it was not Mr. Coldebella, although I know he was involved. It was Mr. Perry. And, in fact, we did receive some 350,000 pages of documents from the Department and did transcribed interviews with 73 witnesses. So I just want to fill in that part of the picture as well.

Mr. Coldebella's nearly 3 years of experience at DHS and his current service as Acting General Counsel have given him ample opportunities to appreciate the importance and the critical nature of the position for which he has been nominated. He does also have an impressive legal background that has served him well.

The fact is, however, that his nomination does deserve close scrutiny. The Department of Homeland Security operates many programs that are critical to promoting the safety of American citizens and the security of America's infrastructure and economy. Those programs require the cooperation and support of State and local governments and the understanding and trust of citizens, if they are to succeed. And the Department has certainly had many rough spots and many difficult decisions to make. It has not always been smooth. I have had many conversations with the Department on chemical security regulations, on the implementation of the REAL ID Act, and at times, the performance of the Department of the legal counsel's office certainly could have been better.

The official actions of the Department and the conduct of all its employees must, therefore, meet the highest standards set by the law, and that is what we will explore today. Again, I appreciate the opportunity to question the witness today and his commitment to public service.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks very much, Senator Collins.

Mr. Coldebella has filed responses to a biographical and financial questionnaire, answered pre-hearing questions submitted by the Committee, and has had his financial statements reviewed by the Office of Government Ethics. Without objection, this information will be made part of the hearing record with the exception of the financial data, which are on file and available for public inspection in the Committee offices.[1]

Our Committee rules require that all witnesses at nomination hearings give their testimony under oath, so, Mr. Coldebella, I would ask you to please stand and raise your right hand and respond to this question: Do you swear that the testimony you are about to give to the Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. COLDEBELLA. I do.

Chairman LIEBERMAN. Thank you. Please be seated.

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[1] The biographical information appears in the Appendix on page 30.

Mr. Coldebella, as I mentioned, I understand you have a few family members here with you today, and I wanted to know whether you would like to introduce them at this time and then proceed with your statement to the Committee.

Mr. COLDEBELLA. Thank you, Mr. Chairman. My wife of slightly over 10 weeks, Heather Coldebella, is here, as are my parents, Gus and Phyllis Coldebella.

We also have about 12 of our summer legal interns from the Department on this side of the gallery.

Chairman LIEBERMAN. Should we ask them to vote on your confirmation?

Mr. COLDEBELLA. I would appreciate that. [Laughter.]

Chairman LIEBERMAN. OK. Anyway, we welcome them. We certainly welcome your wife and your self-evidently proud parents. You can proceed with your statement now.

TESTIMONY OF GUS P. COLDEBELLA[1] TO BE GENERAL COUNSEL, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. COLDEBELLA. Thank you, Senator. It is my pleasure to appear before you today as the nominee for General Counsel of the Department of Homeland Security. Since October 2005, it has been my great honor to work alongside the men and women of the Department on our important mission of keeping the Nation secure. I am grateful for the confidence placed in me by the President and by Secretary Chertoff. Thank you, Mr. Chairman and Ranking Member Collins, for your opening remarks. I look forward to answering each and every one of your questions about my performance at the Department over the last 3 years.

During my time at DHS, and especially since I took the role of Acting General Counsel in February 2007, I have done everything in my power to make sure that the rule of law is strong at the Department. I will discuss just a few of those things now.

As you noted, Chairman Lieberman—and I agree—the paramount duty of the General Counsel is to faithfully interpret the Homeland Security Act, the 9/11 Act, and the other laws that Congress has passed that relate to the Department. With the assistance of the 70 or so attorneys at headquarters and the over 1,700 lawyers around the Department's components, we have accomplished this goal by providing correct, useful, and timely legal advice.

It has been my great honor to work with these highly skilled civil servants during my time at the Department, and I have been consistently impressed with the level of rigor and professionalism that they bring to the tasks that they are assigned to accomplish.

I have tried to bring to the Office of the General Counsel (OGC) a spirit of forward-leaning lawyering that well suits the mission of the Department. It is the job of a good agency lawyer to tell operators and policymakers that they cannot follow a particular course of action if the law does not allow it. But it is the job of a very good agency lawyer to suggest an alternative, if one exists—one that comports with the Constitution and all relevant laws to achieve the Department's goals. This idea, that lawyers should be problem solv-

[1] The prepared statement of Mr. Coldebella appears in the Appendix on page 25.

ers instead of merely problem identifiers, is one that I have propagated throughout DHS.

The Office of the General Counsel is uniquely positioned for another task, which is helping to unify, integrate, and improve the efficiency of the Department. Because lawyers are serving in every component, communication between those lawyers and the General Counsel helps to identify impediments to accomplishing our homeland security goals so those impediments can be removed quickly.

There are also several management goals that I have put into place over the last year or so regarding continuity, transition, and other issues that are noted in my written statement. I would like to mention one now for special note, which is that we at OGC have named a career Deputy General Counsel, which I think is an important move so that at the time of an Administration change, the new Secretary has the benefit of an experienced Acting General Counsel.

All of these things lay the foundation for an office that is not only recognized inside the Department for its quick, clear, and excellent legal counsel, but also acknowledged by lawyers outside the Department as a high-quality legal office and as one of the most rewarding places to work in the Executive Branch, as I consider it to be.

Mr. Chairman, as you made clear, given that I have been at the Department for almost 3 years, I am not an unknown quantity to this Committee. During that period, we have had many joint successes, including the passage and implementation of the first Federal chemical security legislation, improvements to security in the 9/11 Act, including the Visa Waiver Program, and many others. We have also worked together on some difficult issues, and as both you and the Ranking Member pointed out, one of them was the investigation into the response to Hurricane Katrina.

Throughout our discussions about these and other matters, I have strived to be both clear in my legal interpretations and straightforward in presenting the Department's positions to you and to other interested members and committees of Congress. If confirmed, I will, of course, continue to do my best to make sure the Department communicates well and clearly with Congress.

Access to the Department's information by this Committee, by other committees of Congress, by the Department's Inspector General, and by the GAO is a topic frequently raised in my discussions with Members and congressional staff. I am committed, as is the Secretary, to swift access by Congress, the IG, and the GAO.

I am gratified that the Department's Inspector General stated in congressional testimony back in February of this year that cooperation in the preceding year had improved noticeably and access during the same period had been outstanding. At the same hearing, the Comptroller General testified that access to departmental information had improved due to discussions between DHS and GAO over the preceding year.

Recently, the Department issued two documents: A revised management directive regarding the relationship between the Department and GAO, and a memorandum from the Secretary to all employees about the roles of the Inspector General. Both of these documents are designed to improve access, and if confirmed, I will con-

tinue to look for ways to make more efficient the information flow to Congress.

Mr. Chairman, I am humbled that the President has asked me to serve in this capacity and that this Committee is considering my nomination. I look forward to answering all of the questions that you have today, and I request that my full written statement be included in the record.

Chairman LIEBERMAN. Without objection, it will be included in the record.

I thank you for your opening statement. I am going to start with the standard questions that we ask of all nominees.

First, Mr. Coldebella, is there anything you are aware of in your background that might present a conflict of interest with the duties of the office to which you have been nominated?

Mr. COLDEBELLA. No.

Chairman LIEBERMAN. Do you know of anything, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Mr. COLDEBELLA. No.

Chairman LIEBERMAN. And, finally, do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted Committee of Congress if you are confirmed?

Mr. COLDEBELLA. Yes.

Chairman LIEBERMAN. OK. Thank you. We are going to start with a first round of questions limited to 6 minutes.

I had a question on the Hurricane Katrina investigation, but I think I am going to defer it because I note that Senator Landrieu is here, and I would guess that because she has such an interest ongoing in that matter, she may want to ask that.

Let me go to this question, which in some sense puts in focus, perhaps not in a typical way, some of the concerns that I think our staff has had as a result of their interactions with you.

Last year, the House Homeland Security Committee invited you to testify at a hearing concerning privacy and civil liberties issues in the Department's National Applications Office. You responded with a letter to Chairman Bennie Thompson in which you stated, "I must respectfully decline your invitation." You asserted that your participation as a hearing witness would prevent or limit you from carrying out your responsibilities to provide legal advice and counsel to Department officials and that for these reasons, "members of the Office of General Counsel do not ordinarily provide testimony."

Notwithstanding that, just moments ago when I asked you one of the three standard questions we ask all nominees that come before the Committee, which is if you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress, you responded—and, of course, you are under oath—that you did.

So this puts in focus, I think, the way in which you would balance both your responsibilities as counsel to the Department of Homeland Security and your responsibility to testify before Members of Congress, before duly constituted committees of Congress.

So I wanted to ask you if you would explain—if you would respond to that question, and particularly whether you would explain if there are any limitations on your agreement to respond to a reasonable summons to appear before a committee of Congress or any circumstances in which you believe that you or others in the Office of General Counsel might appropriately decline to testify before this or any other committees? And take your time answering this. This is an important question.

Mr. COLDEBELLA. Thank you, Mr. Chairman. I would like to talk about some of the circumstances that led up to the letter that you quoted from.

Chairman LIEBERMAN. The letter on the House side, you mean.

Mr. COLDEBELLA. That is exactly right.

Chairman LIEBERMAN. OK.

Mr. COLDEBELLA. The letter that was sent to Chairman Thompson was not the first communication that I had with that committee regarding the hearing. In fact, when it was suggested that I testify at that hearing, the first thing I did was to pick up the phone and speak to Chairman Thompson's staff. And I think that is an important fact that is not made clear just by the letter.

What I wanted to do was express my concerns about testifying on that particular topic at that particular time. The Department was at that point considering various options on which it was seeking legal advice regarding the National Applications Office. And while the staff director to whom I spoke was completely aware of, sympathetic with, and understanding about the divide between getting into legal advice that had been given to the Secretary or would be given to the Secretary, and the justification for programs that the Department was pursuing or not pursuing, she understood during our phone call that the various members of that committee might not, even if she briefed them, understand or deal with that difference.

More clearly, the concern that I had was one of discussing legal advice that was yet to be given, and I expressed that concern and really asked the staff for advice on how to proceed. The advice that I received was, first of all, that they understand; second, it would make sense to write a note to Chairman Thompson regarding this conflict, which I gladly did.

The next that I had heard of it was at the time of the hearing when Chairman Thompson spoke about the letter that I had sent him and was upset about it.

As I discussed during my staff interview, I think it is important, first of all, to have a dialogue between the Department and the staff that is requesting information. That is how I try to comport myself all of the time, and that is how I did so here. But, second, if the message that I received during that initial phone call that led to the letter was not reflective of the chairman's view—which it seems not to have been since he made that comment at the hearing—I would have been perfectly open to further discussions with the committee about appearing, about sending someone else, about providing the committee the information that it needed in order to have the hearing that it wanted to have.

Chairman LIEBERMAN. Forgive me for interrupting, but my time is running out. So you are saying that the sentence that I quoted

from your letter, "I must respectfully decline your invitation," was a result of the conversation you had with the staff member?

Mr. COLDEBELLA. That is right.

Chairman LIEBERMAN. And, therefore, that if you had known how the chairman felt, you might have decided otherwise and gone to the hearing?

Mr. COLDEBELLA. Well, my basis for sending the letter was the discussion that I had with the staff, and the point that I was making was I would prefer to keep that discussion open. You read a few sentences from the letter. The letter seems very final. But it seems to me that in my interactions with that committee, in my interactions with this Committee, what we tend to do is have discussions about information that is sought and try to refine both what we are going to be able to provide and what the committee is seeking.

Chairman LIEBERMAN. I am over my time now, but I want you to just very briefly indicate what you meant when you said yes to the third question that I asked. Now, obviously, I do not want to coach the witness. That does not mean that you will necessarily answer every question. But can we take that to mean that you will feel, if confirmed, a responsibility to respond to any reasonable summons to appear and testify before any duly constituted committee of Congress?

Mr. COLDEBELLA. Yes. And just to be clear about it, I feel a responsibility to respond to every request for information or testimony, be it from me or from anyone else at the Department. The natural next step is speaking with the Committee about the information that is being sought. So I can unequivocally answer that, yes, I will appear whenever asked by this Committee. That is not to say that I will not pick up the phone and speak to your staff if I do have concerns about it. But the answer to that question is definitively yes.

Chairman LIEBERMAN. OK. I think I better stop here. I thank you, and I will yield to Senator Collins.

Senator COLLINS. Thank you. Mr. Chairman, I know that Senator McCaskill has to preside, so I am going to only ask one very quick question, and then yield to her, if that is OK, and then reclaim my time later.

Chairman LIEBERMAN. Go ahead.

Senator COLLINS. I would like to talk to you about the relationship with GAO and the IG, both of which have expressed concerns that the General Counsel's office within the Department of Homeland Security has at times been a roadblock to getting cooperation from the various entities within the Department. That is of great concern to this Committee. We rely very heavily on both the GAO and the IG for information and investigation.

I would like you to address that issue in general. Then I am going to yield to Senator McCaskill given her time constraints, and then I will get back to the issue.

Mr. COLDEBELLA. Thank you, Senator. Let me start with the IG. I think that Rick Skinner and I have a very good relationship. We try on a monthly basis to get together to talk about access issues at the Department that he may be having. And we worked together over the past few months in order to have the Secretary issue that

memo that I talked about in my opening remarks, instructing all Department employees on how to interact with the IG.

Mr. Skinner certainly will raise access issues to me, to the Deputy Secretary, to the Under Secretary for Management. That is the kind of attitude, the kind of relationship that we need to have at the Department. If he is running into roadblocks somewhere, it is part of the General Counsel's job to remove the roadblocks, not to be a roadblock. And I think we have been successful at that over the past year, year and a half that I have been interacting with Mr. Skinner.

One more thing about the IG is that I have the attitude, and the Secretary has the attitude, that the IG is not someone to call when he is about to issue a report. The IG is someone to call when the Department is dealing with thorny issues of financial controls, thorny issues that are in his area of expertise. And I make it a practice to, in dealing with issues such as that—some examples spring to mind of a few years ago where there were data breaches at some of our components. One of the first calls that we make is to the IG.

Regarding the GAO, I mentioned that we had recently redone our management directive, and I believe that the new process laid out in the management directive is going to meet our goal and Congress' goal of getting the GAO documents within 20 days. That is very aggressive. I think that is what exists in the statute when the Comptroller General complains. But we are taking that on in the first instance.

Senator COLLINS. I am going to reserve the balance of my time.

Chairman LIEBERMAN. Without objection. Senator McCaskill.

OPENING STATEMENT OF SENATOR MCCASKILL

Senator MCCASKILL. Thank you so much. I really appreciate it, Senator Collins, that you are giving me this opportunity.

I obviously do not have much time since I am supposed to be on the chair in 6 minutes, so some of what I have to say and my thoughts about your nomination I will put in the record. And some of the questions I ask now, you may want to respond in the record in terms of the time consideration.

On November 6 and 7, there were requests made by this Committee, your authorizing and supervisory Committee in Congress, for pictures of the Halloween party that was held at Immigration and Customs Enforcement (ICE), highly controversial. And CNN made requests at the same time under a Freedom of Information Act (FOIA) request. One week later, November 10, those pictures were recovered. They were not given to this Committee. Julie Myers was confirmed in mid-December, and the first week of February, the pictures were first produced to CNN and then a day later to this Committee.

Do you disagree with any of those facts?

Mr. COLDEBELLA. The only fact that I was unaware of, Senator, was the request by the Committee—I think you said on November 10.

Senator MCCASKILL. No. The pictures were recovered on November 10 by your Department. The request was made by the Com-

mittee and the request was made by CNN on November 6 and November 7.

Mr. COLDEBELLA. Right.

Senator MCCASKILL. Do you disagree with any of those facts?

Mr. COLDEBELLA. No. I think that sounds right.

Senator MCCASKILL. OK. And do you think that is appropriate?

Mr. COLDEBELLA. Well, Senator, like I said, the request by the Committee—and I was not personally involved in the back and forth between the Committee and the Assistant Secretary—I think had followed several briefings—at least one briefing, but I think more than one briefing—by Assistant Secretary Myers to the Committee or the Committee staff about this.

The first that my office had heard that there was a standing request by the Committee for the recovered photographs was at the time that the photographs were in the process of being sent to the FOIA requester. So I could see you laying out the timeline as you have, that this request—if a committee of Congress makes a request for a document, then that document should be produced, whether it be text, photographs, etc.

Senator MCCASKILL. Well, frankly, there is no excuse not to give it to CNN on November 11.

Mr. COLDEBELLA. I am not familiar——

Senator MCCASKILL. Which would have solved the problem because that is how we got to see it in the first place, through CNN.

Mr. COLDEBELLA. I believe the process that ICE went through was to go through the documents for the FOIA request, which is typically what you do in the course of business. But I agree with you that at the time that the documents were recovered, if there was a standing request from this Committee, it should have been addressed.

Senator MCCASKILL. Well, it should have been given to CNN, and it was not, and I would like in writing at what time you were informed of this and whatever written documentation that your office has, whether it is e-mails or written documentation between you, Julie Myers, the Department, the Secretary, as it relates to these photographs for the record.

Now moving on to access, I respect your background as a litigator. I am one, too. And I get it that when you are litigator, you think adversarially. But I have to tell you that I believe you see GAO adversarially, and I have reviewed their letter to you of June 4, 2008, where they reject your new policy on access. And I have reviewed your response on July 1, 2008. And I have four questions, and I do not know that we will have time to go into all of them. You can pick one to answer now, and I would appreciate a written answer to the remaining questions in writing to this Committee or to my office within a week.

First, I want to talk about and find out your requirement that every request from GAO must go through a central office.

Second, your, in fact, debilitating request that everything they want, the request has to be in writing. As a former government auditor, that is absolutely debilitating to an auditor. It interrupts the free flow of information between the government auditor and the agency that must provide that level of accountability to the government auditor.

Third, the requirement that GAO must clearly identify the document requested. It appears that you are trying to prevent fishing expeditions, which is what you do when you are litigating against an opponent in court. You want to prevent fishing expeditions. But it is exactly what GAO is supposed to be doing. They are on a fishing expedition. It is their job to fish. They do not know every exact document they need. That is why they are asking the questions. So to require a clearly identified document is saying to GAO, "Nah, nah, nah, nah, nah, we are not going to give you what you may want because you cannot name it."

And, finally, I would like to hear from you—and this is the one question I would like you to try to address quickly, and I will maybe have to leave in the middle of your answer. I do not mean to be rude, but I get in big trouble if I am not on the chair when I am supposed to be. I would like you to cite the appropriate legal authority on what basis you think you can deny GAO documents that you consider law enforcement sensitive, pre-decisional or draft records, or records relating to ongoing proceedings or investigations or confidential. I am not aware of any legal authority that allows you to withhold any of those documents from GAO, and I would like you to find that legal authority and cite it to me or the Committee.

And once again, I apologize for being so rude, but I am going to be late if I leave right now. You can either choose to address those later in your testimony, or you can obviously get them to me in writing, and I will share them with the rest of the Committee.

Mr. COLDEBELLA. Senator, I would be pleased to give those answers to you in writing.

Senator MCCASKILL. And I want to tell you, sir, I have nothing against you or your fine family, and I appreciate your willingness to leave probably a very lucrative law practice to serve government. But I think you are the wrong man for this job.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks, Senator McCaskill.

We will now return to Senator Collins, who will complete her questioning.

Senator COLLINS. Thank you, Mr. Chairman.

I do want to continue talking about the GAO issue which I raised and then Senator McCaskill elaborated on. As I look at the policy, it is a far more formal process than GAO usually has. Even the Department of Defense, with its massive size and all of its entities, does not have the kind of formal tracking process that DHS has. Now, I personally believe that the reason that it has been implemented is to make sure that every agency is responding to GAO in a timely fashion.

Is that the reason that it has been centralized in the General Counsel's office?

Mr. COLDEBELLA. Yes, Senator. It has not actually been centralized in the General Counsel's office. It has been centralized under the Under Secretary for Management, who has a liaison with the GAO. But describing it in the way that I think Senator McCaskill has, and certainly the General Counsel of GAO has, as "overcentralized" I think is incorrect because each of our components has

a liaison with the GAO. It is not as though every request has to be written down and sent to headquarters and then sent out.

The reason that you stated is exactly why liaisons need to be involved.

Senator COLLINS. Let me just suggest to you that we want GAO to be happy with the process——

Mr. COLDEBELLA. As do we.

Senator COLLINS [continuing]. To put it bluntly, since the whole idea of the direction that Congress gave to you was in response to GAO's belief that it had great difficulty in getting the information it needed and the cooperation from DHS.

So my strong suggestion to you is that while it is a good idea to have a tracking system to ensure that every request is answered, you make a mistake if you embrace a system that GAO believes is too bureaucratic and will result in less than a free flow of information and the kind of access that GAO simply must have in order to perform its duties.

Mr. COLDEBELLA. Senator, I would make two very quick points.

The first one is that the legislation that we were responding to—and our own internal desire to modernize the procedures that we deal with GAO on—have set a high bar for ourselves. We are supposed to produce documents in 20 days. The proof is going to be in the pudding. I mean, I think the last paragraph of Gary Kepplinger's letter—and I have spoken with him on several occasions about our one remaining area of difference on the GAO management directive—is we need to be able to say both to GAO and to the Secretary, and to you as one of our oversight committees, that we are meeting the goal that we have set for ourselves.

If the system is that we go directly to program points of contact, operators, people in the field, it is one of 20 of their jobs to respond to GAO. If the liaison—decentralized now, in each of the components—is the person who is in charge of making sure that document is produced in 20 days, that is his or her only job. And for that reason, though I respect Mr. Kepplinger's opinion here, I think the system that we have chosen is going to help us to be more accountable to ourselves and to you at the high bar that we have set.

Senator COLLINS. Thank you. Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks, Senator Collins. Senator Landrieu.

OPENING STATEMENT OF SENATOR LANDRIEU

Senator LANDRIEU. Thank you, Mr. Chairman.

I appreciate the Chairman allowing me to ask a few FEMA, Katrina, and Rita-related questions. Of course, this has been heavily on my mind the last couple of years. And you know as we move to the end of this August, it will be the marking of the third anniversary of the largest natural catastrophe to hit our country, and our people are still struggling to recover. So I am very interested in pursuing your testimony in your written, as well as your oral presentation before our Committee this morning, about identifying yourself as a problem solver. And I will say that both Secretary Chertoff and FEMA Administrator Paulison have testified before this Committee on separate occasions, but unequivocally, that the Stafford Act is inadequate to address the needs of families and

communities after a catastrophic disaster. Yet, to date, neither FEMA nor DHS has requested to my knowledge any additional legislative authorities from this Committee to change the Stafford Act.

Can you explain how this reality, which, according to my understanding, is the reality, with your claim that you are indeed a problem solver?

Mr. COLDEBELLA. Yes, Senator. I think I would point to a few things.

The first is that much closer to the time of Hurricane Katrina—in fact, I think this Committee's investigation had just wound down or was winding down—your office approached my office, and me in particular, with a problem regarding charter schools in New Orleans, and what I considered to be an overly bureaucratic requirement that those charter schools make an application to another agency before they could go to FEMA for assistance. And I think because it had been done a particular way in disasters in the past, FEMA gave your office the answer that it was to be done this way going forward.

We took a look at the problem with fresh eyes and had a meeting—not here—somewhere else in this building at which we were able to talk to your staff about how both the Stafford Act and the regulations allowed us to do what we thought was not only a legally sound thing, but the right thing for those charter schools in New Orleans.

Senator LANDRIEU. And I appreciate that, and I will accept that. Could you provide at least four or five other items in writing to this Committee about examples of your office being a problem solver—and that is a good one—relative to the Stafford Act and how it was interpreted? And particularly if you could mention the confusion that still seems to exist between FEMA and Homeland Security over use of mitigation money. There is, I think, if my memory serves me correctly, about $1 billion—$1.16 billion in mitigation money that is still tied up in a dispute. So if you could list at least four or five others and specifically comment on the status of that mitigation.

Mr. COLDEBELLA. I would be glad to, Senator.[1]

Senator LANDRIEU. In 2007, the *Washington Post* uncovered communications from a FEMA attorney who advised agency officials not to publicly reveal the fact that formaldehyde emissions were causing trailer occupants to become ill. In your written response to this Committee's pre-hearing questions, you asserted that your office had no knowledge of this advice at the time it was given and that you subsequently sent a memo to attorneys in the Department on the issue of formaldehyde.

When did you first learn that the attorneys in FEMA's Office of General Counsel were providing this advice? What was the nature and subject of your memo? Who did you circulate it to? And when was it distributed? And if you have a copy of it, I would like it submitted to this Committee.

[1] The information appears in the Appendix on page 28.

Mr. COLDEBELLA. Senator, I would be glad to submit a copy of the memo. In fact, I do not have one with me, but I will send it right over to your office.[1]

The time that I discovered that this advice had been given was, I think, coincidental with the production of documents to Chairman Waxman's Oversight and Government Reform Committee on the House side. He had been looking into matters of formaldehyde in travel trailers with FEMA, and during the document production, it was pointed out to me that an e-mail existed that suggested that an attorney had, either intentionally or not, tried to delay some testing, citing litigation reasons.

I think my reaction to that was swift and appropriate, which was even if that attorney had good intentions—and reading the e-mail, that attorney would have to make a pretty strong argument to me that he did—it left the impression that at least one attorney in the Department had put litigation concerns over the concerns of the health and welfare of victims of this disaster, and that was completely inappropriate.

The memo that I prepared was sent to every attorney in the Department of Homeland Security for a simple reason. I know I felt like I was punched in the gut when I saw that e-mail and when it ended up in the paper. And I wanted to reassure all of the attorneys around the Department that I expected them to put the health and safety and welfare of the disaster victims first.

Senator LANDRIEU. OK. If you would supply a copy of your memo to this Committee, and did that lawyer work for you?

Mr. COLDEBELLA. As far as I remember, Senator, that lawyer was a temporary lawyer and——

Senator LANDRIEU. Has he been terminated?

Mr. COLDEBELLA. His term came to an end, and he is not——

Senator LANDRIEU. So he is no longer working with the Department.

Mr. COLDEBELLA. That is correct, Senator.

Senator LANDRIEU. OK. One final question, if I could, Mr. Chairman. I am going to submit a question about presidential signing statements that I am somewhat concerned about that may be able to be cleared up by this nominee. I had the opportunity—I guess you could say it in that way—to meet a constituent of mine who was literally burned to a crisp in a FEMA trailer. Her name is Mrs. Jeanne Joseph. I met her at a public event when I was home. She is still walking, amazingly, and talking and, most amazingly of all, has a spirit that I am not sure I could have myself under those circumstances. She had only been in her trailer about 30 minutes when it blew up and burned her almost beyond recognition.

We are having a very difficult time getting information on burn victims in trailers. I don't know why we are, and I don't have time to go over that today. But I would like you to submit any correspondence to this Committee that you or your office have related to fires in FEMA trailers. And if that request is too broad, I trust that the Chairman will help me to fashion it in a way to get some information about how many fires there have been in FEMA trailers, a broad but general description of those. And if the number of

[1] The memorandum submitted by Mr. Coldebella appears in the Appendix on page 29.

fires in FEMA trailers is a greater proportion of fires than exists in regular homes at regular times, not in California wildfires but under regular circumstances, so we can ascertain how extensive this problem is. In the meantime, I am doing what I can to help Ms. Joseph, but I am assuming that there are a lot more people that might be in her situation.

Thank you.

Mr. COLDEBELLA. Thank you, Senator.

Chairman LIEBERMAN. Thanks, Senator Landrieu. I will certainly work with you on that, and, Mr. Coldebella, I urge you to be as responsive as quickly as possible to Senator Landrieu on this matter as you possibly can be.

Mr. COLDEBELLA. Senator, I wrote down the questions. This is the first that I have heard of your request for information, but as soon as I get back to the office, I will pass it along to FEMA and make sure that they follow up on it.

[The information from FEMA follows:]

INFORMATION PROVIDED FOR THE RECORD

"In 2006 and 2007, there were approximated 90,000 FEMA-provided Temporary Housing Units (THU) occupied in Louisiana. During this period, there were 145 reported fires in FEMA managed THUs, resulting in a fire incident rate of 0.16 percent. During this same period, the incident rate of reported fires in U.S. homes was 1.26 percent. Causes of trailer fires varied greatly, and include factors such as arson, smoking, candles, cooking accidents, overloading of electrical circuits, portable space heaters and other electrical heat sources operating too close to flammables, and improper use of trailer appliances. FEMA has taken numerous precautions to ensure fire safety in THUs. The Lousiana Transitional Recovery Office's Individual Assistance case workers have consistently communicated THU safety to occupants through flyers, PSAs, public information sessions, and face to face recertification visits."

Chairman LIEBERMAN. Thank you. Senator Akaka.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you very much, Mr. Chairman. I want to commend you and Ranking Member Collins for having this hearing. And I want to add my welcome to Mr. Coldebella and his family: Your lovely wife, Heather, and your Mom and Dad, Phyllis and Gus. Welcome to the Committee.

Mr. Chairman, I ask that my full statement be made a part of the record.

Chairman LIEBERMAN. Without objection.

[The prepared statement of Senator Akaka follows:]

PREPARED STATEMENT OF SENATOR AKAKA

Thank you, Mr. Chairman. I join you in welcoming Mr. Coldebella and his family and friends today.

Mr. Coldebella, I want to start by thanking you for your service at the Department of Homeland Security. I appreciate your willingness to leave a law firm partnership to join the Federal Government.

However, I do have several concerns about your nomination, which I hope you will address at this hearing.

I am concerned about vacancies in the General Counsel's office, particularly among senior-level people. As we near the presidential transition, filling key vacancies with highly-qualified Federal employees is increasingly important.

My other concerns all relate to the tendency in this Department and this Administration to view Executive Branch power expansively and congressional oversight as something to be avoided, evaded, or marginalized whenever possible. I hope you ap-

proach oversight as a constitutional congressional responsibility and a constructive avenue to improve government programs for the American people, but I am concerned that your actions may indicate otherwise.

I have been disappointed at times with DHS delays in responding to congressional requests for information and the adequacy of the information we receive. Too often, the Department categorizes information as law enforcement sensitive or otherwise restricts it, likewise limiting the public's access to information about DHS activities. Similarly, the Government Accountability Office (GAO) has had problems with access to information during your tenure in the Office of General Counsel.

Additionally, I am troubled by your office's aggressive legal interpretations of certain statutes to fit Administration priorities. Relatedly, I am troubled by your view that Executive Branch officials are bound to follow presidential signing statements disagreeing with provisions of laws passed by Congress and signed by the President.

I understand that these problems are not always connected with the General Counsel's office, but it appears that your office at times has been part of the problem rather than part of the solution.

If confirmed, I hope you will work to increase the Department's transparency and accountability.

I look forward to hearing from you on these important issues.

Thank you, Mr. Chairman.

Senator AKAKA. I will come back to the issue of your approach to oversight, if possible, but first I would like to ask you about an issue that is very important to my State of Hawaii.

The Passenger Vessel Services Act (PVSA), restricts foreign-flagged ships' operations at U.S. ports. But it has not been enforced adequately. Customs and Border Protection (CBP) issued an interpretive rule on the PVSA in November 2007. In May 2008, I asked Paul Schneider about the delay in finalizing the rule, and he promised a speedy resolution. Well, my concern now is that the rule still has not been finalized.

In the meantime, due to unfair competition from foreign ships that are not required to follow U.S. tax, labor, environmental, and other laws, two U.S.-flagged cruise ships left Hawaii for the last time, causing a dramatic economic loss in my State. And that is my concern. There is only one remaining large U.S.-flagged cruise ship operating in Hawaii.

Mr. Coldebella, can you explain to me the delay in finalizing this regulation?

Mr. COLDEBELLA. Senator, thank you for asking the question. As you pointed out, CBP issued interpretive guidance late last year regarding the PVSA. We received over a thousand comments on that draft interpretation, and most of them were supportive; that is, for the trade between Los Angeles and Hawaii for large passenger vessels, the U.S.-flagged vessels should be protected by the PVSA. There were, I think, an equal number of comments that raised concerns about other trades around the country, specifically from the Northwest of the United States to Alaska and around New England, that the rule—the interpretation was drafted in such a way that it might suggest that foreign-flagged vessels operating those trades without any large-passenger U.S. vessels in the same trade would also have to leave those other markets. And even though the rulemaking is pending, Senator, I can tell you a few things.

We have sent the rule over to the Office of Management and Budget (OMB)—for what I hope will be a quick review—last week. And while we took those comments that I just noted for you into account in putting together the rulemaking, the core function of the interpretation that CBP issued late last year is still intact; that is,

the large U.S.-flagged passenger vessels that you were speaking of will be protected by the PVSA.

Senator AKAKA. Well, as I said, my concern was the delay, and hopefully we can get that as soon as we can.

Mr. Coldebella, I am concerned about the vacancies in your office, particularly among senior-level people. And this Committee—in particular, my Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia—has been working on the recruitment and retention of employees throughout the Federal Government. A recent report by the National Academy of Public Administration on DHS's planning for the presidential transition revealed that the DHS Office of General Counsel had a 40-percent vacancy rate in executive positions. That was one of the highest levels in the Department, which has an overall average vacancy rate on the executive level of 26 percent. Moreover, one-third of the executives that you do have are political appointees who will leave at the end of this Administration. This is very concerning to me.

As we near the presidential transition, filling key vacancies with highly qualified career employees is increasingly important, and you will be left with very few senior people through the Presidential transition.

What are you doing to fill high-level vacancies in the Office of General Counsel?

Mr. COLDEBELLA. Thank you, Senator. We read the same report, and we have been acting on the recommendations made in it. I will note a few things.

The first one is that we have appointed a Deputy General Counsel, who is a career lawyer, who will provide continuity for the new Secretary immediately upon his or her arrival. I think that is important, and we are striving to do that around the Department for all of the headquarters components and the operating components.

The second point that you have made about vacancies is one that we have been working hard to remedy. In fact, the senior leadership positions within the headquarters of OGC have all been filled or are on the brink of being filled; that is, the Associate General Counsel for Immigration, the Associate General Counsel for Science and Technology, and the Associate General Counsel for Operations and Enforcement are either at the end of their listing period or they are in the selection process.

But the most important point that I will make is regarding the percentage of political appointees within OGC. We have been steadily reducing the number of political appointees in the senior leadership ranks of OGC. In fact, when the Department began, I think also when I began at the Department, the Associate General Counsel for Science and Technology was a political appointee, the Associate General Counsel for Information and Analysis was a political appointee, and the Associate General Counsel for Immigration was as well. All of those positions have been converted within the last year or so during the posting of these jobs that I just discussed to career positions, which I think, in addition to the Deputy General Counsel, will ensure high-quality legal advice to the new team.

Senator AKAKA. If I may, Mr. Chairman. Mr. Coldebella, I have long been concerned with DHS's overreliance on contractors to per-

form government work. I understand that DHS used contractors to assist in drafting and editing DHS's regulations.

What actions are you taking to ensure that contractors are not, in effect, making policy determinations that the American people expect to be made by government officials?

Mr. COLDEBELLA. Senator, I take seriously the proscription on using contractors to perform inherently governmental functions, and one of those functions—in fact, one of the functions that is mentioned in the OMB circular is "interpreting the laws that Congress passes." And I include in that, making the policy choices that end up in the regulations of the Department.

Let me mention a few things.

First of all, we have lawyers in each of our components that are providing guidance to the policymakers and the operators about what is appropriate and what is not appropriate for contractors to do.

Now, the Department's rulemaking pace is torrid. Congress has, I think quite rightly, given the Department of Homeland Security several deadlines on important regulations which we are striving to meet. While I would prefer all of the work on our regulations to be done by Federal employees, we must make sure as a Department that when that work—such as economic analysis, for one example—is done by contractors, that the contractors are not making any of the policy choices that are being implemented in that rulemaking. That requires good supervision by the contracting officials and the operators in those components to make sure that the contractors are being given very strong guidance as to what they may and may not do.

Senator AKAKA. Thank you, Mr. Chairman, for your courtesy, and thank you, Mr. Coldebella, for your responses.

Mr. COLDEBELLA. Thank you, Senator.

Chairman LIEBERMAN. Thank you, Senator Akaka. We will do one additional round as time allows. We are going to have a vote in the next 5 or 10 minutes.

Obviously, you get the drift, Mr. Coldebella, that the concern that I have is about what we could expect from you as General Counsel in terms of cooperation with Congress. Let me go to the question of the relations with the Government Accountability Office, which we work very closely with on this Committee.

On June 30, the Department of Homeland Security issued a new directive on relations with GAO after several months of discussions, as you know. Unfortunately, I understand that GAO remains dissatisfied with and skeptical of this new directive. Just yesterday, GAO's General Counsel sent you a letter complaining that the new process "places burdensome controls over access to the information we need and to which we have a statutory right of access."

Their concern apparently is that under the new procedures, even simple requests will not be able to be handled by the program officials with knowledge of the matter, but will require the involvement of multiple layers of "liaisons," and they fear that would lead inevitably to greater delays and reduced access.

So I want to ask you what assurances can you offer that these new procedures will not hamper and delay access needed by GAO to conduct its audits and ultimately to keep Congress and the

American people informed, and whether you intend to take any further action that even small, routine requests for information by GAO are not encumbered by a lengthy, multi-layered review process.

Mr. COLDEBELLA. Thank you, Senator. Gary Kepplinger, who is the General Counsel of GAO, and I have a small disagreement about the management directive that you referenced in your question. What is driving the revision of the Department's process vis-a-vis GAO is a perception that access to documents and access to witnesses has taken too long, not ultimately that GAO hasn't received access to the documents and witnesses that it has asked for but that it has taken too long.

We have set for ourselves a very aggressive goal, which is providing documents to GAO within 20 days. What animates the requirement, not that all requests go to a central point, but that a GAO liaison at least be aware of the fact that GAO has asked for documents, so that person can make sure that the 20-day calendar is being met.

As I was saying earlier, if the request goes directly to a program person, the manager of the CBP office on the Southwest border, for example, that person has mission after mission after mission that he or she has to accomplish. And one of the long list of things will be responding to this GAO request.

If the request is also communicated to the CBP liaison or the Border Patrol liaison, then that person's sole task is making sure that the document gets from where it is to where it needs to be within the 20 days that we have set for ourselves as a goal.

I do not begrudge Mr. Kepplinger's opinion here. We have had at least two discussions about this, and probably even more. And as I told him, I am committed to making sure the Department sticks with that schedule. What are we going to do? As we are working through the new process, we are going to make sure that all the documents are produced within that time period. And when Ms. Duke and I were talking to the senior leadership of the Department regarding the new management directive, we made it very clear that, in addition to this piece of paper, there was going to be training. Folks from the Under Secretary's immediate office and knowledgeable lawyers were going to talk to everyone who is involved in the chain of production to GAO about making sure that they comply with the new 20-day requirement.

So what I would say, Senator, is the proof is in the pudding. If for some reason we see a lot of requests that are going over the target that we have set for ourselves, then I will revisit the management directive.

Chairman LIEBERMAN. All right. I appreciate that. So you are saying that the liaisons and what they see as centralization and unnecessary notification for routine requests is really your attempt to guarantee that all requests are answered within 20 days.

Mr. COLDEBELLA. The Department has an obligation to Congress because this did appear in a statute, to get those documents out within 20 days, yes.

Chairman LIEBERMAN. All right. So we are going to hold you to that.

Let me ask you—and I apologize for doing this. I just have about a minute left, and we have to go soon. I want to know, briefly, if you would indicate to us what legal bases, if any, you believe there are for the Department to ever withhold requested information or documents from Congress. In other words, this is the basic concern that is expressed about your nomination, not your qualifications, not your integrity, but to what extent you will block Congress' exercise of its responsibilities.

Mr. COLDEBELLA. Senator, I think my operating principle since February 2007, when I became the Acting General Counsel, is to, as quickly as possible, give Congress all the documents that it requests; if there are questions or concerns, to immediately speak with the staff about those questions or concerns.

Now, we spent quite a while talking about this topic in my staff interview. The questions of privilege or other legal defenses should not really be reached when the Department is operating in the right way and when the staff is operating in the right way, which is to get together and speak about what is necessary right now, what the concerns are, and getting to a solution that works for both Congress and the Department.

I think the basis for what has been called for years "the process of accommodation" is in some decisions; it is in some Attorney General opinions from every Administration. But we could talk about the law. What I want to assure you, Senator, is that since I have been heading up OGC, I think the problems that may have been described by some of the other Senators and some of the things that may be causing you concern have not appeared. There are fewer, if any, access issues that I would say some lawyer is causing this problem to happen. And, in fact, with this Committee, with GAO, and with the IG, I see my lawyers and I certainly see myself as a facilitator of getting the information quickly out to Congress.

Chairman LIEBERMAN. OK. My time is up. Senator Collins.

Senator COLLINS. Thank you.

Mr. Coldebella, I want to return to two issues which Senator Akaka raised with you. The first is the proposed rule from Customs and Border Protection that I have a very different view than my friend from Hawaii has. This rule, simply put, would devastate the cruise ship industry in my State and result in the loss of tens of millions of tourism dollars. It would require foreign-flagged cruise ships—and almost all of the cruise ships today are foreign-flagged—to visit a foreign port for at least 48 hours during each trip itinerary.

I have filed comments in opposition to that rule expressing my concerns, as have several other Maine State officials and businesses from my State. In total, I am told that there were hundreds of comments filed, most in opposition to the proposed rule.

I know that you cannot comment on what is in the rule given the stage of the proceeding, but I am seeking from you two things today: One is assurance that when the final rule is issued, it will address the points that were raised in these comments; and, second, I would like a better indication from you of the time frame for issuing the final rule. You mentioned to Senator Akaka that it has been sent to OMB for review. When do you expect the revised rule to actually be issued?

Mr. COLDEBELLA. Thank you, Senator. This is one of our top priorities. The rule, as I said, is at OMB. I will commit to checking on the process as soon as I get back to the office, but I think it is fair to say that it will be—OMB has 90 days to review. I think it will be significantly shorter than that.

On the assurance regarding the comments that you and—you are right—hundreds of others made about the effect that this would have on other trades around the country, you do have my assurance that those comments have been taken into account in what has been submitted to OMB.

Senator COLLINS. Thank you, and I would appreciate prompt notification when the rule is about to be issued.

Let me return to another issue that the Senator from Hawaii raised, and it is one that I know is of great concern to the Chairman as well because he held an excellent hearing looking at the overreliance of DHS on contractors.

I am sympathetic to the fact that DHS has been inundated with work, with new rules, with new laws, with new responsibilities. And I also recognize that all of them are time sensitive. When it comes to protecting the security of this Nation, everything is important and, thus, we have imposed a tremendous work burden on the Department. But I can tell you also that this Congress, this Senate, is also very responsive when DHS tells us that you need more people to carry out these responsibilities.

The hearing that the Chairman held earlier this year found that DHS has an overreliance on private contractors and that the line which is supposed to be drawn keeping inherently governmental functions for Federal employees to carry out has been crossed many times. And this is not just my view or the Chairman's view. It was the result of an analysis that GAO did which found that to be the case.

I am very concerned when I look at the list of contractor support in DHS rulemakings that the Department has provided to the Committee that a contractor for Citizenship and Immigration Services has performed research and prepared the initial draft of a regulation. Preparing the initial draft of a regulation seems to me to be clearly an inherently governmental function that should not be contracted out. It involves substantial value judgments and decision-making.

Do you think it is appropriate for DHS to be using private contractors to draft the initial regulation or policy?

Mr. COLDEBELLA. Senator, I would prefer it—and I expressed this to the Committee staff—if Federal employees ran every step of the rulemaking process. I think implementing the laws that Congress passes is an inherently governmental function. And I have no reason to doubt—and have talked a little bit about what my office does in order to train people on how to draw that line appropriately between what contractors may do and what contractors should not do because the function is inherently governmental.

I will add one additional thing about the rulemaking process, which is while it is suboptimal to have non-Federal employees write the initial draft of a regulation, the rulemaking process at DHS is one of the functions that actually has many sets of eyes, not just Federal employee eyes but high-level Federal employee

eyes, on the rulemaking before it is signed by the Secretary and put in the *Federal Register*.

So I completely agree with the premise, and I agree that the Department—I think Ms. Duke testified, amongst others, at the hearing that you are referring to. She and I have spoken about the many ways that we can further shore up this process. But I can tell you that for every significant rulemaking, a senior member of my career staff and SES will review the rule, and then I will review the rule, and then the Secretary will review the rule.

Senator COLLINS. I do not doubt that, and I understand that the rule is not going to be published without the involvement of high-level staff as well as political appointees in the Department. But that is still very different when you have a private contractor drafting the initial rule. That does not strike me as an appropriate function to be contracting out. And I would also argue that it is very questionable—and the Department has done this as well—that the Department uses contractors to do comment evaluation. In other words, we just spoke of a rule that is very important in my State. Should that be contracted out to review those comments?

I think, again, that is inherently governmental, and it is something that should be done by Federal employees. And the problem is when you contract out core judgments or core work like preparing regulations and evaluating the comments, it casts a cloud over the integrity of the process. It raises conflict-of-interest concerns that otherwise would not exist when the Department keeps that work fully in-house.

So I would encourage you to adopt a policy that either eliminates that kind of contracting out or certainly curtails it significantly. As you yourself have been very forthright in saying today, it is inherently governmental and, thus, arguably, you are not following the law if it is contracted out or you are not following the OMB circular on that issue. And it just casts a cloud of suspicion over the integrity of the rulemaking process. DHS does not need that. If you need more employees to do the work, come to us, and I think you will find that we are very sympathetic to that cause.

Mr. COLDEBELLA. Thank you, Senator. I agree.

Senator COLLINS. Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thanks, Senator Collins.

Mr. Coldebella, that will be it. In one sense, I think that probably is good news to you. In the other sense, you have a lawyer's taste for debate, so maybe it could have gone on if we did not have to go and vote.

I want to thank you for appearing before the Committee today. I want to again express respect and appreciation that your parents and your wife are here. And I want to indicate that, without objection, the record of this hearing will be kept open until 12 noon tomorrow for the submission of any written questions or statements by other Members for the record.

Would you have anything that you would like to say before we close?

Mr. COLDEBELLA. No. I think we have been keeping a pretty good list of the requests that were made during the hearing, and we will get you answers as soon as possible.

Chairman LIEBERMAN. I appreciate that very much. Thank you.

The hearing is adjourned.
Mr. COLDEBELLA. Thank you.
[Whereupon, at 11:26 a.m., the Committee was adjourned.]

APPENDIX

UNITED STATES SENATE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

Hearing on the Nomination of Gus P. Coldebella to be the General Counsel of the Department of Homeland Security

Testimony of Gus P. Coldebella

July 15, 2008

Thank you Chairman Lieberman, Ranking Member Collins, and members of the committee. It is my pleasure to appear before you today as the nominee for the position of general counsel of the Department of Homeland Security. I would like to thank for being here my wife, Heather, my parents, Gus and Phyllis, and a number of the Department's summer legal interns. I would also like to thank the committee's staff, which has put in a great amount of effort to prepare for this hearing.

I.

Since October 2005, it has been my great honor to work alongside the men and women of the department on our important mission of keeping the nation secure. During that time, I have done everything I could—first, as deputy general counsel, and then, beginning in February 2007, as the acting general counsel—to make sure the rule of law is strong at the department. I will discuss a few of those things now.

First, I have done my best to be a trusted advisor to the Secretary and the rest of the senior staff of the department in faithfully interpreting the Homeland Security Act, the 9/11 Act, and the other laws that Congress has passed that relate to the department, to make sure that our programs, policies, and actions are lawfully implemented.

In a department as large and widespread as ours, it is impossible to accomplish this task alone, of course. The 70 or so attorneys at headquarters, and the over 1,700 lawyers around the department's components, facilitate the department's missions by providing correct, useful, and timely legal advice. It has been my great honor to work with these

highly skilled civil servants during my time at the department, and I have been consistently impressed with the level of rigor and professionalism that they bring to the tasks they are assigned to accomplish.

I have tried to bring to the Office of the General Counsel a spirit of forward-leaning lawyering that well suits the mission of the department. It is the job of a good agency lawyer to tell operators and policymakers that they cannot follow a particular course of action if the law does not allow it. But it is the job of a very good agency lawyer to suggest an alternative if one exists—one that comports with the Constitution and all relevant laws—to achieve the department's goals. This idea—that lawyers should be problem solvers instead of merely problem identifiers—is one I have propagated throughout DHS.

The Office of the General Counsel is uniquely positioned for another task, which is helping to unify, integrate, and improve the efficiency of the department. Because lawyers are serving in every component, communication between those lawyers and the general counsel helps to identify impediments to accomplishing our homeland security goals, so those impediments may be more quickly resolved.

Finally, I have made it a priority for OGC's senior management team to think about and act upon issues of management, continuity, and transition. We have named a career deputy general counsel, so at the time of an administration change the new Secretary has the benefit of an experienced acting general counsel. We have begun the restructuring of OGC to better meet the legal needs of headquarters and the larger department, while increasing the number of leadership positions for attorneys to occupy. We have created and are continually updating a compendium of emergency legal authorities, so that when disaster strikes, our lawyers are trained and prepared to deal with any contingency. And we have opened new inroads into hiring, begun an attorney honors program, and kicked off a series of educational programs for the department's lawyers.

All of these things lay the foundation for an OGC that is not only recognized by the department for its quick, clear, and excellent legal counsel, but also acknowledged by lawyers outside the department as a high-quality legal office, and as one of the most rewarding places to work in the executive branch.

II.

Given that I have been at the department for almost three years, I am not an unknown quantity to this committee. During that period, we have had many joint successes, including the passage and implementation of the first federal chemical security legislation, the improvements to security in the 9/11 Act, and many others. We have also worked together on some difficult issues, like the committee's important investigation into the response to Hurricane Katrina.

Throughout our discussions about these and other matters, I have strived to be both clear in my legal interpretations and straightforward in presenting the department's positions to you and to other interested members and committees of Congress. If confirmed, I will of

course continue to do my best to make sure the department communicates well and clearly with Congress.

Access to the department's information—by committees of Congress, the department's inspector general, and the General Accountability Office—is a topic frequently raised in my discussions with congressional staff. I am committed, as is the Secretary, to swift access by Congress, the IG, and GAO. I am gratified that the department's inspector general stated, in congressional testimony in February 2008, that cooperation in the preceding year had improved "noticeably," and access during that same period had been "outstanding." At the same hearing, the comptroller general testified that access to departmental information had improved due to discussions between DHS and GAO over the preceding year.

Even in the context of substantial improvement, there is still work left to do. Recently, the department issued two documents: a revised management directive regarding the relationship between the department and GAO, and a memorandum from the Secretary to all employees about the roles of the inspector general. Both of these improve access.

One of the general counsel's roles is to make sure that access is quickly and properly given, and to work with the other components of DHS—most centrally, the management directorate—to make sure the department continues to meet its goals regarding GAO, IG, and congressional access, and I commit to continuing to do so.

III.

The nation is in a time of transition. The presidential campaign is in full swing. And we at the Department of Homeland Security have a special obligation to ensure a smooth transition and an experienced leadership team in place until the nominees are confirmed, given the importance of our missions to the security of the nation. I have made a commitment to Secretary Chertoff that, if confirmed by the Senate, I will be part of his senior leadership team until the last day, God and the President willing.

I am humbled that the President has asked me to serve in this capacity, and that this committee is considering my nomination. I look forward to answering your questions.

Subject: FW: Stafford Act

Here are the remaining examples Senator Landrieu requested from Gus.

From: Coldebella, Gus
Sent: Tuesday, July 29, 2008 3:04 PM
To: Gillis, Ryan M
Subject: Stafford Act

During my confirmation hearing, Senator Landrieu asked for four or five examples of "forward-leaning lawyering" by the Office of the General Counsel that helped in the recovery from Hurricane Katrina and other disasters. The first example, the one I discussed at the hearing, is representative of the approach we took after the disaster -- to look at the Stafford Act with fresh eyes to deal with the unprecedented scope and scale of the recovery effort. Our determination -- that New Orleans charter schools were eligible for FEMA assistance without first applying for an SBA loan -- speeded funding to those schools, eliminated bureaucratic hurdles, and did so within the law.

We also made changes based on the lessons learned during Katrina. One example: The pre- and post-storm evacuations were of a massive scale, and created a significant need for evacuation and sheltering outside of the disaster area -- in fact, evacuees ended up in almost every one of the fifty states. State and local governments outside of the designated disaster area provided transportation, shelter, and other assistance to evacuees and, as a result, incurred significant disaster-related costs. FEMA's existing regulations, however, limited financial assistance to work performed within a designated disaster area. Under this reg, states and local governments outside of the designated area were only eligible for FEMA assistance if they sought and obtained separate emergency declarations, which created unnecessary delay, expense and bureaucratic burden. OGC identified this problem and drove the process of amending FEMA's regs to prevent similar reimbursement hurdles in the future. Under FEMA's amended public assistance regulations, which were implemented at the beginning of the following hurricane season in 2006, FEMA can now reimburse for sheltering and evacuation costs incurred by governments outside of the disaster area.

I would point to a few of the other ways that lawyers helped to solve real problems:

• Gift acceptance/grant making. While the Stafford Act allows FEMA to accept gifts of international assistance, it does not give FEMA the ability to make grants of those gifts to all necessary entities, such as disaster organizations. OGC developed a creative solution under the law involving the delegation of the Secretary's grant authority to make sure international assistance could be distributed to the people who needed it most, and subsequently provided technical assistance to the Hill for legislative changes to facilitate procedures in the future, now pending in Congress.

• Emergency Transportation. OGC read section 403 and other sections of the Stafford Act in a new way to allow for funding of transportation of persons from New Orleans to Baton Rouge and between temporary housing sites.

• HMGP/Waiver. Stafford Act's section 301, the administrative waiver provision, has to our knowledge never been used before Katrina to waive the deadline for applying for HMGP grants. We determined, in light of Katrina's scope and scale, that the waiver could be used to extend the grant application deadline for one year beyond what was provided by the regulation.

We'd be pleased to provide whatever additional information the Senator requires. Thanks.

Gus P. Coldebella

General Counsel, Acting

U.S. Department of Homeland Security

MEMORANDUM

TO: All DHS Attorneys

FROM: Gus P. Coldebella
Acting General Counsel

RE: ***Legal Advice***

DATE: July 20, 2007

This morning, the *Washington Post* and other newspapers reported on yesterday's hearing held by the House Oversight and Government Reform Committee regarding formaldehyde in FEMA travel trailers. These stories suggested that certain lawyers advised the agency to delay testing the levels of formaldehyde because such testing might trigger a legal liability.

I write to let you know that we are already inquiring into the e-mails presented at yesterday's hearing and the handling of the formaldehyde issue. I also want to state something that we all know and believe, but that bears repeating after today's news: As lawyers for the Federal Government, we have a responsibility not only to protect our client's interests, but moreover to protect the public. It is not acceptable to put anyone at risk, or to delay solving a problem, or to otherwise avoid necessary action, to try to improve an agency's litigation position. Very simply, our advice as lawyers for the Department must be consistent with our overarching duty to protect the people we have sworn to serve.

REDACTED

UNITED STATES SENATE
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS

Biographical Questionnaire for the Nomination of
Gus P. Coldebella to be General Counsel of the
Department of Homeland Security

October 18, 2007

A. Biographical Information

1. **Name:** (Include any former names used.)

   Gus Peter Coldebella. No former names used.

2. **Position to which nominated:**

   General Counsel, Department of Homeland Security.

3. **Date of nomination:**

   October 16, 2007.

4. **Address:** (List current place of residence and office addresses.)

   Residence:
   Office: DHS HQ, Nebraska Avenue Complex, Bldg. 1, Washington, D.C.

5. **Date and place of birth:**

   October 11, 1969; Livingston, N.J.

6. **Marital status:** (Include maiden name of wife or husband's name.)

   Engaged to Ms. Heather L. Ferguson; plan to marry on April 26, 2008.

7. **Names and ages of children:**

   None.

8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.

   J.D., Cornell Law School, Ithaca, N.Y., May 1994;
   B.A., Colgate University, Hamilton, N.Y., May 1991;

Nutley Senior High School, Nutley, N.J., 1987.

9. **Employment record:** List all jobs held since college, and any relevant or significant jobs held prior to that time, including the title or description of job, name of employer, location of work, and dates of employment. (Please use separate attachment, if necessary.)

Department of Homeland Security, Office of the General Counsel. October 3, 2005-present. Served as Deputy General Counsel; Principal Deputy General Counsel; Acting General Counsel.

Goodwin Procter LLP, Boston, MA. Partner from October 1, 2002 to September 30, 2005. Also employed as an Associate from 1994 to September 30, 2002, and a Summer Associate in 2002.

Middlesex Co. District Attorney's Office, Cambridge, MA. While employed at Goodwin Procter LLP, selected to serve as a Special Assistant District Attorney in Cambridge, MA. 1997.

Research Associate, Cornell Law School. While in law school, worked as a research associate for Dean Russell K. Osgood from May to December 1992, and Professor David Wippman from July to August 1992.

10. **Government experience:** List any advisory, consultative, honorary or other part-time service or positions with federal, State, or local governments, other than those listed above.

Other than the employment at DHS and with Middlesex County already noted, I worked for Township of Nutley, N.J. (my hometown) during summers while in high school.

11. **Business relationships:** List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.

Employer

Goodwin Procter LLP
Affiliation: Law partner
Status of relationship: Left partnership on September 30, 2005 to commence federal employment

Major Clients

The following is a list of clients of Goodwin Procter LLP for whom I directly provided services generating a fee or payment of over $5,000.

2005

Advent International Corp.
Anika Therapeutics, Inc.
Bergensons Property Services, Inc.
BlueCross BlueShield of Massachusetts
Boynton, Judith Gubala
Cayuga County, New York
Corba, Kenneth W.
Harris Miller Miller & Hanson Inc.
Lernout, Jozef
Mathsoft Engineering & Education, Inc.
Nepco, LP
Onondaga County, New York, et al.
PAV Republic, Inc.
Triumph Health Care

2004

Boynton, Judith Gubala
Cayuga County, New York
CCBT Financial Companies, Inc.
Corba, Kenneth W.
Covad Communications
Fifth Third Bancorp
First State Plastics
First Years, The
Francis E. Sutherby, Peter C. Read, Gail Edwards
Harris Miller Miller & Hanson Inc.
Highfields Capital Management LP
Jerusalem Venture Partners
La Quinta
Land America
Lernout, Jozef
Moors & Cabot Inc.
Niko Real Estate Trust
Quinn, Kevin
Washington & Congress Managers LLC

2003

Advent International Corporation
Anika Therapeutics, Inc.
Cayuga County, New York
Covad Communications
Crescent Private Capital
Flents Products, Inc.
Francis E. Sutherby, Peter C. Read, Gail Edwards
La Quinta
Land America
Lernout, Jo
Moors & Cabot Inc.
Niko Real Estate Trust
One Equity Partners, Inc.
Seneca Indian Land Claim
Visiting Nurse Association Of Boston
Watts Water Technologies, Inc.

2002

Advent International Corporation
Anika Therapeutics, Inc.
Cayuga County, New York
Covad Communications
Cratos Networks, Inc.
Francis E. Sutherby, Peter C. Read, Gail Edwards
La Quinta
Lee, Steven J.
Lernout, Jozef
Mathsoft Engineering & Education, Inc.
Micro Networks Corporation
Monarch Dental Corp.
Niko Real Estate Trust
Ramrath, Joseph R.
Seneca Indian Land Claim
Visiting Nurse Association of Boston

Investments

True Ventures
Affiliation: Limited partner (investor)
Status of relationship: Current

K&L Enterprises LLC

Affiliation: Limited partner (investor)
Status of relationship: Current

Non-Profit Organizations

Colgate University Alumni Corporation Board of Directors
Affiliation: Director, Legal Counsel, Vice President (current)
Status of relationship: Current

12. **Memberships:** List all memberships, affiliations, or and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable or other organizations.

Colgate University Alumni Corporation Board of Directors, 2001-present. (Also listed above.) Positions held: Legal Counsel; Vice President (current). Also, Colgate Alumni Club of Boston, 1994-2005. Position held: President.

Federalist Society, 1991 (approx.) to present.

Delta Gamma Chapter of Alpha Tau Omega Fraternity Alumni Board, 1995 (approx.) to present. (Also, active member of fraternity while an undergraduate; held offices of President and Vice President.)

National Italian American Foundation, member since 2006.

Trustees of the Reservations, member 2003-2005 (approx.)

Also, member of various bar associations, including ABA, Massachusetts Bar Association, and Boston Bar Association, though I believe my memberships in all three have ended.

13. **Political affiliations and activities:**

(a) List all offices with a political party which you have held or any public office for which you have been a candidate.

None.

(b) List all memberships and offices held in and services rendered to any political party or election committee during the last 10 years.

No offices held. No services rendered, except I once co-sponsored a political fundraiser for young professionals for Mitt Romney and Kerry Healey while in Massachusetts. Additionally, I do not believe I held a membership in any political party or election committee, though certain contributions may have

caused me to be listed as a "member" of the Massachusetts Republican Party or RNC, for example.

(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $50 or more during the past 5 years.

8/13/2003, $500 to George W. Bush
1/27/2004, $500 to George W. Bush
8/3/2004, $1,000 to George W. Bush

I am currently trying to determine if I made any donations in excess of $50 to the RNC or the Massachusetts Republican Party within the last five years, and I will supplement this answer if I determine that I did.

14. **Honors and awards:** List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.

Eagle Scout, 1987.
Konosioni Senior Honor Society (Colgate University's senior honor society), 1990.
Order of the Coif, 1994.
Massachusetts Super Lawyers "Rising Star," 2005.
Maroon Citation (Colgate University alumni award), 2006.

15. **Published writings:** Provide the Committee with two copies of any books, articles, reports, or other published materials which you have written.

I co-authored the chapter entitled "Securities Litigation" in the American Bar Association's *Annual Review of Developments in Business and Corporate Litigation 2005*, and worked specifically on §§ 22.3 and 22.4. Attached as *Exhibit A*.

I also co-wrote an article, entitled "The Landowner Defendants in Indian Land Claim Litigation: Hostages to History," in the *New England Law Review*, 37 New Eng. L. Rev. 585 (2003). Attached as *Exhibit B*.

16. **Speeches:**

(a) Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated. Provide copies of any testimony to Congress, or to any other legislative or administrative body.

(b) Provide a list of all speeches and testimony you have delivered in the past 10 years, except for those the text of which you are providing to the Committee.

Please provide a short description of the speech or testimony, its date of delivery, and the audience to whom you delivered it.

On April 18, 2006, I spoke at the NORTHCOM legal conference in Cheyenne Mountain, Colorado, entitled "A Perfect Storm: States, Federal Agencies & the Role of NORAD & USNORTHCOM in Disaster Response Operations," on DHS's role in disaster response. I gave a speech on the same topic at the Naval War College, Newport, Rhode Island during its 2006 International Law Conference. I did not prepare a written speech for these events.

On September 6, 2006, I gave brief remarks at the naturalization ceremony for 434 new U.S. citizens at Faneuil Hall, Boston. Remarks attached as *Exhibit C.*

On September 25, 2007, I spoke to the Real Estate Roundtable regarding private sector standards. I did not prepare a written speech for this event.

On September 28, 2007, I spoke to the ABA's Section of Environment, Energy and Resources annual meeting on a panel entitled "Homeland Security and Critical Infrastructure Protection: the Chemical Sector and Beyond." I did not prepare a written speech for this event.

I have not given any testimony to Congress.

17. **Selection:**

(a) Do you know why you were chosen for this nomination by the President?

I believe that I was nominated by the President because of Secretary Chertoff's favorable view of my counsel and leadership from October 2005 to the present, as well as my track record of success at the Department.

(b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

I served as Deputy General Counsel and Principal Deputy General Counsel from October 3, 2005 to February 6, 2007, and was in charge of the Office of the General Counsel, either as Acting General Counsel or Principal Deputy, from February 7, 2007 to the present. The role of the General Counsel is multi-faceted: it includes acting as counselor to the Secretary on the pressing matters that the Department faces every day, managing the legal functions of the Department, and most importantly making sure that the Secretary's and the President's homeland security policies are implemented lawfully, quickly, and efficiently. Moreover, the General Counsel represents the Department on myriad issues with other agencies and the White House on a regular basis, including (for example) working with the Department of Justice on the Department's litigation portfolio. The

General Counsel is also suited to promote the integration of the Department's components and agencies, because attorneys serve in almost every corner of the Department. My work in these areas since I joined the Department in October 2005—and especially since I began leading and managing the office in February 2007—is at the top of my list of qualifications. Additionally, I have substantial experience as a litigator and as a counselor to a wide range of clients during my years in private practice. My pre-government experience—including management of complex litigation, the supervision of large teams of lawyers, and the research and resolution of novel and thorny legal problems—is solid preparation for dealing with the issues that DHS confronts on a daily basis.

B. Employment Relationships

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

   I am presently employed by the Department. I severed all employment connections with Goodwin Procter LLP on September 30, 2005 in preparation for beginning my position as Deputy General Counsel. I still maintain two 401(k) accounts that I had while an associate and a partner at Goodwin Procter, but the firm does not make (and has never made) any contributions to those accounts.

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

   No.

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

   No.

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

   No.

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

   Yes, contingent always on the fact that I would be (and am currently) serving at the pleasure of the President.

6. Have you ever been asked by an employer to leave a job or otherwise left a job on a non-voluntary basis? If so, please explain.

No.

C. Potential Conflicts Of Interest

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

I have reviewed my interests, affiliations, and the potential for conflicts of interest with the Department's ethics official, both in relation to my existing duties as well as in connection with this nomination. Our ethics official has further discussed this with the U.S. Office of Government Ethics. I believe that the ethics agreement I have executed—which has been or will be provided to the Committee by our ethics official—lays out a plan for appropriately addressing any conflict that may arise. I am committed to observing the highest ethical standards, will be alert for the possibility of a conflict, and will work closely with the agency's ethics official to ensure that any potential conflict is identified and dealt with promptly and appropriately.

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

None.

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

Yes.

D. Legal Matters

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

No, with the exception of the issue described in 3, below.

2. Have you ever been investigated, arrested, charged or convicted (including pleas of guilty or nolo contendere) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, other than a minor traffic offense? If so, provide details.

   No.

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

   While I am generally aware that Goodwin Procter LLP has been a party in interest in administrative agency proceedings and civil litigation, I am not aware of all such instances.

   Regarding cases involving me personally, plaintiff Christopher Moore has filed complaints in both Massachusetts Superior Court and the Federal District Court for the District of Massachusetts against Goodwin Procter LLP and me alleging breach of fiduciary duty. In brief, Moore alleged that, while Goodwin Procter was representing him, the firm (through me) also represented a party adverse to him. All three cases (two in Massachusetts Superior Court, one in federal district court) have been dismissed; Moore has noticed an appeal of the dismissal of one of the state court actions. Relevant documents in these matters are attached as *Exhibit D*.

4. For responses to question 3, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

   None.

5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

E. FINANCIAL DATA

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

AFFIDAVIT

I, Gus P. Coldebella, being duly sworn, hereby state that I have read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Subscribed and sworn before me this 18th day of October, 2007.

Lydia Stampley
Notary Public

Lydia Stampley
Notary Public, District of Columbia
My Commission Expires 8/14/2010

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

October 30, 2007

The Honorable Joseph I. Lieberman
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Gus P. Coldebella, who has been nominated by President Bush for the position of General Counsel, Department of Homeland Security.

We have reviewed the report and have also obtained advice from the Department of Homeland Security concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is a letter dated October 16, 2007, from Mr. Coldebella to the agency's ethics official, outlining the steps Mr. Coldebella will take to avoid conflicts of interest. Unless a specific date has been agreed to, the nominee must fully comply within three months of his confirmation date with any action he agreed to take in his ethics agreement.

Based thereon, we believe that Mr. Coldebella is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

Marilyn L. Glynn
General Counsel

Enclosures

UNITED STATES SENATE

COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS

Pre-Hearing Questionnaire for the Nomination of Gus P. Coldebella to be General Counsel of the Department of Homeland Security

March 17, 2008

I. Nomination Process and Conflicts of Interest

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

   Answer: I believe that I was nominated by the President because of Secretary Chertoff's favorable view of my counsel and leadership from October 2005 to the present, as well as my track record of success at the department.

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

   Answer: No.

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

   Answer: I have substantial experience as a litigator and as a counselor to a wide range of clients during my years in private practice. My pre-government experience—including management of complex litigation, the supervision of large teams of lawyers, and the research and resolution of novel and thorny legal problems—is solid preparation for dealing with the issues that DHS confronts on a daily basis.

   Also, I served as deputy general counsel and principal deputy general counsel from October 3, 2005 to February 6, 2007, and led the Office of the General Counsel, either as acting general counsel or principal deputy, from February 7, 2007 to the present.

   The role of general counsel is multi-faceted: it includes acting as counselor to the Secretary on the pressing matters that the department faces every day, managing the legal functions of the department, and most importantly making sure that the laws passed by the Congress and the Secretary's and the President's homeland security policies are implemented lawfully, quickly, and efficiently. Moreover, the general counsel represents the department on myriad issues with other agencies and the White House on a regular basis, including (for example) working with the Department of Justice on the department's litigation portfolio. The general counsel is also suited to promote the

integration of the department's components and agencies, because attorneys serve in almost every corner of the department. My work in these areas since I joined the department in October 2005—and especially since I began leading and managing the office in February 2007—is at the top of my list of qualifications.

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

   Answer: No.

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

   Answer: I have reviewed my interests, affiliations, and the potential for conflicts of interest with the department's ethics official, both in relation to my existing duties as well as in connection with this nomination. Our ethics official has further discussed this with the Office of Government Ethics. I believe that the ethics agreement I have executed—which has been or will be provided to the committee by our ethics official—lays out a plan for appropriately addressing any conflict that may arise. I am committed to observing the highest ethical standards, will be alert for the possibility of a conflict, and will work closely with the agency's ethics official to ensure that any potential conflict is identified and dealt with promptly and appropriately.

   Even though the one-year bar has expired, I would decline to work on matters brought before the department by lawyers from Goodwin Procter LLP. Since I worked at the firm for eleven years, I believe that it might create an appearance of impropriety for me to engage on such matters. Even though OGC staff is aware of this, I have provided written instruction to the chief of staff to screen any such matters to one of the deputy general counsel.

6. **Have you ever been asked by an employer to leave a job or otherwise left a job on a non-voluntary basis? If so, please explain.**

   Answer: No.

II. Role and Responsibilities of General Counsel of DHS

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

   Answer: The Homeland Security Act designates the general counsel as the "chief legal officer of the Department." It is the general counsel's central task to provide complete, accurate, and timely legal advice—personally, or, more frequently, through his staff—on possible courses of action that the department is pursuing. Other roles of general counsel include advising the Secretary; managing the legal functions of the department; making sure that homeland security policies are implemented lawfully, quickly, and efficiently;

working to protect the rights and liberties of Americans who come into contact with the department; facilitating quick responses to congressional requests for information; and quickly resolving legal issues with other federal departments and agencies.

8. How do you view your role and relationship with respect to:

a. The Secretary of DHS, and

b. White House officials?

Answer: The general counsel's role and relationship with respect to the Secretary is as trusted adviser on legal matters. It has always been my view—both in government and in private practice—that lawyers are more effective when involved early in a plan or program, rather than when reviewing a near-final plan (or worse yet, when a plan is challenged in court). I believe the Secretary, an experienced lawyer, shares my view in this regard.

With regard to the general counsel's relationship with White House officials, the answer depends upon the particular official. For example, the general counsel is sometimes asked to discuss the department's legal authority to pursue a particular program in the context of an interagency meeting called by the Homeland Security Council or one of the other policy coordinating councils. Of course, the relationship with the ultimate White House official is constitutional: if confirmed, the general counsel serves at the pleasure of the President.

9. In your opinion, who is the client of the General Counsel of DHS?

Answer: The Department of Homeland Security itself is the "client." While the department operates through its personnel, the duty of the general counsel runs to the department and not to any particular individual. The general counsel also has a duty to preserve, protect, and defend the Constitution.

10. If the Secretary asked you to provide legal justification for a program or policy but you conclude that the program or policy likely would violate a statute or the U.S. Constitution, how would you advise the Secretary? Please describe in detail.

Answer: It is the responsibility—perhaps the most serious responsibility—of a general counsel to advise the department head if a proposed course of action would be in conflict with the Constitution or the laws of the United States. I also view it as the responsibility of a good general counsel to provide advice to the department head on whether it is possible to attain the goal in another way that does not conflict with the Constitution or applicable laws, or, if a legislative change is necessary, what that legislative change might be.

11. If you advised the Secretary that a program or policy was illegal or unconstitutional, and the Secretary decided to continue the program or policy, would you have an obligation to report your legal opinion:

a. To the President or his staff?

b. To the Attorney General?

c. To Congress?

Answer: It is difficult to imagine such a situation or discuss it in the abstract, because a general counsel's choices would depend on the facts. I am aware of no legal obligation to report a legal opinion to the President, the Attorney General, or to Congress in the circumstances described. Were a general counsel to advise a department head that a program or policy would violate the Constitution or would be illegal and should not be pursued, and were the department head to disregard that advice, the general counsel would have to consider various courses of action. Certainly, one to consider would be alerting the President, since it is ultimately the President's constitutional responsibility to take care that the laws be faithfully executed. One of the other possible courses of action—not mutually exclusive of any other—is resignation.

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

Answer: We have already discussed one of the most important responsibilities of a general counsel: advising the Secretary on the constitutionality and legality of the department's programs. Other important responsibilities include making sure the Office of the General Counsel is effective in providing correct, useful, and timely advice throughout the department, that the department is able to attract and retain high-quality attorneys to perform the department's legal work, and that the office's structure is equal to the tasks it is expected to accomplish. All of this is toward an important end: making sure that the rule of law is strong at the department.

One challenge to retention is that, at headquarters, we often ask our attorneys to put in extra time and work extra hard; and yet we offer the same compensation as other government positions that may be less grueling. As the department matures, I hope that the pressures we put on our headquarters attorneys abate—but I also believe that it is its own reward to work on some of the most cutting-edge legal issues in support of the most important mission of the federal government, and bright, motivated attorneys who are interested in that challenge always will be drawn to DHS.

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

Answer: My main operational objective during my tenure as general counsel would be to provide legal support to the Secretary in accomplishing his five goals, outlined to this committee in the Secretary's testimony of February 14, 2007. My main intradepartmental objective—in addition to making sure that the responsibilities mentioned above are carried out effectively—would be to further strengthen the rule of law at our young department. This can be done in various ways, including (i) through organizational adjustments, some of which are described below, making sure attorneys are not only available to address legal questions as they are raised, but strategically

placed throughout headquarters to "issue spot"; (ii) through written and other guidance to department leadership about particular legal issues or areas of concern; and (iii) through educational programs for lawyers and non-lawyers alike regarding the legal landscape, to name a few.

14. What are the highest priority legal issues that you will address if you become the General Counsel? What longer-term goals would you like to achieve?

Answer: In the short term, I would concentrate on various rulemaking initiatives. I would hope to facilitate the issuance of rules mandated by Congress and otherwise important to the Secretary's strategy, as well as to make more robust the department's ability to produce and issue high-quality rules.

In the slightly longer term, I feel that it is a responsibility of not just the general counsel, but every officer in charge of a component within the executive branch, to ensure that his or her organization is prepared for the upcoming presidential transition. This responsibility is heightened for components within DHS, because, as we have seen in both the train bombings in Spain and the attacks in London and Glasgow, a tactic used by our enemies is to attack during times of transition. Though this is a slightly longer-term goal, this office is already working on transition issues.

15. In the time you have worked in the DHS Office of the General Counsel, as Deputy General Counsel, Principal Deputy General Counsel, and most recently, Acting General Counsel, what do you consider your most significant accomplishments?

Answer: I would name four accomplishments that I consider to be significant: first, my part in the regulatory actions implementing Section 550 of the DHS FY 2007 Appropriations Act in the congressionally-mandated six-month time period; second, the initiation and continuation of a project that I initiated—the creation of an emergency authorities guide for the department's lawyers, so all of our lawyers have the basic tools to provide advice when the department confronts a hazard; third, the process of re-evaluating the structure of the office to better position it to meet the needs of the Secretary (a process that, as noted above, is not yet complete); and fourth, the promotion and training of excellent career attorneys, which will allow the next Secretary to have reliable legal advice on his or her first day.

16. We understand that the Office of General Counsel is currently or has recently reorganized its structure. Please provide the Committee with a current organization chart for the Office of General Counsel, and detailed information on all recent (since January 1, 2007) or proposed changes to the organization and structure of the Office of General Counsel.

Answer: As of this writing, the organizational adjustments that I am contemplating have not been rolled out, and have been discussed only with OGC's senior leaders. The plan is, however, nearly complete, and would:

- Establish an associate general counsel for immigration and a stand-alone immigration division. In this way, headquarters will continue to develop a team that can provide consistent leadership, guidance and expertise in this important and highly-specialized practice area.

- Establish an associate general counsel for regulatory affairs to manage and oversee the department's regulatory actions. This senior executive service-level lawyer would be responsible for ensuring that all regulations issued by the department comply with law and executive orders governing rulemaking actions. A stand-alone division recognizes its importance and provides visibility necessary to succeed.

- Establish an associate general counsel for operations and enforcement who will provide legal expertise on the operational issues facing the department—whether related to handling emergency response and recovery activities, international agreements and trade issues, or law enforcement activities undertaken by DHS components.

- Add to the associate general counsel for legal counsel's portfolio: legislation, litigation, special projects, and civil rights, civil liberties, and privacy. Placing these related areas of expertise in one division will enhance efficiency and consistency.

- Streamline the responsibilities of the associate general counsel for general law to focus on administrative, appropriations, employment, and procurement law.

- Establish within the office the new position of "assistant general counsel." Currently, those lawyers in headquarters who are not an associate general counsel or a deputy associate general counsel can only be an "attorney-adviser." The assistant general counsel position will report to the associate general counsel for the assigned division, and will offer attorney-advisers leadership and advancement opportunities.

- Establish cross-division and cross-component practice groups, to make sure that the department has the benefit of the finest legal advice wherever it may reside within our structure.

17. Please describe the relationship between the main DHS Office of General Counsel and component legal departments.

Answer: Each component legal department is led by a chief counsel or equivalent (e.g., the Coast Guard has a judge advocate general). The interaction between headquarters and the component legal departments includes regular bi-weekly meetings with the chiefs. These meetings facilitate information sharing, and allow me to receive input and provide direction to the chiefs on significant issues. Headquarters also reviews and approves bonuses for certain senior managers of the component legal departments.

One of my long-standing goals, dating from when I started at DHS, is visiting with as many of the department's lawyers as possible. While the demands of providing advice at headquarters makes this difficult, I have had the opportunity to address groups of lawyers

from ICE, USCIS, TSA, FEMA, and USCG during the last two years. My reason for doing so is to make clear the connectedness of every lawyer's mission to the Secretary's goals, and to communicate my vision and plans for the office.

a. Do you plan to make changes in the current structure or the relationship between the DHS headquarters Office of General Counsel and component legal departments?

Answer: No.

b. What steps will you take to ensure consistency of legal positions across the Department?

Answer: The process that the office has in place works well, and I would continue it. Though I have not calculated the ratio, I think it is fair to say that the vast majority of legal positions taken by the department are taken in the field and at the components, and are not of the type that would require headquarters-level coordination. When components have a divergent view of a particular authority, headquarters will step in to resolve that difference. Additionally, the chief counsel are required to notify headquarters of significant litigation, to allow coordination of legal positions.

We have also initiated a series of legal education programs, such as the employment law program hosted in Boston last year, and the intelligence law program this year, to make sure that lawyers around the department that practice in the same area—whether at headquarters or a component—have a similar basis for making legal determinations.

c. Are lawyers from the DHS headquarters Office of General Counsel or lawyers from FEMA's Office of Chief Counsel taking the lead on analyzing and advising on legal issues related to the implementation of the Post-Katrina Emergency Management and Reform Act of 2006 (P.L. 109-295)?

Answer: As a general rule, I rely on the component chiefs, including FEMA's, to advise component leadership on statutory obligations and to monitor compliance with congressional mandates, and I have left to FEMA the legal work associated with the Post-Katrina Emergency Management Reform Act. As a result of this question, I have asked FEMA for a briefing on compliance with PKEMRA, as well as a scorecard on accomplishing the initiatives mandated by Congress in that legislation.

In Question 65, you ask whether I will make available department personnel—including OGC personnel—to brief the committee on the execution of the department's responsibilities under the Implementing the Recommendations of the 9/11 Commission Act, and of course I agree to do so. I also would agree to have the appropriate FEMA personnel brief the committee on implementation of PKEMRA.

18. Has the Office of General Counsel developed a transition plan for the changeover to the next Administration in January 2009, as part of broader DHS transition planning activities? If not, do you intend to develop one?

Answer: My office has been actively engaged in the development of succession orders and transition planning for the department. Our own plan is being developed, and I have asked for a working group of attorneys to be appointed to develop a plan for me to review in the coming months.

III. Legal Background and Experience

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

Answer: I have been a member of various bar associations, including the ABA, the Massachusetts Bar Association, and the Boston Bar Association, though I believe my memberships in all three have ended. I have also been a member of the Federalist Society from approximately 1991 to the present.

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

Answer: I have been admitted to the bars of the Massachusetts Supreme Judicial Court (since December 2004), the U.S. District Court for the District of Massachusetts, the U.S. Courts of Appeals for the First and Second Circuits, and the U.S. Supreme Court. I am aware of no lapses in these admissions. I have also been admitted to various state and federal courts *pro hac vice*.

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

Answer: Since graduation from law school, I have held the following legal positions:

- Associate, Litigation Department, Goodwin Procter LLP, Boston, MA. September 1994 to September 2002.
- Special Assistant District Attorney, Middlesex Co. District Attorney's Office, Cambridge, MA. While still employed by Goodwin Procter, I was selected to serve as a special assistant district attorney in Cambridge, MA. 1997.
- Partner, Litigation Department, Goodwin Procter LLP, Boston, MA. October 2002 to September 2005.
- Department of Homeland Security, Office of the General Counsel. Served as deputy general counsel, principal deputy general counsel, and acting general counsel. October 3, 2005 to present.

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

Answer: Among the highlights of my career prior to my government service are these:

- I have represented publicly traded companies and their directors and officers in class action litigation involving allegations of securities fraud, and in particular alleged violations of U.S. GAAP. I have successfully argued that such claims should be dismissed. *See, e.g.*, *Baron* v. *Smith*, 285 F. Supp. 2d 96 (D. Mass. 2003), *aff'd*, 380 F.3d 49 (1st Cir. 2004).

- I have also represented individuals and publicly traded companies in SEC and stock market investigations regarding alleged insider trading, accounting improprieties and other matters. I have successfully defended litigation involving clients' merger and acquisition transactions, and have also represented private equity funds in disputes arising from their investment activity. I have conducted investigations of alleged breaches of fiduciary duties on behalf of special committees of boards of directors.

- In addition, I have successfully represented classes of thousands of defendant landowners—in claims seeking their ejectment from the land—in ancient Indian land claims. In one case, I successfully argued to the district court that ejectment should not be a remedy, and to the Second Circuit that the land claim should be dismissed in its entirety. *See Cayuga Indian Nation* v. *Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 2021 (2006). In another, I successfully argued to both the trial court and the Second Circuit that summary judgment should be granted because the land claimed by the plaintiffs was not theirs at the time of the challenged transaction in 1815. *See Seneca Nation of Indians* v. *State of New York*, 206 F. Supp. 2d 448 (W.D.N.Y. 2002), *aff'd*, 383 F.3d 45 (2d Cir. 2004). I also submitted an *amicus curiae* brief on behalf of the prevailing party in *City of Sherrill* v. *Oneida Indian Nation*, an 8-1 decision of the U.S. Supreme Court.

- I engaged in pro bono activities while at Goodwin Procter, including representing indigent parties facing eviction in the Massachusetts Housing Court, a musician in a dispute with her former producer, and other matters.

- As a special assistant district attorney, I prosecuted all manner phases of criminal actions in Cambridge District Court including assault and battery, drunk driving, larceny and drug crimes, including six jury trials and dozens of bench trials.

23. You disclosed in your biographical questionnaire that plaintiff Christopher Moore filed complaints in Massachusetts Superior Court and the Federal District Court for the District of Massachusetts alleging breach of fiduciary duty against Goodwin Procter and you. The state lawsuits were dismissed for lack of service of process and the federal lawsuit was dismissed for lack of subject matter jurisdiction. Please provide information about the factual allegations contained in Mr. Moore's complaints.

a. **Mr. Moore's complaints allege that he retained legal services from Goodwin Procter. Is that correct?**

b. **If so, please describe the scope of the representation and when it began.**

c. **If not, please describe any contact that Mr. Moore had with you or other Goodwin Procter attorneys prior to his asserting claims for breach of fiduciary duty.**

d. **Mr. Moore's complaints allege that he was informed after retaining Goodwin Procter's services that the firm represented a party adverse to Mr. Moore. Is that correct? If so, please explain in detail how that conflict of interest arose and what steps Goodwin Procter took to rectify it.**

Answer: While the actions have been dismissed at the trial court level, and his appeals seem not to have been perfected, the plaintiff has in the past availed himself of different venues to bring his claims. As the facts are still the subject of potential litigation, I would prefer to communicate with the committee about this matter in a different forum.

IV. Policy Questions

General Legal Issues

24. **What role, if any, do Presidential signing statements play in your interpretation and implementation of legislation?**

Answer: On different occasions, and for different statutes, presidential signing statements have transmitted different types of information. Some signing statements have expressed support for the legislation the President is signing; some have criticized the legislation; some have given instructions on how the executive branch must interpret the legislation; and some have announced the President's view on the legislation's constitutionality.

Article II of the Constitution vests the President with "the executive Power," and, with it, the constitutional authority to supervise and control the activity of subordinate officials in the executive branch. To the extent a signing statement executed by the President presents a determination as to a statute's interpretation or constitutionality, all executive branch officials should execute the law according to those determinations.

25. **What role have the Presidential signing statements on the statutes below played in the Office of General Counsel's interpretation and implementation of these laws in the time you have worked in that office:**

a. **The Homeland Security Act of 2002 (P.L. 107-296)?**

b. **The SAFE Port Act of 2006 (P.L. 109-347)?**

c. **The Department of Homeland Security Appropriations Act for 2007 (P.L. 109-295), including Title VI, the Post-Katrina Emergency Management Reform Act of 2006?**

Answer: As mentioned above, subordinate executive branch officials are bound to follow the President's lead in interpreting statutes, if the President has expressed a view. Even given this, I do not believe that the signing statements you identified have led the Office of the General Counsel to instruct department officials to disregard any provision of those statutes.

26. **The signing statement for Department of Homeland Security Appropriations Act, 2007 (P.L. 109-295) indicated that the President disagreed with the provision (Sec. 611) that establishes that the Administrator of FEMA shall be appointed among individuals who have a "demonstrated ability in and knowledge of emergency management and homeland security" and "not less than 5 years of executive leadership and management experience in the public or private sector." The signing statement indicates that the legislation "purports to limit the qualifications of the pool of persons from whom the President may select the appointee in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office."**

a. **Given that the signing statement contradicts the express provisions of the statute, what weight would you, as General Counsel, give it in interpreting and implementing Section 611 of the Act?**

Answer: I do not see how the statement contradicts the express provisions of the statute. Instead, it describes what the statute says (i.e., it limits the pool from which the President may select appointees), and then it instructs the executive branch to construe this provision in a manner consistent with the Constitution. Of course, in this case, the instruction is to the President himself, since it deals with appointments, and therefore it is unlikely that Section 611 will be implemented by the department or the Secretary.

b. **How do you interpret Section 611's requirement that the Administrator of FEMA have a "demonstrated ability in and knowledge of emergency management and homeland security" and "not less than 5 years executive leadership and management experience in the public or private sector?"**

Answer: Were I asked to interpret the requirement with regard to a specific person and his or her qualifications, I do not think it would be challenging to provide advice on whether such a person met the statutory standard. But it is difficult to do so in the abstract.

c. **Do you believe that the requirements in Section 611 are legally binding?**

Answer: This question raises another, which is: binding on whom? In some future situation, or some future administration, the President may seek to nominate someone who does not meet the qualifications listed in § 611. Is the President, by § 611, legally bound not to send that nomination to the Senate for its advice and consent? If the

President sent the nomination, may the Senate withhold consent for that nominee, to enforce the provisions of § 611? Would the Senate be bound to withhold consent because of § 611? The point is that, even if the President nominated a person who did not meet the § 611 standard, the constitutional structure puts § 611's enforcement squarely within the Senate's hands.

d. Do you personally agree with the view expressed in the excerpted portion of the signing statement?

Answer: Without having studied the pool of people best qualified to serve as the administrator of FEMA—and without having any occasion to do so, since the office is occupied—I have no personal opinion on whether § 611 rules out a "large portion of the persons best qualified by experience and knowledge to fill the office." I do agree with the statement that the statute "purports to limit the qualifications of the pool of persons from whom the President may select the appointee," which is simply a description of § 611.

e. Do you believe that an individual who lacks the prerequisite criteria specified in Section 611 of P.L. 109-295 can legally serve as Administrator of FEMA?

Answer: If that person were nominated by the President and confirmed by the Senate, for example, yes.

f. How would you advise the Secretary of Homeland Security if he wished to recommend to the President a nominee for FEMA Administrator who did not meet the criteria specified in Section 611?

Answer: While difficult to talk about advice I might give in the future, especially without knowing key facts such as the nominee's qualifications, I likely would discuss the relevant legal-constitutional landscape with the Secretary.

27. Section 103 of the Homeland Security Act of 2002 (P.L. 107-296) authorizes the appointment, by and with the advice and consent of the Senate, of "not more than 12 Assistant Secretaries." Section 201 of the Act also authorizes the appointment by the President of an Assistant Secretary for Information Analysis and an Assistant Secretary for Infrastructure Protection. The Appointments Clause of the United States Constitution requires the advice and consent of the Senate for all officers of the United States, except that it permits Congress to vest by law "the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Please identify all of the current Assistant Secretaries at the Department of Homeland Security, indicating which are appointed by and with the consent of the Senate, and which are appointed directly by the President or the Secretary, without Senate confirmation.

Answer: Please see the attached chart, which lists the current assistant secretaries and the type of position each one holds.

a. **Under what authority or authorities is the President or the Secretary allowed to appoint individuals at the Assistant Secretary level to positions that do not require Senate confirmation? Please answer this question with respect to all current Assistant Secretaries within the Department who have not been confirmed by the Senate, and other Assistant Secretary positions that do not require Senate confirmation.**

Answer: As pointed out in the question, Congress vested in the President appointment authority of the Assistant Secretary of Infrastructure Protection and the former Assistant Secretary for Intelligence and Analysis. Congress's power to vest appointment authority of inferior officers in the President, the heads of departments, or the federal courts is found in the Appointments Clause, and therefore I believe Congress was authorized to do so.

Certain non-PAS assistant secretary positions were created by the department, prior to my becoming acting general counsel, and I believe prior to my arrival at the department. While I did not opine on them, one can see several legal bases for the creation and selection of personnel for such positions. Congress has given the Secretary the authority to "delegate any of the Secretary's functions to any officer, employee, or organizational unit of the Department." *See* Homeland Security Act of 2002 (P.L. 107-296), § 102(b)(1). Even outside the Act, department heads have broad authority to perform their missions, including authority over internal agency administration. 5 U.S.C. § 301. Department heads may exercise this authority by taking final action on matters pertaining to the employment, direction, and general administration of personnel within the agency, including hiring employees, creating new positions and assigning position titles. 5 U.S.C. § 302.

b. **How do you interpret the numerical limitation on Assistant Secretaries contained in Section 103 of the Homeland Security Act?**

Answer: I believe that the department has interpreted § 103(a)(9) to allow the department to create not more than twelve PAS assistant secretary positions.

c. **What interpretation of Section 103 justifies the conclusion that Congress intended to limit Senate-confirmed Assistant Secretaries but to permit an unlimited number of Assistant Secretaries not Senate-confirmed or explicitly authorized in legislation?**

Answer: By its terms, § 103 authorizes—and limits the number of—departmentally-created PAS assistant secretaries only. It is interpretation of other authorities outside of § 103(a)(9), which are discussed above, that I believe were the basis for the department's decision to create and name additional non-PAS assistant secretaries.

d. **Describe the duties of each Assistant Secretary position that is not appointed pursuant to Section 103 or 201 of the Homeland Security Act or pursuant to another statutory provision explicitly establishing the position, and for each one indicate whether the Assistant Secretary position involves the exercise of**

significant authority and discretion. For each position, indicate whether the position should be characterized under the language of the Appointments Clause as an "officer" (also referred to in case law as a "principal officer"), "an inferior officer", or an employee. Base your answers on the analysis contained in relevant legal precedents such as Buckley v. Valeo, 424 U.S. 1 (1976) ("any appointee exercising significant authority pursuant to the laws of the United States . . . must . . . be appointed in the manner prescribed by [the Appointments Clause]"; Freytag v. Commissioner, 501 U.S. 868 (1991) (special trial judges of the Tax Court are officers rather than employees because they "exercise significant discretion", among other reasons); Burnap v. United States, 252 U.S. 512, 516-19 (1920) (landscape architect in the Office of Public Buildings and Grounds was an employee, not an officer); Second Deputy Comptroller of the Currency – Appointment, 26 Op. Att'y Gen. 627, 628 (1908) (Deputy Comptroller of the Currency was "manifestly an officer of the United States" rather than an employee).

Answer: The attached chart contains a description of each position. As you know, the question of whether an official is an officer, an inferior officer, or an employee of the United States often arises in litigation about the authority of that official to act. Each of the officials you have asked this question about is acting on behalf of the department every day, and opining in a way that might cause his or her authority to be questioned would not be prudent. Additionally, the cases—as well as the opinions of the Department of Justice addressing this issue—employ a multi-factor analysis regarding the placement of officials in the constitutional constellation. I will say, however, that, after reviewing the case law, it appears to me that there was a sound legal basis for the creation and filling of each of the positions mentioned on the attachment.

Congressional Oversight

28. Other than a valid claim of executive privilege, on what bases, if any, do you believe the Department may be entitled to withhold information or documents from Congress? For each such basis, please explain the legal authority for your view.

Answer: Outside of a claim of executive privilege, it seems to me that it should always be possible to reach a solution that meets the needs of the executive branch and the legislative branch regarding requests from Congress for information, documents, and witnesses from the department.

29. Under what circumstances, if any, do you believe an official or employee of the Department may decline to testify before a Congressional Committee? For each such circumstance, please explain the legal basis for your conclusion.

Answer: I am committed to cooperating with Congress to satisfy its requests for witnesses from the department—as well as requests for information and documents—in ways that take into account both executive and legislative branch concerns.

30. When a request is made by Congress, including a duly constituted Committee of Congress, to the Department of Homeland Security, what role does the Office of General Counsel typically play in vetting or reviewing this request, and determining the response to it?

Answer: The Secretary has said to this and other committees of Congress that congressional oversight is important, and responsiveness to congressional requests is a departmental priority. The Office of the General Counsel assists the department in meeting this priority. The department estimates that it received approximately 6,500 congressional requests in 2007 alone, and this total does not include the numerous informal requests from members and staff. Given the volume of congressional requests to the department, as well as our ordinary practice, it is my impression that the office typically plays a minor role, if any role at all, in most letters requesting information, with one exception: lawyers will frequently review the Secretary's correspondence to Congress to make sure it accurately states the law, and is timely and complete. The department has set a general goal of a 30-day turn-around for replies to congressional correspondence; a goal which I think is met in most cases. For certain requests for information, documents, briefings, and witnesses, OGC lawyers' involvement may include reviewing documents for sensitivities such as those related to ongoing investigations or proceedings, or personal privacy, intelligence or law-enforcement information; to ensure that such information is appropriately marked and handled, including noting for the committee's information when sensitive information—which may require special handling, such as Privacy Act information—is included; and ensuring that disclosures are consistent and comprehensive.

a. What criteria do the Office of General Counsel use to decide whether and how to respond to this request?

Answer: One overarching interest of the Office of the General Counsel and the entire department is in responding to congressional requests as quickly and fully as possible in a way that addresses both legislative branch and executive branch concerns. Of course, every congressional request should be responded to—so there should not be a question of "whether."

b. Will you commit to providing timely responses to requests from Congress, and where there is an explainable cause for delay, provide information as to expectations for providing this information?

Answer: Yes.

31. In your letter to Rep. Bennie Thompson, Chairman of the House Homeland Security Committee, dated August 29, 2007, you declined to testify in the hearing entitled "Turning Spy Satellites on the Homeland: the Privacy and Civil Liberties Implications of the National Applications Office," which was held on September 6, 2007. In your letter, you wrote:

"The Office of the General Counsel is ultimately responsible for ensuring that DHS activities comply with all legal requirements. In carrying out these duties, we routinely provide legal advice and counsel to officials at all levels of the organization. These communications are sensitive, as they are attorney-client communications. In addition, it is our duty to advise and provide counsel to Department witnesses at hearings before Congress. My participation as a hearing witness would prevent me or limit me from carrying out this responsibility. For these reasons, members of the Office of General Counsel do not ordinarily provide testimony."

a. Please describe in detail the basis for your decision not to testify.

b. There have been numerous instances in the past several years where General Counsels of other federal agencies have testified before Congress on policy matters. For example, the General Counsel of the Department of Energy, David Hill, testified before the Senate Committee on Energy and Natural Resources on May 22, 2007 to discuss legislation pending before the Committee. The General Counsel of the Department of Transportation, Jeffrey Rosen, has testified before Congressional committees no less than six times since 2005. And the General Counsel of the Department of Defense, William J. Haynes II, testified before the Senate Armed Services Committee in December 2001 on detention policies. What, if anything, do you believe legally distinguishes your requested testimony before the House Homeland Security Committee from the testimony given by other agency general counsels?

c. If the House Homeland Security Committee had issued a subpoena for your testimony at the September 6, 2007 hearing, do you believe you would have been legally obligated to testify? If not, please provide the legal basis for your conclusion.

d. Please describe, and provide the legal basis for, those circumstances where you believe the General Counsel, or Acting General Counsel, of the Department of Homeland Security may appropriately decline to testify before Congress?

e. Please provide the legal basis for your assertion that your communications with officials at DHS are considered to be "attorney-client communications." Do you believe that such purported "attorney-client communications" are exempt from disclosure to Congress? If so, please provide the legal basis for your conclusion.

f. Did you provide information to the House Homeland Security Committee with respect to the role and opinions of the Office of General Counsel vis-à-vis the establishment of the National Applications Office in any other forum?

Answer: My letter to Chairman Thompson was written and sent based the recommendation of the Chairman's staff, after a telephone conversation in which I expressed some reluctance to testify because of the reasons stated in the letter. The staff's recommendation to me was to write a letter to the Chairman explaining the reasons that I was reluctant to testify. After the letter was sent, neither Chairman Thompson nor

his staff communicated to me that the Chairman wanted me to testify notwithstanding the concerns expressed in my letter; in fact, I heard nothing about my letter until Chairman Thompson's opening statement at the hearing. During the telephone conversation with staff, I likely mentioned OGC's role in the development of the National Applications Office.

As subpart *c* of your question makes clear, there was not a subpoena for my testimony. Therefore—as with all informal relations with the legislative branch—we engaged in a discussion with the committee about satisfying its aims. It is unlikely that we would have reached the point where the Chairman would have issued a subpoena, since the purpose of my letter, as well as the discussions with the Chairman's staff, was to engage in that discussion. Given this, I am not aware of any difference, legal or otherwise, between this request and the requests that likely preceded the testimony of Mr. Hill, Mr. Rosen, and Mr. Haynes cited in your question, though I did not research the circumstances of their testimony.

The correspondence refers to "attorney-client communications" not as an assertion of any sort, but as a fact. Again, since the Committee did not issue a subpoena—in fact, the purpose of the letter was to avoid such an outcome, and instead to engage with the Chairman about what would be acceptable—the issue of what testimony would or would not have been legally permissible did not arise.

Hurricane Katrina Investigation

32. You joined the Department as Deputy General Counsel on October 3, 2005, shortly after the Senate Homeland Security and Governmental Affairs Committee (hereafter "the Committee") began its investigation into the failed response to Hurricane Katrina. Describe your role in DHS's response to the Committee's investigation. What were your responsibilities?

Answer: I worked with the general counsel to help respond to the committee's requests, as well as to the requests of the other congressional committees inquiring into Hurricane Katrina. This involved establishing a task force to produce documents as quickly as possible to the committee, attempting to produce witnesses—many of whom were still responding to Katrina away from Washington, D.C.—in the timeframe requested by the committee, and other tasks.

33. On September 28, 2005, the Committee sent four letters to the Department of Homeland Security and its components requesting documents and information to assist the Committee in its investigation of the Nation's preparedness for and response to Hurricane Katrina: to the Acting Under Secretary for Emergency Preparedness and Response (concerning FEMA materials), to the Commandant of the Coast Guard, to the Assistant Secretary for Infrastructure Protection (concerning materials related to the National Communications System), and to Secretary Chertoff (concerning materials for all remaining parts of the Department, including DHS headquarters). Please describe your role in responding to the requests in each of these letters.

Answer: My main role with regard to these requests was helping the general counsel and the rest of the department respond to them in a timely way. The September 28, 2005 letter to the Secretary requested all documents about Hurricane Katrina held by anyone in the department. Production of all of those documents all at once would have been a mammoth—actually, an impossible—undertaking. And given that many employees were still responding to Hurricane Katrina in Louisiana, Mississippi, and elsewhere, access to those employees and their documents was made even more difficult. Committee staff recognized the size and difficulty of the request, and worked with us to prioritize. One way in which the committee did so was to ask for documents associated with the witnesses that the committee sought to interview, which in most cases allowed the committee to have and review those documents before the interview took place. (I believe we had a good rate of success at this.) By the end of the committee's work, DHS had produced more than 350,000 pages of documents and facilitated the interview of more than 70 witnesses.

34. Three months after the Committee sent the four letters described in Question 33, DHS had provided the Committee with a substantial number of documents in response to only one of the letters, the one to the Acting Under Secretary for Emergency Preparedness and Response seeking FEMA documents. In particular, no documents at all had been produced in response to the letter sent to the Assistant Secretary for Infrastructure Protection for National Communications System materials, and only a small number of documents were produced in response to the letter to Secretary for the remainder of the Department. Moreover, no reason or explanation had been offered by the Department for the failure to provide the materials requested from outside FEMA. On December 30, 2005, Senators Collins and Lieberman sent a follow-up letter to Secretary Chertoff expressing concern that the Committee did not have "the documents, information, and access to Department personnel that we need to conduct a thorough and timely investigation," and requesting his assistance in ensuring that the Department "promptly and fully" complied with the Committee's document and information requests. With an intensive period of hearings slated to take place soon thereafter, and in an effort to jump-start the process of production, the letter also included a list of 21 particularly critical document requests, as well as a set of information requests, that the Committee sought access to on a "priority basis" in the two weeks that followed.

Please describe your role in responding to the "priority" document and information requests in the Committee's December 30, 2005 letter.

Answer: I assisted the general counsel in responding to these requests, including by directing the task force to concentrate on the production of documents and the scheduling of witnesses listed, and writing responses to the staff. In reviewing the correspondence between the committee and the department, I was reminded of the massive amount of work that was done between the date of the letter—December 30, 2005—and our responses to the committee on January 11 and January 30, 2006, which I can provide to the committee if necessary. They demonstrate a good-faith, intensive, quick effort to produce the documents and make available the witnesses that the committee prioritized.

They also demonstrate our desire to communicate fully to the committee about, for example, various documents that we were not able to produce.

35. **As Senators Lieberman, Levin, Akaka, Carper, Lautenberg, and Pryor pointed out in their additional views to "Hurricane Katrina: A National Still Unprepared," the Committee's report on the findings of its investigation into the response to Hurricane Katrina, "[e]ven when DHS made witnesses available, it often did so under conditions that limited the effectiveness of the interview." These conditions included short notice of witness availability, a failure in some cases to produce a witness' emails or other documents before the interview, and limiting the length of interviews for DHS witnesses other than those from the FEMA and Coast Guard components.**

    a. **What role did you play in determining which individuals from the Department would be made available for interviews by the Committee, when they would be made available, and the conditions under which they would be made available?**

    b. **What direction, if any, did you give to others in the Office of the General Counsel and in the component legal offices concerning which individuals from the Department should be made available for interviews by the Committee, when they should be made available, and the conditions under which they should be made available?**

Answer: One note at the outset: As stated in the additional views of then-Chairman Collins and Senators Stevens, Coleman, Coburn, Bennett, and Domenici to *Hurricane Katrina: A Nation Still Unprepared*, the committee engaged in an "extraordinary undertaking," holding 22 hearings with 85 witnesses and interviewing more than 325 individuals. A substantial portion of the information considered by the committee was provided by DHS, and the process of producing over 350,000 pages of documents and making available 70 witnesses over a short period of time—especially for a department managing the post-hurricane recovery—was similarly extraordinary.

I worked with committee staff to determine the committee's priority witnesses and to facilitate their appearance. This took DHS personnel and committee staff to New Orleans, Austin, Chicago, and other places, to interview DHS employees still managing the response and recovery effort. While I do not recall which if any interviews were time-limited, I would suggest that any such limitation was based on the witness's need to get back to work. Regarding the concern about witness availability, committee staff interviewed Deputy Secretary Michael Jackson, John Wood, the DHS chief of staff, and Admiral Thad Allen. The committee itself had Secretary Chertoff testify. I believe that the committee's access to the department's leadership was very good.

While I do remember that there may have been an occasion on which we were not able to produce a witness's documents before the interview, that was a rare occurrence—it was part of our process to concentrate on producing the documents of those people who the committee had designated as priority witnesses. In assisting the general counsel in doing these things, I am sure that I gave some direction on which lawyer should attend

committee interviews of witnesses, and communicated with them on how to handle testimony about sensitive communications, which I discuss in the answers to the next few questions.

36. What was your role in developing positions on any objections made during interviews of DHS employees conducted by Committee staff?

Answer: I believe we put very few limitations on the scope of witness testimony. One, discussed in my answer to Question 37, regards testimony about witness preparation, and another, discussed in Questions 38 and 39, regards testimony about communications with certain White House officials. I believe I helped the general counsel in developing these positions, and likely communicated with our attorneys about the positions once they were developed.

37. In an interview of one witness during the Committee's investigation of Hurricane Katrina, you refused to let a witness answer questions regarding conversations he had had with DHS attorneys preparing him for his interview, asserting attorney-client privilege. (See transcript of Committee staff interview with Marty Bahamonde, October 7, 2005, at 13-18, Attachment 1).

a. Why did you refuse to let Bahamonde answer that question?

Answer: That interview took place on October 7, which was my fifth day at DHS. I was surprised that at the outset of the interview, the staffer attempted to question the witness about his discussions with the department's lawyers rather than about his recollections of the hurricane, which he witnessed from inside New Orleans. Even so, I made a good-faith attempt to accommodate the committee's desire for information by discussing the parameters of Mr. Bahamonde's preparation on the record.

b. What was the legal authority for making this objection?

Answer: Given the fact we were in an informal interview, the question of legal authority—i.e., would a communication between a department employee and a department lawyer be protected—never arose. Instead, I set a boundary, one which I expressed at the time on the record I would discuss with the committee if it so desired, as part of the inter-branch discussion on the parameters of the inquiry. (I do not believe any follow-up on this issue was ever requested by the committee.) As already noted, we discussed on the record Mr. Bahamonde's preparation.

More generally, however, it is beyond dispute that inquiries about communications with lawyers have an effect on whether people will seek legal advice in the future, and whether, if they do, they will be as open, honest, and complete in their discussions as they need to be to receive the best advice. This applies to government employees just as it does to individuals and corporate officers, and, as the deputy general counsel, I had and still have an interest in encouraging DHS employees to consult with lawyers to make sure their proposed courses of action are lawful.

38. **In the January 19, 2006 the Committee interview of Matthew Broderick, then Director of DHS's Homeland Security Operations Center, you said that you would not allow Broderick to talk about certain conversations with certain White House officials that might be confidential, based on instructions you had received from the White House. You, however, would not discuss on the record from whom you got these instructions and precisely what the instructions were. (See transcript of Committee staff interview with Matthew Broderick, at pp. 51-54, Attachment 2).**

a. From whom did you receive such instructions?

Answer: In this interview, I implemented what had been discussed between DHS and lawyers at the White House: that witnesses would answer questions about the substance of communications on factual and operational issues between the witness and White House personnel, but that, if the White House personnel were of such a high level that the communication might have executive branch confidentiality interests attached to it, we would instruct the witness not to answer. Of course, any instruction not to answer could have been the subject of additional discussions between the committee and the executive branch.

As is clear from my comments on the record, I thought that lawyers from the White House had discussed this with committee staff, and while staff said on the record that they had not agreed with the arrangement that I described, I believe that they had already communicated with White House lawyers about it.

b. What precisely were the instructions?

Answer: The arrangement was what I described in the answer to subpart *a*, as well as during the Broderick interview: "the witness can speak about conversation[s] that he had with low-level personnel at the White House on factual matters and operational matters."

c. Why wouldn't you discuss your objection on the record during the interview in order to explain your objection?

Answer: I clearly explained my instruction on the record. I said that "the witness can speak about conversation[s] that he had with low-level personnel at the White House on factual matters and operational matters."

39. **In the Committee's February 27, 2006 interview of John Wood, you refused to let Wood answer questions about the substance of his conversation with Brian Hook, a White House employee. (See transcript of Committee staff interview with John Wood, at pp. 116-117, Attachment 3).**

a. Why did you refuse to let Wood answer this question?

Answer: I believe it was because of the arrangement I described in my answer to Question 38.

b. What was the legal authority for refusing to let Wood answer the question?

Answer: Given the fact we were in an informal interview, the legal question of whether a privilege could be invoked to protect the inquired-about communications never arose. Instead, I was implementing what we believed to be a good, common-sense accommodation to allow witnesses to testify broadly, while preserving the executive branch's prerogative to protect certain information. If the legislative branch had pressed for an answer to this or the small number of other questions that were not answered on these grounds, I imagine the general counsel and lawyers from the White House would have discussed this further with the committee.

c. Who, if anyone, instructed you to make such objection?

Answer: Please see response to Question 38*a*.

d. Do you believe there was a valid legal authority to instruct Wood to not answer the question? Why or why not?

Answer: Yes, for the reasons stated above.

40. What role did the Office of General Counsel play in the consideration of whether, when, and under what circumstances to test for formaldehyde in FEMA provided travel trailers, mobile homes, and park models, what to do in response to the results of such tests, or consideration of any other issues related to formaldehyde testing in FEMA provided travel trailers, mobile homes, and park models? What role did you play in consideration of these issues?

Answer: My understanding is that, when questions about formaldehyde in emergency housing provided by FEMA first arose, FEMA's recovery operations staff addressed the issue, and lawyers in FEMA's chief counsel's office provided legal advice. Documents produced to Congress evince discussions within FEMA that touched upon future or ongoing litigation involving formaldehyde in FEMA emergency housing. It is my understanding that neither headquarters OGC nor I personally was involved in, or aware of, such discussions at the time.

OGC was involved with the issue of formaldehyde in a number of ways more recently, including the following: I asked headquarters lawyers to assist FEMA in the production of documents to the House Oversight Committee and to examine allegations made during that committee's investigation. At around the same time, I wrote a note to all department lawyers in response to a piece in the *Washington Post* regarding the advice that a FEMA attorney allegedly gave regarding formaldehyde testing. Additionally, OGC was consulted in planning for next steps in response to the recent results of the Centers for Disease Control's testing of trailers and mobile homes.

Government Accountability Office (GAO) Access

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

Answer: Yes. I view it as a role of a general counsel to encourage department leadership to make sure they are responsive to GAO, and to facilitate speedy responses to congressional requests.

42. What specific steps will you take, or have you taken, to ensure that GAO receives access to the information and agency officials it needs to carry out reviews of DHS programs and activities, and to ensure that information is provided in a timely manner?

Answer: I believe that the relationship between the department and GAO is good, and has gotten better. The comptroller general recently testified that access to departmental information has improved due to discussions between GAO and DHS over the past year. I plan to continue this productive dialogue with the GAO.

One example of this is that I recently called the GAO's general counsel to discuss how DHS is planning on complying with the statutory requirement to revise the department's guidance on GAO access. Among other things, this guidance will provide for expedited timeframes to provide GAO with information and interviews and a streamlined review process for GAO requests. We will consult with GAO before issuing such guidance, and those discussions have already begun.

43. Title I of the Department of Homeland Security Appropriations Act of 2008 (included as Division E of the Consolidated Appropriations Act, 2008, P.L. 110-161) requires that, as a condition of receiving certain funds, the Department must revise its guidance with respect to relations with GAO to expedite timeframes for access to records and for interviews and to significantly streamline the review process for documents and interview requests. Has Department guidance been revised in accordance with this provision? If so, please provide the Committee with the revised guidance. If not, please indicate when the revised guidance will be issued.

Answer: I have discussed the revised guidance with GAO's general counsel, my staff and his have spoken, and I anticipate that the revised guidance will be issued shortly.

DHS Inspector General

44. What has been your role in decisions regarding granting, denying, or delaying the DHS Office of Inspector General's access to DHS documents?

Answer: As with the GAO, the inspector general recently testified about the department and improvements in access made during the last year. During the same hearing mentioned in the last question, the inspector general testified that cooperation has improved "noticeably," and access during this past year has been "outstanding."

The department routinely makes its documents available to Office of the Inspector General without any involvement by headquarters OGC. For this reason, I believe that in nearly all cases our office has had no role in decisions about which documents are provided to the Office of the Inspector General. And I have never made a decision to deny or delay access to documents to the inspector general. Instead, I would suggest that

I have done just the opposite: I discuss with the inspector general, during our periodic meetings, how I can help his office gain better access to information.

45. At the House Homeland Security Committee hearing on April 25, 2007, there was a discussion of a letter that the DHS Inspector General had drafted for Secretary Chertoff in July 2006 to send to all DHS employees, outlining their responsibilities with respect to interactions with the DHS Inspector General. As of the date of the hearing, nine months after the letter was drafted, it had not yet been distributed, and the record of the hearing indicates that the Office of General Counsel was the bottleneck in moving forward with this letter. At the hearing, Under Secretary for Management Paul Schneider said:

"From what I understand, and when I became aware of this letter a couple of days ago, my question was: Who actually saw it? I don't know for a fact that the Deputy Secretary actually saw it. I know for a fact that the General Counsel saw it. Whether it ever got to the Deputy Secretary or Secretary with or without the General Counsel's comments, I don't know. I didn't ask him, frankly."

Later in this same exchange, Schneider said:

"Well, first of all, I am not aware of any formal response to this draft letter. I am also not aware of whether it was handed to the general counsel or if it was formally transmitted, or whether or not they had any discussions about what the potential concerns with what was in here. So yes, sir, should he have perhaps given him a formal, "Look, I have issues with A, B, and C. Let's talk about it?" Probably."

a. When were you first aware of this draft letter from the DHS Inspector General to Secretary Chertoff?

Answer: The first time I became aware of this communication was at the time of inspector general's February 6, 2007 testimony before the Homeland Security Subcommittee of the House Committee on Appropriations. Soon after that hearing, the inspector general and I met, and he gave me a copy of the memorandum. He and I have had further discussions about the memorandum since that time.

b. What was your impression of this letter when you first viewed it? Did you and/or colleagues in the Office of General Counsel have objections to it? If so, what were they?

Answer: I believe that it is important for our employees to understand the role of the inspector general and how they should respond to requests from his office, and I thought the memorandum was one way to communicate with them about that role. I also believed, and discussed with the inspector general, that given certain circumstances that are presented in rare matters, another approach to consider might be training for department managers on inspector general access issues.

c. **Why, according to Under Secretary Schneider's account, did the Office of General Counsel not communicate its concerns about this letter back to the DHS Inspector General?**

Answer: I had discussions with the inspector general about the memorandum soon after reading it.

d. **Why did the Office of General Counsel not provide a draft of this letter to the Secretary or Deputy Secretary for their consideration, at any time prior to April 25, 2007?**

Answer: OGC and the Office of the Inspector General are currently consulting about the memorandum, and I believe that this memorandum will be used to satisfy the statutory mandate of the FY 2008 DHS appropriations bill. The acting Deputy Secretary is obviously aware of the memorandum and has been involved in our discussions about it. Once our consultations have concluded, we will present it to the Secretary.

e. **Has this letter now been sent? If so, when, and please provide a copy of the letter to the Committee. If not, why has it not yet been sent?**

Answer: OGC and the Office of the Inspector General are currently consulting about the memorandum, and I believe that this memorandum will be used to satisfy the statutory mandate of the FY 2008 DHS appropriations bill. Once our consultations have concluded, we will present it to the Secretary, and soon thereafter I imagine it will be sent.

46. **The recently enacted FY 2008 DHS appropriations bill requires that the Secretary issue a memorandum outlining the roles and responsibilities of the Department's Inspector General.**

a. **Do you know if such a memorandum is now underway?**

Answer: As described above, it is underway.

b. **Do you agree that it is important for DHS employees to understand clearly their role with respect to interactions with the DHS Inspector General?**

Answer: Yes.

c. **What do you see as the Department's responsibilities to assist the Inspector General in carrying out audits and investigations?**

Answer: I think it is the department's responsibility to ensure that the inspector general is able to carry out his important statutory mission, including preventing waste, fraud, mismanagement, and abuse. To that end, the inspector general should be a valued partner in the review of departmental programs at an early stage, rather than after the fact. That way, the department can have the benefit of real-time advice from the inspector general.

It is just as important to encourage DHS employees to cooperate with the Office of the Inspector General by timely disclosing complete and accurate information. Senior DHS officials, component heads, and other managers should ensure this. DHS officials are similarly responsible for respecting employees' individual rights to speak with the Office of the Inspector General and refraining from retributive activity that might inhibit or chill an employee or contractor's communication or cooperation. The department is responsible for ensuring that all DHS officials, employees, and managers understand these responsibilities and the important role played by the inspector general.

Conflicts of Interest

47. What steps does the Office of General Counsel take to ensure that DHS employees are aware of applicable ethics laws and regulations?

Answer: NB: The designated agency ethics official, or DAEO, is within the Office of General Counsel's structure, but under Management Directive 0400.2, OGC provides only administrative and other appropriate support to the DAEO, and the functions of the DAEO are not vested in the general counsel. Therefore, the answers in this section, while containing my best understanding of the issues discussed, have been based on information from the DAEO, except where otherwise noted.

The DAEO is responsible for developing, implementing and coordinating the department's ethics program, and performs the duties assigned to him by statute and Office of Government Ethics regulations. The DAEO provides a regular program of annual ethics education, maintains a website on the DHS intranet that makes ethics information available to employees, and responds to requests for advice on ethics issues. The DAEO's staff provides training and other ethics resources directly for headquarters components (such as the policy office) and indirectly to the operating components (such as FEMA) through the DAEO's delegates. He also manages the department's financial disclosure report process, and gives advice as needed to employees who have questions about post-employment restrictions, the scope of the gift rules, and other ethics issues.

Additionally, given that this is a transition year, I asked the DAEO to initiate a program for non-career staff regarding issues that typically arise as employees depart, such as negotiations about future employment, post-employment restrictions, and what is government property. In addition to addressing those ethics topics, the program discusses the limitations that non-career employees must observe in their political activities, which are derived from the Hatch Act (as well as DHS's more restrictive policy). Along the same lines, we have issued two memorandums—one from the Secretary, and one from me—urging compliance with the Hatch Act and the department's policy on political participation by career and non-career employees alike. We considered these reminders to be important given that we were entering a presidential election cycle.

48. What is the role of the Office of General Counsel to ensure that DHS employees are under compliance with applicable ethics laws and regulations?

Answer: One of OGC's main functions is ensuring compliance with the law, including the ethics statutes and regulations. As I stated in response to the previous question, this function is undertaken by the DAEO, in the manner specified above.

49. If there is a potential for a conflict of interest involving a DHS employee, what responsibility does the Office of General Counsel have to ensure there is no actual conflict of interest?

Answer: Without regard to how a situation comes to his attention, the DAEO directly or through a delegate should determine whether a conflict exists or a reasonable basis exists to warrant further action. If a conflict exists or a possibility is reasonably raised, the DAEO or delegate should recommend appropriate investigative or curative actions to the employee or the supervisory chain, as appropriate. Implementing the DAEO's judgments requires action by the concerned employee or supervisor. If personnel do not comply, the DAEO has the responsibility to appropriately elevate the issue through the department to the Secretary and the IG until it is appropriately addressed.

50. How does the Office of General Counsel handle an appearance of conflicts of interest, when there is no actual violation of the ethics laws and regulations? Has the Office of General Counsel established any internal policies or procedures to avoid the appearance of conflicts of interest?

Answer: As reflected in the answer to Question 49, the DAEO is to provide advice whenever a conflict of interest, or an appearance of a conflict of interest, is suspected, reported, or otherwise brought to the DAEO's attention. The matter should be addressed and resolved with the DAEO's guidance, which may include recommendations for recusal, disqualification, divestiture of an asset, reassignment of duties, resignation, removal, waiver of conflict, or immunizing the tainted asset through a financial arrangement.

51. Does the Office of General Counsel perform a thorough review of an employee's financial disclosure report when he or she is first hired by the Department and when a DHS employee transfers positions within the Department? What steps does the Office of General Counsel take to ensure that each report is thoroughly reviewed and that any apparent or actual conflicts of interest are resolved? This includes review of the Confidential Financial Disclosure Reports (OGE Form 450) and the Public Financial Disclosure Reports (SF-278).

Answer: The filing and review process of financial disclosure reports required by the Ethics in Government Act of 1978 is controlled by the OGE Director. The DAEO or his delegate reviews and certifies all financial disclosure report filings.

I review the SF-278 and OGC Form 450 financial disclosure forms of my direct reports.

52. What steps does the Office of General Counsel take to ensure the information provided in an employee's financial disclosure report (OGE Form 450/SF-278) is accurate?

Answer: Please see answer to Question 50.

53. Does the Office of General Counsel require DHS employees with potential conflicts of interest to submit a written documentation of a recusal, divestiture, or resignation of an outside position, where appropriate? If not, why not?

Answer: Please see answer to Question 50.

54. What resources are provided to DHS employees by the Office of General Counsel regarding ethics laws and regulations?

Answer: The DAEO provides a regular program of annual ethics education, maintains a prominently-placed website on the DHS intranet that makes ethics information available to employees, and responds to requests for advice on ethics issues. The DAEO's staff provides training and other ethics resources directly for the headquarters components of the Department and indirectly to the operating components through the DAEO's delegates. He also manages the department's financial disclosure report process, and gives advice as needed to employees who have questions about post-employment restrictions, the scope of the gift rules, and other ethics issues.

55. When information is provided to the Office of Government Ethics (OGE) related to the nomination of a particular individual, what steps does the Office of General Counsel take to ensure the information provided to OGE is accurate and complete?

Answer: Once advised by the White House liaison of a potential nomination, the DAEO is to work with candidates for nomination to Senate-confirmed positions to ensure that complete and accurate information is collected and properly reported. The DAEO should review the affiliations and financial holdings of candidates and certify their disclosure reports.

Office of General Counsel Budget and Spending

56. For FY 2008, the Department requested a significant increase to the budget of the Office of General Counsel, from $12.8 million to $15.5 million. Please provide a short explanation of why you believe the Office of General Counsel needed a 21% budget increase in FY 2008.

Answer: The request was driven by a need for additional attorneys and support staff to meet the growing legal demands of the department. As the budget justification indicates, OGC would have used funds to hire attorneys for the national preparedness and programs directorate, the science and technology directorate, and the department's ethics program; to provide advice on foreign investments reviewed by the Committee on Foreign Investment in the United States, the Secure Border Initiative and other issues of immigration and border security law, policy, and litigation; to assist the department in meeting the aggressive timelines of Congress for regulatory and legislative matters; to provide for enhanced fiscal law compliance; and to enhance entry-level recruitment programs. Given the workload and scope of responsibilities undertaken by OGC, I

believe this request and the current request for FY09 are fully justified, and would serve to improve the overall performance of the department.

57. The Department of Homeland Security has faced significant challenges with recruitment and retention of employees.

a. How do you assess the Office of General Counsel's ability to hire and retain top-quality attorneys?

Answer: OGC has a strong record of attracting top-quality attorneys, from right out of law school to experts in their fields. I am privileged to work with such knowledgeable and talented lawyers. Recent announcements for openings in OGC have attracted applicants with excellent credentials—many from large firms, many with experience as law clerks, many with impressive experience at other agencies—who are willing to earn less than in the private sector or to move from a more well-established agency to work on the cutting-edge legal issues that we handle.

I have found DHS's attorneys, including the lawyers I work with every day at headquarters, to be dedicated, hard working, and mission-focused. They are willing to put in long hours when necessary. As I noted in response to Question 12, however, long work hours can lead to burnout and affect retention. I hope that, as the department continues to mature, we can offer headquarters lawyers the same level of complex and interesting legal issues that they currently work on, with fewer all-nighters. We are engaging in the process described earlier (in the answer to Question 16) to identify where our existing resources can be used more effectively. Also, our request in the President's budget would allow OGC to hire additional personnel and increase capacity.

b. What steps have you taken as Acting General Counsel, and what steps do you plan to take as General Counsel, if confirmed, to improve the Office's attorney recruitment and retention?

Answer: I have made it a priority to improve OGC's outreach to the legal community to attract and retain the best possible legal team. Some of these efforts include expanding the scope of advertising beyond the typical usajobs.gov announcement to trade publications, such as *Legal Times*, and to popular career search and networking websites, such as linkedin.com. (I have even gone so far as to design print ads, to make sure they convey the exciting legal issues that attorneys can expect to work on at the department. The headline "Attorney-Adviser" does not do the trick, but the headline "Cyber Security Lawyer" might.) I have also insisted that OGC's management team engage with law firms in the D.C. area and elsewhere to determine whether DHS can post announcements to the "outplacement" page on their intranet, or to their alumni websites—both of which are new and increasingly common tools at larger firms. These efforts are intended to attract an even wider range of talented lawyers to DHS.

I have also set out to improve the honors attorney program. It is similar to, but smaller than, the programs administered by the Department of Justice and other federal agencies, and through it we seek to recruit and train recent law school graduates for entry-level

positions. OGC's efforts in previous years have been hampered by its budget, but in cooperation with the chiefs, we have planned a more robust program staring this year. Six honors attorneys begin in the fall. These lawyers will be trained at headquarters and rotate through component legal offices during their two-year term. At the end of the program, successful candidates will be hired into a permanent position at headquarters or a component office.

As noted in my answer to Question 16, I have tried to improve career options within OGC by developing new leadership positions. I believe that additional training opportunities, OGC awards programs, and efforts to include attorneys as much as possible in the mission of the department will help improve morale and attorneys' work experience in general.

c. How many attorneys are currently employed by the Office of General Counsel? How many attorneys are employed by each of the legal offices of the Department's components?

Answer: Headquarters OGC currently employs 64 attorneys and 10 support staff. The component legal offices employ the following number of attorneys: 840 at Immigration and Customs Enforcement; 224 (including 146 judge advocates general) at the Coast Guard; 206 at Customs and Border Protection; 174 at Transportation Security Administration; 114 at Citizenship and Immigration Services; 61 at the Federal Emergency Management Agency; 19 at the Secret Service; and 5 at the Federal Law Enforcement Training Center.

d. Is the General Counsel's Office currently fully staffed? If not, how many vacancies does it have?

Answer: OGC has 77 authorized FTE and 74 on-board employees, leaving 3 vacancies. We are actively recruiting for a number of new positions and existing vacancies.

e. Is the General Counsel's Office adequately staffed to service the Department's needs?

Answer: As underscored by our request in the President's 2009 budget, I believe that headquarters attorney resources are spread thin in many areas and that additional staffing would be helpful to the mission of the department. I believe it is essential that when additional responsibilities are undertaken by DHS as required by law, that budgets and funding levels for those activities take into consideration the need to provide the necessary legal services. Ignoring this support function places increasing burdens on the existing legal staff and makes it increasingly difficult to ensure that programs are developed and carried out in compliance with all applicable laws.

That said, headquarters lawyers are dedicated to the mission of the department and focused on making sure we provide the best legal advice, and OGC will continue to provide high-quality advice in a timely manner to the Secretary and the department. Even so, I believe that the funding requested in the President's budget is necessary to

maintaining and improving this level of service. The requested funding would allow OGC to provide the support our attorneys need to more efficiently carry out their duties, hire additional attorneys as needed to ease the workload in areas where existing staff are struggling to meet demands, and establish formalized training and attorney development programs that lead to greater job satisfaction.

The unintended consequence of lower-than-requested appropriations in the face of increasing workloads is an overburdened workforce: a condition that may lead to employee morale issues and the loss of talented attorneys.

f. The Senate Appropriations Committee has expressed concern in its report accompanying the FY 2008 DHS appropriations bill about DHS Office of General Counsel appropriations decisions. The report indicates that the Office of General Counsel's responsibilities to ensure that departmental activities fully comply with appropriations law are not being met. What steps are you taking to address these concerns?

Answer: I took the comments of the Senate Appropriations Committee very seriously. OGC recently hired an additional, highly-experienced attorney to focus solely on fiscal and appropriations law issues. Further, the President's budget for FY09 includes a funding request to hire additional appropriations counsel.

Fiscal law is not intuitive. This combined with the proliferation of new programs and the exercise of new authorities at the department sometimes results in officials misapplying fiscal law, unless appropriations counsel (as well as the chief financial officer) is consulted at the very outset of these matters. To encourage the appropriate use of appropriations counsel, earlier this year I sent a memorandum to all component heads reminding them of the general appropriations provisions applicable to the Department.

58. The Congressional Justification for the Office of General Counsel for FY 2008 indicates that the Office was intending to spend $331,000 for "Other Services" in FY 2007 and $1.26 million for "Purchases from Government Accounts." Please indicate the specific services and purchases covered under these two object classes, listing all expenditures in FY 2007 greater than $10,000.

Answer: Actual spending for "Other Services" in FY 2007 was $280,961. Included below is an itemized list of expenses greater than $10,000:

$37,550	DOT Hosting of Rulemaking System
$29,702	Unicor furniture
$28,665	Transit Subsidy Program
$21,500	Educational expenses

$21,161	Conference costs for DHS-OGC Labor and Employment Law Conference
$14,064	Reimbursable agreement with DOT to pay for hosting Board for Correction of Military Records

Actual spending for "Purchases from Government Accounts" in FY07 was $819,431. Included below is an itemized list of expenses greater than $10,000:

$241,170	Financial Management (Departmental Operations Branch)
$160,155	HQ Human Capital Services
$124,322	Subscriptions for law library
$82,110	Financial Management (Finance & Accounting shared services)
$94,354	NCR Infrastructure Operations
$55,262	GSA Rent
$14,294	DHS Executive Leadership
$11,096	NFC Payroll Services Reporting

59. According to the Federal Procurement Data System, DHS obligated $7.1 million in FY 2007 for contracts classified as "Legal Services."

a. What types of legal services have been contracted out by DHS since you started working at DHS? What are the rationales for contracting out legal services to the private sector at the Department?

Answer: As far as I have been able to discover, the department does not contract with the private sector for lawyers performing legal work, nor in my opinion should it. The department has contracted for support for its legal function, including data entry, database management, recordkeeping, report processing, and filing. In addition, the department has contracted for ancillary services such as court reporting. The department contracts for these support services because it does not have the organic capacity to provide them, especially during surge or heavy volume periods.

On one occasion last year, the Secret Service executed a contract with a private law firm for services that I considered to be legal work. That contract was terminated.

b. Does the Department have written guidance that governs when and how legal services should be procured?

Answer: Not specifically, though the Homeland Security Acquisition Regulation and relevant procurement guidance mandates how all procurements should be done.

c. **Since the beginning of 2006, the Transportation Security Administration has paid nearly $5.2 million to the company Systems Research and Applications (SRA) for contracts categorized as "Legal Services" according to the Federal Procurement Data System. Is this data accurate? Please provide additional information about this contract.**

Answer: I am told by TSA that the contract mentioned in the question is not accurate for two reasons: first, the contract was with a company called Systems Application & Technology, not Systems Research and Applications, and second, the contract was not for legal services, but for support services for TSA's civil rights office, including administration, diversity policy, investigation and processing of discrimination/EEO complaints, data entry, database management, recordkeeping, report processing, filing, archiving (electronic and paper), and mail service. The contractor also provided alternative dispute resolution counseling and mediation to TSA. TSA suggests that this contract was categorized as "Legal Services" since it was the closest category in the federal procurement data system.

60. **What role do outside contractors play in the rulemaking processes of DHS and its component agencies?**

a. **Since you joined DHS in October 2005, have contractors been involved in developing or drafting regulations to be issued by DHS or any of its component agencies? Do you believe it is appropriate for contractors to develop or draft government regulations? Why or why not?**

Answer: I do not think it is appropriate to have government contractors making the policy choices contained in government regulations; the rulemaking actions that result from Congress's delegations of authority are inherently governmental. There are, however, some tasks related to regulations that—while we might prefer that they be conducted federal employees exclusively—are by necessity contracted for. These functions include quantifying the costs and benefits of rules on the regulated population (under the direction of a federally-employed economist or program analyst), and collecting and summarizing comments received from the public on proposed rules. They also include, in a small number of rulemaking matters, the technical drafting of initial, proposed regulatory provisions. These drafts are reviewed and edited by federal employees prior to the department promulgating them as even proposed regulations. So long as this work is reviewed, edited, and accepted by federal employees, I believe that it is in line with OMB's current guidance on inherently governmental functions, Circular A-76: "An activity may be provided by contract support (i.e., a private sector source or a public reimbursable source using contract support) where the contractor does not have the authority to decide on the course of action, but is tasked to develop options or implement a course of action, with agency oversight." *See also* OMB Policy Letter 92-1 ("Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials.").

b. **Please list all rulemaking proceedings undertaken by DHS or its components agencies that have been ongoing since October 2005 for which outside**

contractors have been employed. For each such proceeding, indicate: (i) the subject matter of the regulation; (ii) the name of the contractor(s) working on the rulemaking proceeding; (iii) the nature of the work performed by the contractor(s); and (iv) the dollar value of the contract.

Answer: Contractors should not—and I am told do not—make decisions about the scope, substance or timing of agency regulatory actions; those decisions are made by federal employees. Maintaining DHS's regulatory agenda requires contractor support, however. Support provided under these contracts includes conducting environmental impact assessments required under the National Environmental Protection Act, developing economic analyses required under the Regulatory Flexibility Act and Executive Order 12866, providing docket center support services and analysis of comments received during rulemaking actions, and technical writing of regulations.

The following is a breakdown of the contract support provided to DHS and its components to identify the name of the regulation, the contractor or contractors involved in that rulemaking action; the nature of the work performed by the contractors; and the dollar value of the contract. The department's complete regulatory agenda is in the fall unified agenda, which was published in the Federal Register on December 10, 2007. *See* 72 F.R. 7006. Please see below for a detailed breakdown:

Headquarters

1. General Rulemaking Support

   Contractor: Lockheed Martin

   Nature of Work: Scanning paper comments received by fax or U.S. mail and uploading comments to the Federal Docket Management System, the electronic public docket for federal agency rulemaking. Lockheed Martin does not engage in any analysis of comments or participate in the drafting or development of regulations.

   Dollar Value of Contract: $554,125 (FY05-06 $254,125; FY07-08 $350,000). Note: the cost of this contract is prorated among headquarters and components (but is not counted in the component contract estimates set forth below).

2. Chemical Facility Anti-Terrorism Standards (CFATS) (Advance Notice of Rulemaking, April 2007 interim final rule and November 2007 Appendix A). This rulemaking action established risk-based performance standards for the security of the nation's chemical facilities. It requires covered chemical facilities to prepare security vulnerability assessments, which identify facility security vulnerabilities, and to develop and implement site security plans, which include measures that satisfy the identified risk-based performance standards. DHS developed and issued the ANRM and interim final rule for this complex regulatory program within six months, as directed under the Department of Homeland Security Appropriations Act of 2007 (Pub. L. 109-295).

Contractor #1: SPA

Nature of Work: Develop and maintain key decision support tools and study key issues; general support for CFATS development.

Dollar Value of Contract: $1.0 million.

Contractor #2: ICF

Nature of Work: Processed, categorized and summarized comments received on the ANRM and interim final rule.

Dollar Value of Contract: $100,000.

Contractor #3: AcuTech Consulting Group

Nature of Work: Policy and program development and implementation support (RAMCAP) and risk-based performance standards; support for Appendix A development; and general subject matter expertise.

Dollar Value of Contract: $2.5 million.

Contractor #4: Moore Economics

Nature of work: Assist with the development of regulatory economic analysis and assessment.

Dollar Value of Contract: under $50,000.

3. Collection of Alien Biometric Data upon Exit from the United States at Air and Sea Ports of Departure; United States Visitor and Immigrant Status Indicator Technology Program ("US-VISIT"). DHS used contract support to develop the economic analysis for a notice of proposed rulemaking that was submitted to the Office of Management and Budget on January 17, 2008 for review. The NPRM proposes to require aliens enrolled in US-VISIT to provide biometric identifiers before departing the United States from air or sea ports of entry. This air exit system is required to be in effect by June 2009 under section 711 of the Implementing the Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. 110-53.

Contractor #1: HDR Decision Economics (via subcontract to Smart Border Alliance/Accenture).

Nature of Work: Economic analysis support in preparation of the regulatory analysis and corollary activities.

Dollar Value of Contract: $330,000.

Contractor #2: Tecolote Research, Inc. (via subcontract to MITRE)

Nature of Work: Economic analysis support in preparation of the regulatory analysis and corollary activities.

Dollar Value of Contract: $350,000.

U.S. Customs and Border Protection

CBP has used one contractor, Industrial Economics Inc, to provide support on three regulatory actions between October 1, 2005 and the present. CBP uses contract support for the economic analyses required for each significant regulatory action. CBP does not use contract support for technical drafting of regulations or to collect or analyze comments received during public comment periods on regulatory actions.

Contractor: Industrial Economics, Inc.

Nature of the Work: regulatory analysis, including the primary cost-benefit analysis (and alternatives) required under Executive Order 12866, and statutory requirements including, but not limited to, the Regulatory Flexibility Act and Unfunded Mandate Act.

Dollar Value of Contract: in the aggregate, estimated at $1.6 million.

The regulatory initiatives supported by Industrial Economics, Inc., but are not necessarily limited to:

1. Western Hemisphere Travel Initiative Land and Sea NPRM and Final Rule. This rulemaking action (the final rule is pending final clearance with the Office of Management and Budget) would amend DHS regulations to implement new documentation requirements for U.S. citizens and certain nonimmigrant aliens entering the United States at sea and land ports-of-entry. This final rule is under review at the Office of Management and Budget.

2. Importer Security Filing and Additional Carrier Requirements NPRM and Final Rule. CBP proposes to require both importers and carriers to submit additional information pertaining to cargo before the cargo is brought into the United States by vessel. CBP published a Notice of Proposed Rulemaking (NPRM) on January 2, 2008. The sixty-day public comment period concluded on March 3, 2008. DHS anticipates that a final rule will be published during the summer of 2008.

U.S. Citizenship and Immigration Services

1. General Regulatory Support

Contractor: Labat-Anderson.

Nature of Work: Labat has been providing clerical support for USCIS's Regulatory Management Division from 2005 to the present. One of their

main functions is to process comment letters from the public as they relate to all USCIS regulatory actions (notices, proposed, and interim regulations) published in the Federal Register. As USCIS receives comments by mail or courier, they are scanned and electronically submitted by our contractor to Regulations.gov (which is managed by Lockheed Martin for all of DHS).

Dollar Value of Contract: Approximately $2.0 million.

2. Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule. USCIS published this final rule on May 30, 2007 (NPRM published on February 1, 2007), adjusting the fee schedule for CIS immigration and naturalization benefit applications and petitions, including nonimmigrant applications and visa petitions. This final rule became effective July 30, 2007.

Contractor #1: Nortel (Kevin Sawyer). This is the umbrella contract for administrative and acquisition support services contract for USCIS.

Nature of the Work: Regulatory analysis.

Dollar Value of Contract: The total value of the umbrella contract is $9.0 million. However, USCIS Office of the Chief Financial Officer (OCFO) used one contractor for analysis support for the fee review during 2006 and 2007 with an estimated cost of $400,000.

Contractor #2: Lawrence J. Weinig

Nature of the Work: Performing research for the regulation and preparing initial draft of the regulation for USCIS substantive review and approval.

Dollar Value of Contract: approximately $617,000.

3. Privacy Impact Assessments for Refugees, Asylum, and Parole System (RAPS) and the Asylum Pre-Screening System (APSS).

Contractor: Computer Sciences Corporation (CSC), RAPS team

Nature of Work: Assistance with the preparation of a privacy impact assessment (PIA) for the RAPS and APSS. The CSC RAPS team provided details on system design, technical specifications, and information on the location and maintenance of the system servers. CSC also conducted a complete review of the description of the operation and use of RAPS and APSS.

Dollar Value of Contract: The cost of the work performed is not currently available. The review of the PIA was covered under the overall budget for system operations and maintenance, which is maintained by the Office of the Chief Information Officer. The review of the PIA was one small part of larger IT and systems support provided by the contractor.

U.S. Coast Guard

1. General Regulatory Support. The Coast Guard uses contractor support on an ongoing basis for most of its regulatory agenda.

   Contractor: SAGE Systems Technologies LLC

   Nature of Work: Technical writing and editing of Coast Guard regulations, analytic support for environmental impact analyses required under the National Environmental Protection Act of 1969 (NEPA) and DHS and Coast Guard NEPA requirements, and economic analyses required under Executive Order 12866, the Regulatory Flexibility Act and the Unfunded Mandates Reform Act.

   Dollar Value of Contract: approximately $5.0 million.

   Contractor: VOLPE

   Nature of Work: Study Estimating Economic Impacts of Regulatory, Security, commercial and Environmental Changes and Disruptions to U.S. Port Operations

   Dollar Value of Contract: $220,063.

2. Dry Cargo Residue Discharge in the Great Lakes. This NPRM proposes to regulate the dumping of incidental dry cargo residue from commercial vessels on the Great Lakes as required under the Coast Guard and Maritime Transportation Act of 2004, Pub. L. 108-293.

   Contractor: CH2M Hill

   Nature of Work: NEPA analysis

   Dollar Value of Contract: $1.5 million for FY07 and FY08.

Federal Emergency Management Agency

1. General Regulatory Support

   Contractor: SRA

   Nature of Work: To support legislative implementation work groups tasked with developing appropriate policies, strategies, and planning requirements related to PKEMRA. Contractor support included work group facilitation, coordination, and satisfying related reporting requirements.

   Dollar Value of Contract: less than $280,000.

2. National Flood Insurance Program; Standard Flood Insurance Policy; Expansion of Increased Cost of Compliance (ICC) Coverage and Prospective Payment of Flood Insurance Premiums (1660-AA30). This proposed regulation would extend the ICC coverage which currently applies when a community is enforcing its substantial damage or cumulative substantial damage ordinance. It also includes those properties for which an offer of mitigation assistance is made under a variety of FEMA-funded mitigation programs. Finally, it implements the BBB Insurance Reform Act requirement that if a policyholder is determined to be paying a lower premium that is required due to an error in the floodplain determination, the higher premium may only be charged prospectively.

   Contractor: Greenhorne & O'Mara, Inc.

   Nature of Work Performed: The contractor assists the National Flood Insurance Program of FEMA's Mitigation Division in regulatory drafting and economic analysis.

   Dollar Value of Contract: $18,840.

U.S. Immigration and Customs Enforcement

1. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter. ICE published an NPRM on June 14, 2006, and final rule on August 15, 2007, describing the legal obligations of an employer, under current immigration law, when the employer receives a no-match letter from the Social Security Administration or receives a letter regarding employment verification forms from the Department of Homeland Security. This rulemaking action also described "safe-harbor" procedures that the employer can follow in response to such a letter and thereby be certain that the Department of Homeland Security will not use the letter as any part of an allegation that the employer had constructive knowledge that the employee referred to in the letter was an alien not authorized to work in the United States.

   Contractor: Econometrica, Inc

   Nature of Work: Provide technical support services to analyze the economic impact on small entities of this rulemaking action.

   Dollar Value of Contract: $122,332.

2. Establishing Procedures for Out-of-Cycle Review and Recertification of Schools Certified by the Student and Exchange Visitor Program to Enroll F or M Nonimmigrant Students and Adjusting Program Fees. This rule, which is under review by the Office of Management and Budget, proposes to adjust the fees charges by ICE's Student and Exchange Visitor Program (SEVP) to defray the costs of SEVP operating expenses. This rule also proposes school recertification procedures.

Contractor #1: Grant Thornton LLP

Nature of Work: The firm (including subcontractors) conducted the underlying fee study, supported regulation drafting, and supported strategic communications for program outreach. The statement of work also provides for support to the comment evaluation, response drafting and rule adjustment upon publication of the NPRM.

Dollar Value of Contract: $1.5 million (FY06-$747,100.64, FY07-$593,555.39 and FY08-$137,721.51).

Contractor #2: Sy Coleman

Nature of Work: Coordination of the input from various ICE components; technical drafting of the original text.

Dollar Value of Contract: $409,295

Contractor #3: ManTech Security Tech Corp.

Nature of Work: A ManTech employee assisted in the development, drafting and review of this rulemaking action under the direct supervision of a federal employee.

Dollar Value of Contract: $396,000

Contractor #4: Tessada & Associates, Inc.

Nature of Work: Coordination of the input from various ICE components; technical drafting of regulation; development of the initial risk based assessment and the Regulatory Flexibility Act analysis.

Dollar Value of Contract: $548,797.

Transportation Security Administration

1. General Regulatory Support

Contractor #1: GRA, Incorporated

Nature of Work: The overall support includes data, research, comment processing, evaluation drafting, economic modeling, library type materials, editorial support for plain language, and Small Business Guides, as well as support in preparing regulatory evaluations.

Dollar Value of Contract: Approximately $330,000.

Contractor #2: ICF

Nature of Work: data, research, comment processing, evaluation drafting, economic modeling, library type materials, editorial support for plain language, and Small Business Guides comment collection.

Dollar Value of Contract: Approximately $920,000.

Contractor #3: David Lee and Kimberly Duplichain.

Nature of Work: Analyzing cost and population estimates to help develop proposed fees that are charged to regulated populations. The contractors would gather, document and analyze data related to regulated populations. Further, the contractors would gather, document and analyze data related to the cost to operate each program.

Dollar Value of Contract: $190,000 per fiscal year.

2. Large Aircraft Security Program. This TSA NPRM proposes to amend aviation transportation security regulations to enhance the security of general aviation by proposing, among other requirements, that general aviation with a maximum certified takeoff weight (MTOW) of over 12,500 pounds be required to adopt TSA security programs, including certain passenger screening requirements.

Contractor: SkyGroup

Nature of Work: Assistance with developing rulemaking components and draft programs, to include regulatory and economic data analysis.

Dollar Value of Contract: Approximately $817,980.

3. Secure Flight Program. On August 23, 2007, TSA published an NPRM proposing to implement procedures to allow TSA to assume from aircraft operators the responsibility for screening passenger information against government databases, including terrorist watchlists.

Contractor #1: Accenture

Nature of Work: Support with the regulatory impact assessment, technical drafting of regulation, analysis of comments received on the NPRM and assistance with public hearing on NPRM.

Dollar Value of Contract: $505,000.

Contractor #2: SRA Touchstone

Nature of Work: Support with the regulatory impact assessment, technical drafting of regulation, analysis of comments received on the NPRM and assistance with public hearing on NPRM.

Dollar Value of Contract: $48,000.

Contractor #3: ICF

Nature of Work: Comment support.

Dollar Value of Contract: $75,000.

c. **Since October 2005, what steps, if any, has the Office of General Counsel taken to ensure that contractors involved in rulemaking proceedings are not engaging in inherently governmental functions? What actions has the Office of General Counsel taken during that time to mitigate the risk that government decisions may be influenced by, rather than independent from, the judgments of the contractors involved in the rulemaking proceedings?**

Answer: OGC has given advice on the use of contractors in the rulemaking process; attorneys throughout the department also provide advice on a regular basis concerning the appropriate use of contractors. I agree with the important principle of not using contractors for inherently governmental functions and will commit to OGC providing further direction and education, perhaps through written guidance, about this issue.

Intelligence and Information-Sharing Issues

61. **The National Applications Office (NAO), which is to facilitate the use of intelligence community technological assets for civil, homeland security and law enforcement purposes, was recently established at DHS. The Office of Intelligence and Analysis had a lead role in the establishment of NAO.**

a. **Did the Office of General Counsel play a role in the formation and development of the legal framework for this office?**

Answer: Yes.

b. **If so, on what date did this involvement begin, and what was the nature of that involvement? Were you personally involved in addressing the legal issues surrounding the establishment of the NAO? If so, when did that involvement begin? When did you first become aware of the NAO?**

Answer: Since very soon after June 2005, when an independent study group chartered by the Office of the Director of National Intelligence and U.S. Geological Survey issued its blue ribbon study on the future of the Civil Applications Committee, OGC became involved in developing the NAO. OGC played a key role in drafting and gaining interagency agreement on the NAO charter, which, among other things, describes the rigorous legal, privacy, and civil rights and civil liberties reviews that all requests will undergo, and lists what types of requests the NAO will and will not accept.

Of course, issuance of the charter does not end OGC's involvement with the NAO. As the charter makes clear, an attorney reviews every request. This comes on top of

additional legal reviews conducted by the requesting agency, by the entity providing the collection, and, if necessary, by the Department of Justice on certain requests. Additionally, department leadership—including the general counsel—will conduct an internal review of any request that implicates significant legal or policy questions. It seems to me that the level of legal (and privacy and civil liberties) review to be conducted under the NAO exceeds that which was conducted under the CAC.

My immediate staff and I have been personally involved with all of the issues cited above. To the best of my recollection, while I was aware of the NAO as far back as June 2007, neither my immediate staff nor I became closely involved with the NAO until August.

c. What safeguards will be in place when the NAO is fully operational to ensure that information that is disseminated via the NAO to state and local law enforcement or emergency management officials is used appropriately?

Answer: One advantage of the NAO is a more robust legal review. Another focus is facilitation of intelligence community capabilities by appropriate non-traditional users in the civil, homeland security, and law enforcement communities. There is, as the blue ribbon study explained, "an urgent need for action because opportunities to better protect the nation are being missed." At the same time, thorough training and education of new users must accompany these efforts. All information disseminated through NAO will contain appropriate guidance concerning further dissemination and handling of the information.

d. Section 525 of the Department of Homeland Security Appropriations Act of 2008 (included as Division E of the Consolidated Appropriations Act, 2008, P.L. 110-161) prohibits the use of funding to commence operations of the NAO until the Secretary certifies that it complies with existing laws, including all applicable privacy and civil liberties standards, and that certification is reviewed by GAO. Has the Secretary made such a certification? What role, if any, have you played or do you expect to play with respect to such a certification?

Answer: The Secretary has not yet made his certification. At the appropriate time, I expect to advise the Secretary about whether the legal standard in § 525 has been met, and in so doing would likely consult those DHS offices that have relevant and important expertise, including the Offices of Privacy and Civil Rights and Civil Liberties. Currently, both offices are completing impact assessments regarding NAO, which I expect to inform any decision on the § 525 certification.

62. State and local fusion centers are playing an increasingly important role in terms of homeland security intelligence, but some have expressed concerns that they are operating without sufficient legal and policy guidance from the federal government.

a. Do you believe that clearer legal and policy guidance is needed for state and local fusion centers?

Answer: State and local fusion centers are not federal; they are generally created by the states with some federal grant assistance to accomplish missions related to their needs. Consequently, state legal authorities generally govern fusion centers. That said, the federal government is in a unique position to educate fusion center personnel on the risks inherent in the conduct of intelligence efforts and the needs to maintain constant oversight and sensitivity to activities that potentially affect privacy and civil liberties. DOJ and DHS have provided fusion center guidance in the *Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era*, issued in August 2006 to assist state and local partners.

b. Is the Office of General Counsel engaged on this issue? If so, please provide a summary of recent work on this issue.

Answer: We advise DHS's state and local fusion center program management office, or SLFC PMO, on a variety of issues, including the authorities that underlie the program and the department's proper relationship with state and local partners. Department lawyers regularly travel to fusion centers with SLFC PMO leadership, attend meetings to discuss the role of DHS in fusion centers, and regularly attend the annual National Fusion Center conference. Additionally, lawyers provide intelligence oversight training to every office of intelligence and analysis representative deployed to a fusion center. This training includes instruction on the statutory mission of the department and the responsibilities of the office of intelligence and analysis and the SLFC PMO. Lawyers assisted in the drafting of the memorandum of agreement between DHS and the states that describes the activities and role of office of intelligence and analysis representatives in fusion centers.

c. What role has the Office of General Counsel played with respect to establishing guidelines and/or training requirements for privacy and civil liberties issues at fusion centers, as required in Section 511 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (P.L. 110-53)?

Answer: OGC attorneys have played an integral role in establishing guidelines and training required by the 9/11 Act. For example, lawyers reviewed a proposed memorandum of agreement and a statement of work with CRCL that establishes the guidelines and training necessary to meet this statutory requirement; reviewed the CRCL assessment of the SLFC PMO; and are working with the privacy office in the ongoing privacy impact assessment for the SLFC PMO.

63. Guideline 3 of the President's Memorandum of December 2005 on "Guidelines and Requirements in Support of the Information Sharing Environment" concerns efforts to standardize procedures for Sensitive But Unclassified (SBU) information. An effort is underway within the federal government to standardize SBU designations and establish a new Controlled Unclassified Information (CUI) to supplant the 56 different SBU designations currently used, many of which are mainly used by DHS.

a. Does DHS support efforts to establish a common CUI designation? Is DHS requesting that any current SBU designations are kept as exceptions to a common designation?

Answer: The department fully supports Guideline 3. While not exceptions to the CUI framework, there are certain statutorily required information protection regimes that facilitate sharing between the government and the private sector (i.e., protected critical infrastructure information, or PCII, sensitive security information, or SSI, chemical terrorism vulnerability information, or CVI, and safeguards information, or SGI). The CUI framework will accommodate these regimes by requiring that documents carry both the appropriate CUI markings and the legacy marking.

b. Given the fact that this effort has been underway since 2005, why did DHS decide in December 2006 to establish a new SBU designation for chemical security facilities, the Chemical-Terrorism Vulnerability Information (CVI) designation?

Answer: CVI is a direct result of a statutory requirement: § 550 mandates information protection standards not present in any existing SBU designation, such as treating the information as if it is classified in connection with any proceeding. To accommodate this, DHS developed a new designation. Moreover, the CVI designation was created after notice and public comment. Even beyond the statutory requirement, I think it is essential to protect from inappropriate disclosure the chemical facility security information provided under § 550 both because it is incredibly sensitive—vulnerability assessments, for example, could be used by our enemies to develop target sets—and because protection encourages maximum sharing by the regulated community. The department determined that CVI is an appropriate and effective means of accomplishing this goal.

c. How was the decision to establish this designation consistent with the broader impetus to standardize SBU procedures?

Answer: CVI will be handled in a manner consistent with Guideline 3, which satisfies its standardization goal. CVI documents will carry the appropriate CUI markings as well as the CVI marking, which will indicate among other things that the information should be handled appropriately in proceedings.

d. What role does the Office of General Counsel play in the establishment and use of DHS's SBU designations?

Answer: Aside from working on CVI, I have not been involved in the creation of any SBU designations. Attorneys will advise clients on what designation if any may be appropriate on a given document, and other issues related to the use of such designations, including in the context of litigation.

64. Sec. 206(a) of the Homeland Security Act of 2002, as established in the Implementing Recommendations of the 9/11 Act of 2007 (P.L. 110-53, 6 U.S.C. 124c)

requires that all activities to comply with sections 203, 204, and 205 of the Homeland Security Act, also as established by the 9/11 Act, shall be:

(1) consistent with any policies, guidelines, procedures, instructions, or standards established under section 1016 of the Intelligence Reform and Terrorism Prevention Act of 2004 (6 U.S.C. 485);

(2) implemented in coordination with, as appropriate, the program manager for the information sharing environment established under that section;

(3) consistent with any applicable guidance issued by the Director of National Intelligence; and

(4) consistent with any applicable guidance issued by the Secretary relating to the protection of law enforcement information or proprietary information.

a. Has the Office of General Counsel provided guidance to the Secretary of the Department of Homeland Security and/or to the Office of Intelligence and Analysis regarding the implementation of Sec. 206(a)?

Answer: OGC attorneys regularly advise the under secretary for intelligence and analysis on the requirements of § 206(a), particularly as they apply to the integration and coordination of homeland security information sharing policy, systems, and networks pursuant to §§ 204 and 205.

The Secretary has assigned the under secretary the responsibility to assess and coordinate the analysis and dissemination of all terrorism, homeland security, and related law enforcement and intelligence information for the department. He is also the Secretary's agent for overall development and execution of DHS's information sharing enterprise. In our organization, an associate general counsel for intelligence supports the under secretary. The AGC and his staff provide legal guidance on his many information sharing responsibilities, as discussed below.

As chair of the information sharing governance board, or ISGB, DHS's principals-level information sharing policy coordination body, the under secretary oversees department-wide integration of policies, technology, investments, procedures, performance measures, and mandates, including and especially those issued pursuant to § 1016 of the Intelligence Reform and Terrorism Prevention Act of 2004. The under secretary is also DHS's programmatic lead for implementing the requirements of the information sharing environment, or ISE. The general counsel is a voting member of the ISGB and advises on interpretation and formulation of information sharing policy.

b. Has the Office of General Counsel provided guidance to the Secretary of the Department of Homeland Security and/or to the Office of Intelligence and Analysis regarding the implementation of any plans, policies, standards, directives, or memoranda developed by the Program Manager for the Information Sharing Environment (PM-ISE)?

Answer: OGC attorneys support the under secretary in implementing the requirements of the ISE's five guidelines, including his work in the following areas:

Guideline 1: Implementation of the ISE enterprise network architecture and associated business process framework to address the functional IT environment within which the ISE would exist;

Guideline 2: Implementation and standup of the Interagency Threat Assessment and Coordination Group (ITACG) and development of the national fusion center network to address the sharing of information between and among federal government agencies and their state, local, tribal, and private sector partners;

Guideline 3: Development of a prospective framework to address the management and control of sensitive but unclassified information (SBU) across the federal government;

Guideline 4: Consolidation and implementation of best practices to address the sharing of information between the federal government and foreign partners;

Guideline 5: Development and implementation of the ISE privacy guidelines, and standup of the ISE privacy guidelines committee to oversee the further development and implementation of ISE policies designed to address the Privacy and other legal rights of Americans, and to ensure that they are protected within the ISE.

c. **Has the Office of General Counsel offered advice or provided legal justification for any decisions by the Secretary or the Office of Intelligence and Analysis to not comply with Sec. 206(a) of the Homeland Security Act, or with any plans, policies, standards, directives or memoranda developed by the PM-ISE? If so, please detail the specific policy areas in which the Department has not decided to comply.**

Answer: I am not aware of any occasion on which OGC has advised on not complying with the requirements ultimately adopted by the ISE and reflected in § 206(a).

d. **Do you believe that the Department of Homeland Security is currently in compliance with Sec. 206(a) of the Homeland Security Act? If so, please provide specific details of the steps that have been taken since August 3, 2007 to comply with the law. If not, please detail the measures that the Department still needs to take in order to comply with the law.**

Answer: I believe it is. DHS has participated in the writing of and concurred with every ISE Guideline Report issued or pending final approval by the President. DHS is actively engaged with the PM-ISE and regularly supports interagency efforts to further address and implement the requirements of the ISE, including through its representation on the Information Sharing Council (ISC), chaired by the PM-ISE, and on the joint Homeland Security Council/National Security Council-sponsored information sharing principals' coordinating committee (ISPCC).

Implementation of the 9/11 Commission Act of 2007

65. **We understand that the Office of the General Counsel is a co-lead with the Office of Policy on a DHS working group tasked with managing the implementation of the requirements of the Implementing Recommendations of the 9/11 Commission Act (P.L. 110-53). Please describe the role of the Office of the General Counsel in ensuring the appropriate implementation of this Act.**

    Answer: OGC is working to ensure that the department does all it can to meet the extensive requirements of the 9/11 Act. In that capacity, OGC, with the policy office, tracks the progress of the components as they implement the Act. OGC also provides legal advice on interpreting the Act.

66. **Will you commit to ensuring that the Office of General Counsel's representative on this working group will meet no less than monthly, if requested, with the House and Senate Committees of primary jurisdiction over homeland security to discuss the progress on implementation?**

    Answer: Yes. I believe we have already had productive meetings between our staff, including OGC and policy representatives, and your staff.

Visa Waiver Program

67. **Section 711 of the Implementing Recommendations of the 9/11 Commission Act (P.L. 110-53), permits the DHS Secretary to waive one of the statutory requirements for a nation's participation in the Visa Waiver Program (VWP), having a visa refusal rate of less than 3%, once certain conditions have been met. Among the conditions that must be met, DHS must have implemented an Electronic Travel Authorization (ETA) system, as described in Section 711, to collect biographical and other information to determine in advance of travel the eligibility of nationals from VWP countries to enter the United States. Section 711(d) states: "ELIGIBILITY DETERMINATION UNDER THE ELECTRONIC TRAVEL AUTHORIZATION SYSTEM.-- Beginning on the date on which the electronic travel authorization system developed under subsection (h)(3) is <u>fully operational</u>, each alien traveling under the program shall, before applying for admission to the United States, electronically provide to the system biographical information and such other information as the Secretary of Homeland Security shall determine necessary. . . ." Section 711(c) provides that the Secretary may not waive the visa refusal rate until certain conditions are met, including certification by the Secretary that "the electronic travel authorization system required under subsection (h)(3) is <u>fully operational</u>. . . ."**

    a. **Do you interpret the term "fully operational" as used in Section 711(d) to mean that the ETA system will be fully operational when all aliens traveling to the U.S. under the VWP can use the system? If not, explain how you define the term and how you reconcile your answer with the requirement in 711(d) that all aliens**

traveling under the VWP use the system beginning on the date that it becomes fully operational.

b. **Do you interpret the term "fully operational" as used in Section 711(c) to mean that the ETA system will be fully operational when all aliens traveling to the U.S. under the VWP can use the system? If not, explain how you define the term "fully operational" and whether the term in Section 711(c) has a meaning different than the term "fully operational" has in Section 711(d)?**

c. **Do you believe that Section 711(c) permits the Secretary to certify that the ETA system is "fully operational" after a pilot has been completed or after the system has been deployed in some but not all the VWP countries? If so, please explain your answer.**

Answer: For the Secretary to employ the alternate visa refusal rate provided for in the 9/11 Act, he must certify that two conditions exist: that the electronic travel authorization system is "fully operational," and that an exit system is in place that can meet the statutory criteria. Certainly, the term "fully operational" was not defined in the legislation, and therefore is open to agency interpretation. When the time comes to advise the Secretary on whether he should certify, I would consider many factors—including the one contained in the question (that is, the use of "fully operational" in subsections (c) and (d)), and others. The electronic travel authorization is also the subject of a rulemaking action, which the department aims to issue soon.

68. **Another condition listed in Section 711(c) of the Implementing Recommendations of the 9/11 Commission Act prohibits the Secretary from exercising waiver authority until he can certify that "an exit system is in place that can verify the departure of not less than 97 percent of foreign nationals who exit through airports of the United States." Section 711(c) also requires the Department to use the departure information from the air exit system to establish a maximum visa overstay rate, an overstay rate that can be used as a basis for allowing waiver of the visa refusal rate requirement. In order to determine whether an individual has overstayed a visa, the Department will need to match the exit information against information about the individual's visa and date of admission into the country.**

a. **Do you believe that this provision in Section 711(c) requires that, for not less than 97 percent of foreign nationals exiting through airports of the U.S., the Department compare the departure date of a foreign national against the date of admission and thus determine whether the individual had overstayed his visa? If not, please explain your answer and reconcile it with the language in Section 711(c).**

b. **Do you believe that the provision in Section 711(c) permits the Department to arrive at the required 97 percent partly by matching the departure of a foreign national against an earlier departure by the same individual? If so, please explain the relevance of an earlier departure by the same individual, with**

respect to determining whether the individual had overstayed his visa, and with respect to developing information about overstay rates.

Answer: In order for the Secretary to employ the alternate visa refusal rate provided for in the 9/11 Act, he must certify that two conditions exist: that the electronic travel authorization system is "fully operational," and that an exit system is in place that can meet the statutory criteria. I am not currently aware of a proposal to compare departure data to a prior departure of the same alien to arrive at 97%, as contemplated in subsection *b*. When the time comes to advise the Secretary on whether he should certify, I would consider many factors, including the purpose of establishing an exit system (which is determining data to compare to a maximum overstay rate determined by the Secretary), and others.

Critical Infrastructure

69. The Critical Infrastructure Information Act of 2002 (CIIA) (Sections 211-215 of the Homeland Security Act (P.L. 107-296)) contains a number of protections for critical infrastructure information that is voluntarily submitted to the Department of Homeland Security.

a. What is your understanding regarding the circumstances under which information voluntarily submitted to DHS under the CIIA can be shared with other federal or state agencies?

Answer: The Homeland Security Act prohibits, with limited exceptions, the sharing of CII to other federal agencies for purposes other than the protection of critical infrastructure. Congress made clear the importance of strictly adhering to these requirements by imposing criminal penalties for their violation.

With regard to state and local governments, the Act prohibits them from using CII provided by DHS other than for purposes of protecting critical infrastructure, or in furtherance of a criminal investigation or prosecution. The final regulation provides a flexible, responsible approach that requires appropriate arrangements between the PCII program manager and the state or local government, and also provides for emergency disclosure.

b. Do you agree with DHS's policy in this regard?

Answer: Yes. The final rule is more flexible vis-à-vis state and local governments than the proposed rule: whereas the proposed rule required "written agreements," the final requires only "appropriate arrangements"; a change that allows the department to strike the appropriate balance between protecting sensitive information and facilitating the effective sharing of that information.

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

Answer: To the department's inspector general or to a committee of Congress.

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

Answer: While I have not been involved personally in such determinations, attorneys advise the PCII program office, and I understand that their advice includes questions about interpretation of the statute and regulations with regard to particular submissions.

70. What role, if any, have you personally played in the drafting, reviewing, and implementation of chemical security regulations since the passage of the Department of Homeland Security Appropriations Act, 2007 (P.L. 109-295) in the 109th Congress?

Answer: I believe that the regulatory program under § 550 is one of cornerstone actions that the department is taking, and its success is vitally important. Among other things, I reviewed all of—and drafted portions of—the department's rulemaking actions under § 550. I occasionally meet with the team charged with implementing the program to discuss its progress. OGC attorneys—both regulatory lawyers and those advising the national protections and programs directorate—provide day-to-day advice to that team.

71. What will you do as General Counsel, if confirmed, to ensure that the Chemical-Terrorism Vulnerability Information (CVI) portion of the regulations does not lead to a level of secrecy that is detrimental to security?

Answer: The purpose of the CVI regime—and my understanding of the statutory provision on which it is based—is to provide protection for sensitive chemical facility information while ensuring it is shared effectively and quickly with appropriate federal, state and local entities, including those who would be called on to respond in the event of a terrorist attack or other hazard. The department drafted its regulation, as well as the accompanying CVI guidance, to accomplish these dual aims, and, as general counsel, I would ensure that the regulatory regime is followed, and I would advocate change if it is necessary. Additionally, my office is currently reviewing the CVI manual to make sure that instructions on use and sharing of CVI are clear.

National Response Framework

72. What role, if any, did you play in the drafting or reviewing of the National Response Framework? In particular, what role did you play in drafting or reviewing sections of the National Response Framework related to the roles of the FEMA Administrator, the Principal Federal Official, or the Federal Coordinating Officer?

Answer: I reviewed the entire NRF, and assigned a team of lawyers to provide advice on its compliance with relevant statutory provisions, among other things. As far as I remember, I did not draft any portion of it.

Civil Liberties and Privacy

73. The creation of the Department raised many concerns over how the privacy and civil liberties of Americans would be affected by new initiatives to prevent terrorism. To address these concerns, the Homeland Security Act established a Privacy Office and the Office of Civil Rights and Civil Liberties at DHS.

a. How do you view the relationship between the General Counsel, the Chief Privacy Officer and the Officer for Civil Rights and Civil Liberties?

Answer: My view of the relationship between the general counsel, the chief privacy officer and the civil rights and civil liberties officer is similar to my view of how the general counsel should relate to the inspector general: Optimally, those officials should be valued partners in the development and review of departmental programs at an early stage, rather than after the fact. That way, the department can have the benefit of real-time advice on protection of privacy and civil liberties (or, in the case of the inspector general, on financial controls) from these experts. This is the relationship we have, which I commit to continue if confirmed.

b. How does the Office of General Counsel work with and support the mission of these two offices?

Answer: My office has open and productive lines of communication with the privacy office and civil rights and civil liberties office from the top down. My immediate staff and I, for example, communicate regularly with the chief privacy officer and the civil rights and civil liberties officer. In addition to this high-level interaction, our respective staffs interact frequently. Since the beginning of the department, we have had lawyers supporting both offices so that they may provide input and legal support on programs and activities at the earliest stage possible.

c. To the extent that you are involved in these issues, how often do you meet with the Chief Privacy Officer and the Officer for Civil Rights and Civil Liberties?

Answer: As noted in subpart *b*, my immediate staff and I speak with the privacy officer frequently—often several times per week. We speak with the civil rights and civil liberties officer frequently as well.

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

Answer: The general counsel is ultimately responsible for the department's compliance with all laws, including the privacy laws, and OGC attorneys provide advice on the privacy laws. Additionally, we provide legal support to the privacy office so it may conduct its statutory duties with the benefit of legal advice.

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

Answer: Providing advice regarding civil rights and civil liberties is one of the most important and solemn obligations of an agency lawyer: each of us has sworn to preserve, protect and defend the Constitution. It has always been a priority of the office to advise the department of its legal obligations, including those involving individuals' civil rights and civil liberties, and I commit to ensure that it continues to be a priority.

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

Answer: My opinion is that department decision-making is better when it is informed by additional views, including the views of the privacy office and the civil rights and civil liberties office. One action I recommend, therefore, is for the general counsel and the department to continue the relationship that we have with both the privacy and the civil rights and civil liberties officer: that is, to continue inviting them to participate early in the discussion about and formulation of new department programs, so the department may benefit from their views.

Also, an action I will continue taking is encouraging OGC attorneys to view themselves as both lawyers and counselors, and suggesting that one area to counsel on is safeguards that can be put in place for programs that have a potential privacy or civil liberties effect. These may include periodic review of a program by senior officials, senior-level clearance before any change or expansion of a program, and other safeguards.

74. Many privacy experts have suggested that the Privacy Act of 1974 (P.L. 93-579) no longer sufficiently addresses the potential of new technologies to infringe personal privacy.

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

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

c. What role do you think DHS General Counsel should play in assessing the privacy implications of both information sharing efforts, such as with air passenger name records, and any efforts the Department would undertake involving the use of commercial data?

Answer: Section 222 provides the privacy office with separate and distinct authority to conduct activities, some of which may not be contemplated by the Privacy Act or other privacy-related laws such as the E-Government Act of 2002. For example, consistent with its mission under § 222 to "assure that the use of technologies sustain, and do not erode, privacy protections relating to use, collection, and disclosure of personal information," the privacy office, as a matter of policy, issues PIAs not required under the E-Government Act.

In addition to the PIA process, department lawyers have a role in the review and analysis of all department programs, including ones that involve information sharing and commercial data. Where a particular program has potential privacy implications, OGC works closely with the privacy office to ensure that all potential legal issues are addressed before the program goes forward, and that the privacy office has the legal guidance it requires to make decisions about advising on the program's structure.

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

Answer: Certainly, in 1973 and 1974, federal government use of commercial databases was far less than it is today. The privacy office has acknowledged this, and has sought to increase privacy protections when the department uses commercial information. I support the privacy office's efforts in this regard.

76. Data mining has become more prevalent across the federal government. One concern with data mining is the use of information from data brokers whose accuracy is difficult to confirm. What role does the DHS General Counsel have in scrutinizing the accuracy of the data from any data brokers that DHS uses for anti-terror programs, background checks, or any other purpose?

Answer: The role of OGC with respect to data accuracy is to support the privacy office in the exercise of its statutory authorities, and to ensure that that the department and its operational components comply with the Constitution and the laws of the United States, including the Privacy Act of 1974 and Section 208 of the E-Government Act. As part of any PIA it conducts, the privacy office analyzes, among other issues, whether the potential program complies with the Fair Information Practice Principles. One of these principles is to ensure to the extent possible that any personally-identifiable information used in the program is accurate, relevant, timely, and complete.

77. The proposed regulations for the REAL ID Act (P.L. 109-13 Division B) state that the Department sought to provide for privacy and security to "the extent of its authority." *See Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes*, 72 Fed. Reg. 10820, 10825 (2007) (to be codified at 6 C.F.R. Part 37) (proposed March 9, 2007).

a. What privacy laws and principles do you believe DHS was required to follow in issuing the proposed REAL ID regulations?

Answer: As you know, the Real ID rule sets minimum standards that state driver's licenses must meet to be acceptable for certain federal purposes. Though, in comments, a state suggested that DHS was acting beyond its statutory authority to require privacy protection as a minimum standard, the department disagreed. In order to make sure that the minimum standards adopted in the final rule and implemented by states do not cause an inadvertent impact on personal privacy, the rule sets as a standard that states employ

certain key safeguards akin to those found in the Privacy Act and the Federal Information Security Management Act, or FISMA (44 U.S.C. § 36), to information collected under the rule. DHS itself was required to follow the privacy principles underlying the Real ID Act and § 222 of the Homeland Security Act in formulating the rule.

b. Under the proposed regulations, each state is required to submit to DHS a certification document and a comprehensive security plan detailing how the state will protect the privacy of the data collected. If this provision is maintained in the final regulations, what concrete steps will you take to ensure that states effectively safeguard the information gathered to implement the REAL ID Act?

Answer: The department has not yet received such a certification, but I intend to have department lawyers provide advice on whether such a certification meets the standard set out in § 37.41 of the final rule.

Freedom of Information Act

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

a. What role does the Office of General Counsel have in monitoring and ensuring the Department's compliance with FOIA?

Answer: As you may know, the chief privacy officer has been designated as the department's chief FOIA officer, and OGC lawyers provide advice to the chief FOIA officer. After the passage of the Open Government Act of 2007 last December, department lawyers worked with the FOIA officer to draft and disseminate guidance on the new statutory requirements. Additionally, attorneys review all FOIA appeals (unless they are granted by the responding FOIA office), and provide litigation support in any FOIA litigation. I note that in the last year, the Department's FOIA backlog decreased by 25%.

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

Answer: I will continue to work closely with the chief privacy officer on the FOIA program, and offer OGC's assistance to ensure that the department is in compliance with FOIA.

Procurement

79. The Office of the General Counsel provides advice to the Secretary and department leadership and to acquisition personnel to ensure that DHS's activities, including

contracting, comply with legal requirements. DHS is among the largest federal agencies in terms of contracting, obligating nearly $16 billion in FY 2006 for goods and services.

a. How many attorneys in the Office of General Counsel are specifically assigned to provide legal support on DHS's contracting activities?

Answer: The department obligated nearly $16 billion for goods and services in FY 2006 (due in part to Katrina operations), and in FY 2007 obligated $12 billion.

OGC lawyers support the office of procurement operations, the chief procurement office and the science and technology directorate—the headquarters components that deal to the greatest extent with procurements. The office of procurement operations processed $1,927,330,169 worth of procurement activities in FY 2007, and $1,652,659,229 in FY 2006. The science and technology directorate over the last year supported approximately $1 billion in procurement activities. Several major operational components (USCG, FLETC, USSS, CBP, ICE, TSA, FEMA) have their own contracting activities supported by lawyers in chief counsel's offices. Outside of headquarters, USCG, CBP, ICE, and TSA have the largest amount of contracting activity, as illustrated below.

USCG:	FY 06 Obligations: $1,909,205,785
	FY 07 Obligations: $2,315,063,350
CBP:	FY 06 Obligations: $1,844,627,167
	FY 07 Obligations: $2,306,813,981
ICE:	FY 06 Obligations: $1,616,870,301
	FY 07 Obligations: $1,841,912,824
TSA:	FY 2006 Obligations: $1,597,969,450
	FY 2007 Obligations: $1,811,385,823

OGC had four full-time procurement attorneys in FY 2006 (with two added in late FY 2006) and has seven full-time procurement attorneys in FY 2007 (though one attorney is on active duty in Iraq). In the components, USCG has a total of 22 procurement attorneys with 11 at USCG HQ and 11 in field locations. CBP has 5 procurement attorneys in their Indiana field office and 5 procurement attorneys at CBP HQ. TSA has 11 procurement attorneys. ICE has 4 procurement attorneys, and plans to hire 2 more. FEMA has 7 attorneys who spend some portion of their time on procurement law (with 3 full-time attorneys at HQ, 2 attorneys at the Alabama Center for Domestic Preparedness and 2 attorneys at Mount Weather).

b. Do you believe that this number sufficient given the magnitude of DHS's contracting activities?

Answer: Because of the unique and variable nature of DHS's mission—as evidenced by FEMA's FY 2006 obligations, which were dramatically higher than normal as a result of disaster responses due to hurricanes ($6,966,773,411 in FY 2006 versus $1,927,330,169

in FY 2007)—DHS often faces situations that require immediate obligation of funds to respond to natural disasters and other hazards. Most areas of the department are sufficiently staffed and have well-established contracting procedures. I would suggest that CBP, TSA, and headquarters might need improvement in this regard.

CBP has had significant turnover in the last few years and has had difficulty staffing at a level sufficient to cover its increasing procurement demands. Because of requirements of the 9/11 Act, TSA has several new procurement initiatives that may require additional procurement lawyers. And as DHS has matured and evolved, headquarters has increasingly assumed responsibility for its own acquisitions rather than relying on other agencies through inter-agency agreements. More procurement actions result in an increase in bid protest and contract litigation, which, of course, will require increasing the number of procurement attorneys.

c. What is the turnover rate within the Office of General Counsel? If confirmed, what will you do to attract, hire, and retain qualified attorneys with an expertise in federal contracting?

Answer: The turnover rate of OGC headquarters lawyers has been steadily declining: it was 25.9% in 2006, 19.2% in 2007, and we appear on pace to be at or just above 10% this year. We have instituted several initiatives to recruit and attract all lawyers, including procurement lawyers, which I detailed in response to Question 57.

SAFETY Act

80. Under the "Support Anti-Terrorism by Fostering Effective Technologies Act," or SAFETY Act (P.L. 107-296 Subtitle G), the Secretary may designate qualified anti-terrorism technologies to qualify for legal liability protections. The pace of SAFETY Act designations has picked up dramatically over the last year: in 2007, over 80 approvals under the Act have been made so far, compared to a total of just under 100 approvals in the first four years of the Act.

a. What role does the Office of General Counsel play in the SAFETY Act application process?

Answer: OGC lawyers at the science and technology directorate provide advice to the SAFETY Act office and to the under secretary regarding applications, including review all applications and award packages for legal sufficiency, and provide legal interpretations of the rule and statute when necessary. Lawyers also conduct training and outreach on the Act.

b. Do attorneys require special training or qualifications to determine whether a technology may be designated as a qualified anti-terrorism technology under the SAFETY Act? If so, what type of training or qualifications is required?

Answer: Attorneys who work in this area have facility with the regulation and statute, including the public comments on the rule and the legislative history of the Act. They

also have solid drafting skills and technical backgrounds, government contracts expertise, and an understanding of insurance issues.

c. How many attorneys are specifically designated to perform legal reviews of SAFETY Act applications? Given the rise in SAFETY Act applications, do you believe that additional SAFETY Act expertise is needed in the Office of General Counsel?

Answer: Two attorneys and one paralegal perform legal reviews of SAFETY Act applications. I understand that the average turnaround time for these legal reviews is about a week. We believe we have committed the right resources to this task; but if turnaround time goes up due to a rise in applications, I would be open to reconsidering the staffing level.

d. Do you believe any legislative or regulatory changes to the SAFETY Act are needed?

Answer: We do not favor any statutory or regulatory changes at this time.

e. What bearing should a SAFETY Act designation have on procurement decisions made throughout DHS?

Answer: As set forth in the recently published federal acquisition regulation case, 72 Fed. Reg. 63027, § 50.204 provides that agencies may encourage offerors to obtain SAFETY Act protections for qualified procurements; however, agencies may not "mandate SAFETY Act protections for particular acquisitions since applying for SAFETY Act protections for a particular technology is the choice of the offeror."

We are aware that certain state and local governments have required bidders on certain public safety contracts to have SAFETY Act protections. We have no current plans to make the existence of SAFETY Act protections—on the part of an offeror for a government contract—a positive evaluative factor in making a source selection.

81. In the SAFETY Act, a Qualified Anti-Terrorism Technology is defined as follows:

"For purposes of this subtitle, the term "qualified anti-terrorism technology" means any product, equipment, service (including support services), device, or technology (including information technology) designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, that is designated as such by the Secretary."

It is clear from this definition that the original purpose of the SAFETY Act was for products, equipment, and services with a <u>specific</u> purpose related to terrorism. After reviewing the designations made over the past two years, some people contend that the Department is applying the SAFETY Act more broadly that the law allows.

Do you believe that companies that provide security guards and/or other personnel for the physical security of government facilities and/or private critical infrastructure are providing a product or service that has a specific purpose related to terrorism? Please explain in detail the rationale for your answer.

Answer: It is one of the tasks of the SAFETY Act office with the advice of department lawyers to determine if a service under review for SAFETY Act protection is "designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm. . . ." "Specific," however, has a different meaning than "exclusive." It is worth noting that the protections offered by the SAFETY Act are only available if the qualified anti-terrorism technology fails during an act of terrorism; they do not extend to other risks that companies face in the ordinary course of business.

Human Capital Management

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

Answer: In addition to providing advice on human capital management initiatives, which is discussed below, I believe that the general counsel is uniquely positioned to enhance the integration of the department's components into a cohesive whole, since the general counsel's office has personnel in most every component. Our attorney rotation program, which we hope to bring online soon, is designed to give department lawyers a view of the entire department rather than a single component. I commit to pursuing other programs to support integration if confirmed, and look forward to hearing any ideas that the committee may have in this regard.

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

Answer: My management style is inclusive; I try to rely whenever possible on the experience of career lawyers in decision-making, especially on management issues. The department's attorney workforce includes over 400 bargaining unit attorneys. In 2007, OGC and its bargaining unit attorneys were able to reach a stipulated agreement setting forth a newly-defined bargaining unit within ICE without a formal hearing or any other proceeding before the Federal Labor Relations Authority. I understand that there have been few if any labor grievances filed by these employees in the last year. OGC has been able to achieve stable and productive labor-management relationships during my time here, and I would seek to continue this if confirmed.

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

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

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

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

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

Answer: Collective bargaining helps to fulfill the department's mission when representatives effectively represent their bargaining units and bring concerns, suggestions and proposals to management for resolution. It may detract from the mission if it hinders or delays the department in preparing for or responding to emergencies, or impedes the flow of communications between management and employees when such communication is critical to the mission. The role of unions and other employee organizations at the department is set forth in applicable laws, rules and regulations, and the department must comply with those laws, rules and regulations. As provided for in the relevant statutes and regulations, DHS should consult, collaborate, share information and bargain collectively. If confirmed, I will work to make sure that the department fulfills its obligations in this regard.

85. According to 5 U.S.C. § 2302c, federal agencies are to ensure that their employees are informed of their rights and the remedies available to them under federal civil service law. What responsibilities, if any, do you believe the General Counsel bears as a result of this provision, and what actions will you take if confirmed to meet those responsibilities?

Answer: Currently, the civil rights and civil liberties office fulfills the department's responsibilities under 5 U.S.C. § 2302c. As a result of your question, I have instructed OGC staff to determine if CRCL requires any additional legal support in doing so.

86. As part of its new human resources management system, the Department will establish a new process to hear certain individual employee appeals.

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

Answer: I am not aware that the department has taken steps toward creating a Mandatory Removal Panel under 5 C.F.R. 9701.108 or any other such board to hear individual employee appeals. Any such board should be made up of independent, distinguished people known for integrity and impartiality, with expertise in either labor and employee relations or law enforcement/homeland security matters or both. They also should be protected against removal in the same manner Merit Systems Protection Board members are. Such requirements should ensure that any such board has the trust of employees as being a fair and independent adjudicator.

b. On August 12, 2005, a U.S. District Court for the District of Columbia enjoined part of subpart G in the final regulations issued by DHS and the Office of Personnel Management on February 1, 2005, relating to appeals procedures. This part of the regulation limited the authority of the Merit System Protection Board to mitigate penalties imposed by DHS on the ground that this limitation did not comply with a provision of the Homeland Security Act which required that procedures must be fair. (NTEU v. Chertoff, 385 F. Supp. 2d 1 (D.D.C. 2005)). On June 27, 2006, the U.S. Court of Appeals for the District of Columbia Circuit found that the issues related to the MSPB were not ripe for consideration as no employee had been subject to the new appeals process. (452 F.3d 839 (D.C. Cir 2006)). What impact do you believe the District Court's ruling will have on the Department's roll out of the new appeals system? Do you believe any portions of regulations governing the appeals system need to be changed?

Answer: We have reviewed the district court and the court of appeals decisions, and have taken them into account in introducing the new adverse actions and appeals system. The phased rollout permits the department to carefully monitor the impact of the regulations on adverse actions cases and determine if the new regulatory standard is having the desired effect on management's ability to prosecute these cases while maintaining a fair appeals system. I do not believe at this time that the appeals system needs to be changed but commit to watching the system and suggesting changes if necessary.

Miscellaneous Issues

87. There have been reports that the Office of General Counsel is hindering the ability of the Department to consider and promulgate regulations in a timely and efficient manner. We are told that rule packages frequently sit idle at the Office of General Counsel for months at a time and may stay at the Office of General Counsel for months after the Office of General Counsel first reviews them.

For example, we have been told that the Automatic Identification System Notice of Proposed Rulemaking was with the Office of General Counsel for over a year. We understand that the Department's backlog is compounded by the backlog within each component agency. On September 11, 2001, the Coast Guard had a backlog of rule making of about 50 rules. The Coast Guard now has over 90 rules that are backlogged. Such backlogs are troubling, as these regulations are intended to improve the security of our nation.

a. What steps are you taking to clear the backlog with the Office of General Counsel?

b. What steps are you taking to clear the backlog within each component of the Department that has rulemaking authority?

Answer: The department has one of the most vigorous rulemaking practices in the federal government. Whether measured by the number of regulations or the importance and impact of those regulations, the rulemaking demands on DHS are uncommon. Consider, for example, that the 9/11 Act alone requires 15 additional rulemaking actions. The number and importance of the department's rules require prioritization to meet the most pressing security needs and congressional deadlines. Prioritization results in some rules taking longer than others to issue.

Following September 11, 2001, while many agencies began to implement homeland and national security-related laws and regulations by building upon existing regulations and regulatory programs, DHS—the newest and one of the largest cabinet agencies in the executive branch—was uniquely tasked with developing new bodies of homeland security law. Consequently, the regulations that are promulgated by DHS are among the most visible in the federal government. The department's regulatory program primarily comprises six core regulatory components (USCIS, CBP, ICE, FEMA, Coast Guard and TSA), each of which joined DHS from a separate department (DOJ, DOT, Treasury and FEMA), and each of which had been subject to different standards of Departmental-level and Executive Branch oversight prior to joining DHS in March 2003. Over the past five years, the Office of the General Counsel has worked extremely hard to create a uniform regulatory process to ensure that the regulations issued by the Department and all of its components adequately reflect the mission of DHS as a whole, and meet all statutory and Executive Order requirements for agency rulemaking.

I am proud of OGC's role in facilitating and substantially improving the quality of the department's rules. I understand that, when viewed through the lens of a single rule, or even a single component's rules, the department's review may seem cumbersome. But one must consider not only the volume of the rules that the department must consider, but the review that the department conducts on each. For example, when a component submits a regulation to headquarters for review, OGC conducts a legal review, but also coordinates review by other components that have an interest in it. That coordination frequently turns up significant issues or potential conflicts that must be resolved. All of this happens while the regulation is with OGC. OGC sometimes returns a draft rule to the component because it lacks legal justification, conflicts with the law, or does not meet the standards of clarity and quality that we expect. Subsequent adjustments to such proposed regulations must then be prioritized with the components work. Due in large part to our team's efforts, the department has had major successes in promulgating significant regulations quicker than has been done before in the federal government. For example, the department published both a proposed regulation and a final regulation to establish the chemical security program in six months' time. (Comparable programs have taken years to establish.)

Only a small number of regulations are currently at headquarters for coordination or review. In the President's budget request for 2008, I specifically sought additional resources for the office, in large part to enhance our ability to facilitate the quality and efficiency of rulemaking. Even as it added substantial new programs and other mandates that require legal resources, Congress did not increase the level of resources for OGC. Even so, we are leveraging the resources we have to maintain quality and facilitate the pace of rulemaking. The President's 2009 budget request again requests additional resources for the office; the provision of these resources will greatly aid our efforts to promulgate timely, high-quality regulations.

I have met with the leadership of the department's major rulemaking components to assess the regulatory priorities and resource needs. One of the steps in the rulemaking process that routinely takes significant time and resources is the economic assessment of costs and benefits associated with new regulations. I am working with other department leaders on ways to enhance our hiring and access to economists that perform this work. I have also worked with them to identify and encourage the application of additional resources to their rulemaking efforts. Without exception, each component I have worked with has embraced the idea of devoting more resources to rulemaking. The ability to keep pace with the department's rulemaking docket requires that the resources appropriated by Congress match the additional regulatory responsibilities that Congress enacts in authorizing legislation.

88. What role, if any, has the Office of General Counsel played in establishing baseline standards for immigration detention facilities that are operated by the Department of Homeland Security and its contractors? When apparent violations of these standards are uncovered, what role do the Office of General Counsel and the Immigration and Customs Enforcement (ICE) Office of the General Counsel play in investigating these violations and holding appropriate individuals and/or companies responsible for any legal violations?

Answer: OGC has not had a role in detention standards, though I was aware of and participated in the settlement of the lawsuit regarding the Don T. Hutto Detention Center.

89. What role does the Office of General Counsel play with respect to the CFIUS process? Have you been personally involved in any CFIUS reviews since joining the Department?

Answer: OGC works closely with Policy in assessing the security implications of all transactions referred to CFIUS, and either or both of these offices regularly represents the department's views before the interagency committee. I am briefed regularly by my staff on all significant transactions under CFIUS consideration.

90. In 2006, a former Transportation Security Administration (TSA) attorney, Carla Martin, was placed on administrative leave because she had improperly coached several FAA witnesses in the U.S. v. Zacarias Moussaoui case – thereby significantly affecting the United States' case in the most significant terrorist trial since 9/11 in the United States. Of her coaching of witnesses, Judge Leonie Brinkema said: "In

all the years I've been on the bench, I have never seen such an egregious violation of a rule on witnesses."

What actions has the Department taken since this incident to ensure that attorneys at all components of DHS understand their legal and ethical responsibilities with respect to agency witnesses? As General Counsel, what actions will you take to ensure that there is proper oversight of the attorneys with the Department?

Answer: The Carla Martin incident itself was a valuable lesson in the legal and ethical responsibilities of those (very few) agency attorneys who prepare witnesses in conjunction with criminal and civil trials. Your question has caused me to consider memorializing these lessons in memorandum for all department attorneys.

91. **On November 13, 2007, the Officer for Civil Rights and Civil Liberties (CRCL) submitted to the Department's leadership its report regarding its investigation into the Halloween party hosted by U.S. Immigration and Customs Enforcement (ICE) for the Combined Federal Campaign on October 31, 2007. The report describes how immediately after the Halloween party Assistant Secretary Julie Myers directed that certain digital photographs from the party be deleted. In response to a November 6th Freedom of Information Act (FOIA) request by CNN for the deleted photographs, the ICE contractor photographer informed ICE and CRCL that he believed the photos could be retrieved, but that it would take some time to do so. On November 8th, CRCL notified the Department's Office of General Counsel of the FOIA request and a possible conflict of interest regarding the restoration question because ICE senior leadership ordered the destruction. Moreover, on November 8, during a meeting with Julie Myers to discuss the Halloween party incident, Committee staff requested that ICE search for any photographs of the Halloween party and provide them to the Committee, and specifically requested that ICE attempt to retrieve any of the deleted photos. The ICE Principal Legal Adviser later advised ICE to treat the CNN FOIA request as it would any other FOIA request. DHS provided CNN with redacted photos from the party on February 5, 2008, and provided them to Committee staff on the same day.**

a. **Were you personally involved in responding to CNN's FOIA request? If so, please describe your involvement.**

Answer: I was not personally involved in responding to this FOIA request.

b. **Describe the role of the Office of General Counsel in responding to CNN's FOIA request, including any advice the office provided to other DHS components.**

Answer: OGC was not directly involved in responding to this FOIA request, and I do not believe any legal advice was provided to other DHS components on it.

c. **Did the Office of General Counsel determine that there would be a conflict of interest, or a possible conflict of interest, if ICE personnel processed CNN's FOIA request? If not, why not? If so, what steps did the Office of General Counsel take to prevent any conflict of interest?**

Answer: OGC did not determine that there was an actual or possible conflict of interest for ICE personnel to process this FOIA request. And I believe that the result shows that there was no conflict: ICE personnel recovered the photographs, analyzed them under FOIA, and released them.

d. Was anyone at the Office of General Counsel aware of the Committee's request for photos of the incident? If so, describe the role of the Office of General Counsel in responding to the Committee's request, including any advice the office provided to other DHS components.

Answer: I do not know of anyone within OGC who was aware of a request by the committee for photos. I was not aware of the request until very recent discussions about the topic with our office of legislative affairs.

92. In its November 13 report, CRCL recommended that "[t]he DHS Office of General Counsel should further review the decision to delete selected photographs of the event."

a. Were the recommendations contained in the CRCL report communicated to the Office of General Counsel? If so, how has the Office of General Counsel responded to that recommendation?

b. Has the Office of General Counsel reviewed the decision to delete the photographs? If not, why not? If so, describe the results of that review.

c. What additional actions, if any, has the Office of General Counsel taken in response to the deletion of photographs?

Answer: CRCL's recommendations were communicated to OGC, and attorneys inquired about the decision to delete selected photographs. They determined that the action was consistent with departmental obligations under the Federal Records Act, and no further action was taken.

V. Relations with Congress

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

Answer: Yes.

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

Answer: Yes.

VI. Assistance

95. Are these answers your own? Have you consulted with DHS or any interested parties? If so, please indicate the individuals or entities with whom you have consulted, and the nature of the assistance they have provided.

Answer: Yes. In response to some questions, I desired to include a level of detail greater than I could provide on my own, and therefore I sought out as much information as I could with the assistance of a small number of attorneys. Also, as noted in the response to Question 47, given the relationship between OGC and the designated agency ethics official, those answers are largely based upon information the DAEO provided to me regarding the ethics function. That said, all answers are my own and based upon personal knowledge or my understanding of information provided to me.

[Signature page follows.]

AFFIDAVIT

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

Subscribed and sworn before me this 17th day of March, 2008.

Notary Public

Stuart A. Connolly
Notary Public, District of Columbia
My Commission Expires 1/1/2012

SENATOR JOSEPH I. LIEBERMAN

Questions for the Record

Pre-Hearing Questions for the Nomination of Gus P. Coldebella to be General Counsel of the Department of Homeland Security

March 17, 2008

On September 28, 2005, the Committee sent four letters to the Department of Homeland Security and its components requesting documents and information to assist the Committee in its investigation of the Nation's preparedness for and response to Hurricane Katrina: to the Acting Under Secretary for Emergency Preparedness and Response (concerning FEMA materials), to the Commandant of the Coast Guard, to the Assistant Secretary for Infrastructure Protection (concerning materials related to the National Communications System), and to Secretary Chertoff (concerning materials for all remaining parts of the Department, including DHS headquarters).

Three months after the Committee sent these four letters, DHS had provided the Committee with a substantial number of documents in response to only one of the letters, the one to the Acting Under Secretary for Emergency Preparedness and Response seeking FEMA documents. In particular, no documents at all had been produced in response to the letter sent to the Assistant Secretary for Infrastructure Protection for National Communications System materials, and only a small number of documents were produced in response to the letter to Secretary for the remainder of the Department. Moreover, no reason or explanation had been offered by the Department for the failure to provide the materials requested from outside FEMA. On December 30, 2005, Senators Collins and Lieberman sent a follow-up letter to Secretary Chertoff expressing concern that the Committee did not have "the documents, information, and access to Department personnel that we need to conduct a thorough and timely investigation," and requesting his assistance in ensuring that the Department "promptly and fully" complied with the Committee's document and information requests. With an intensive period of hearings slated to take place soon thereafter, and in an effort to jump-start the process of production, the letter also included a list of 21 particularly critical document requests, as well as a set of information requests, that the Committee sought access to on a "priority basis" in the two weeks that followed.

1. **Explain the processes DHS used for producing documents and witnesses to the Committee that were responsive to its Katrina investigation. What was your role in overseeing DHS' document production to HSGAC for its investigation into the failed response to Hurricane Katrina?**

Answer: In October 2005, DHS established a task force to quickly satisfy the committee's priority requests for documents and witness interviews. We have calculated that the task force alone devoted more than 7,000 hours of effort—a figure that does not include the time spent by witnesses to prepare for and give extensive interviews (including some witnesses who were asked to return for multiple rounds of questioning). There was also a significant amount of time spent by staff on gathering and collecting materials for the committee's review.

During this time, I worked with the general counsel to help respond to the committee's requests, as well as to the requests of the other congressional committees inquiring into Hurricane Katrina, in a timely way.

2. **Were all documents responsive to the requests in the Committee's September 28, 2005, letter to Secretary Chertoff produced to the Committee? If not, please provide the following information:**

   a. **Why weren't all such responsive documents produced to the Committee? Please describe all legal bases that you believe support the decision not to provide responsive documents.**

   b. **What role did the Office of General Counsel play in the decision not to produce documents responsive to the Committee's request? What role did you personally play in that decision?**

   c. **Did you agree with the decision or decisions not to produce responsive documents?**

   d. **Were there any documents that DHS component agencies (including component legal offices) recommended be produced to the Committee, or forwarded to the Office of General Counsel for production to the Committee, that were not produced to the Committee as the result of advice, recommendations or other actions by the Office of General Counsel? If so, please describe the nature of any such documents, the legal basis for withholding the documents from the Committee, and your role in the decision not to produce the documents.**

Answer: As I stated in response to Question 33 of the committee's questions, the September 28, 2005 letter to the Secretary requested all documents about Hurricane Katrina held by anyone in the department. Production of all of those documents all at once would have been an impossible undertaking. Committee staff recognized the size and difficulty of the request, and worked with us to prioritize. One way in which we did so was to concentrate our resources on documents associated with the witnesses that the committee sought to interview, which allowed the committee to have and review those documents before the interview took place, which I believe we accomplished to a great extent. By the end of the committee's work, DHS had produced more than 350,000 pages of documents and facilitated the interview of more than 70 witnesses.

The original requests were modified by the committee as it homed in on its priorities. Given that we worked to satisfy the committee's priorities, and not survey all responsive

documents within the entire department, it would have been impossible to determine the set of responsive documents not produced. Certain components forwarded documents to the task force that the components had determined were potentially responsive. Given a number of factors—the limited staff on the task force, the focus on producing the committee's priority documents (i.e., documents of employees scheduled to be interviewed by the committee, before the witness was interviewed), the frequent changes in those priority documents, and the frequent changes in which witnesses the committee sought to interview—I am told that certain documents were not produced by the time the committee's investigation closed. Additionally, while I understand that no decision was made to permanently withhold documents from the committee, certain documents that had executive branch confidentiality interests attached to them were under continuing review, such as the Michael Brown e-mails referenced in Question 7, and were not produced by the end of the committee's investigation.

3. **Were all documents responsive to the requests in the Committee's September 28, 2005, letter to then-Acting Under Secretary for Emergency Preparedness and Response R. David Paulison produced to the Committee? If not, please provide the following information:**

   a. **Why weren't all such responsive documents produced to the Committee? Please describe all legal bases that you believe support the decision not to provide responsive documents.**

   b. **What role did the Office of General Counsel play in the decision not to produce documents responsive to the Committee's request? What role did you personally play in that decision?**

   c. **Did you agree with the decision or decisions not to produce responsive documents?**

   d. **Were there any documents that DHS component agencies (including component legal offices) recommended be produced to the Committee, or forwarded to the Office of General Counsel for production to the Committee, that were not produced to the Committee as the result of advice, recommendations or other actions by the Office of General Counsel? If so, please describe the nature of any such documents, the legal basis for withholding the documents from the Committee, and your role in the decision not to produce the documents.**

Answer: Each of the four letters referenced in Questions 2 through 5 was handled in the same way by the department: by processing documents in line with the committee's expressed priorities. My answer to Question 2 applies here as well.

4. **Were all documents responsive to the requests in the Committee's September 28, 2005, letter to U.S. Coast Guard Commandant Thomas H. Collins produced to the Committee? If not, please provide the following information:**

a. **Why weren't all such responsive documents produced to the Committee? Please describe all legal bases that you believe support the decision not to provide responsive documents.**

b. **What role did the Office of General Counsel play in the decision not to produce documents responsive to the Committee's request? What role did you personally play in that decision?**

c. **Did you agree with the decision or decisions not to produce responsive documents?**

d. **Were there any documents that DHS component agencies (including component legal offices) recommended be produced to the Committee, or forwarded to the Office of General Counsel for production to the Committee, that were not produced to the Committee as the result of advice, recommendations or other actions by the Office of General Counsel? If so, please describe the nature of any such documents, the legal basis for withholding the documents from the Committee, and your role in the decision not to produce the documents.**

Answer: Each of the four letters referenced in Questions 2 through 5 was handled in the same way by the department: by processing documents in line with the committee's expressed priorities. My answer to Question 2 applies here as well.

5. **Were all documents responsive to the requests in the Committee's September 28, 2005, letter to Assistant Secretary for Infrastructure Protection Robert B. Stephan produced to the Committee? If not, please provide the following information:**

a. **Why weren't all such responsive documents produced to the Committee? Please describe all legal bases that you believe support the decision not to provide responsive documents.**

b. **What role did the Office of General Counsel play in the decision not to produce documents responsive to the Committee's request? What role did you personally play in that decision?**

c. **Did you agree with the decision or decisions not to produce responsive documents?**

d. **Were there any documents that DHS component agencies (including component legal offices) recommended be produced to the Committee, or forwarded to the Office of General Counsel for production to the Committee, that were not produced to the Committee as the result of advice, recommendations or other actions by the Office of General Counsel? If so, please describe the nature of any such documents, the legal basis for withholding the documents from the Committee, and your role in the decision not to produce the documents.**

Answer: Each of the four letters referenced in Questions 2 through 5 was handled in the same way by the department: by processing documents in line with the committee's expressed priorities. My answer to Question 2 applies here as well.

6. **Were all documents responsive to the priority document requests set forth in the Committee's December 30, 2005 letter to Secretary Chertoff produced to the Committee? If not, please provide the following information:**

   a. **Why weren't all such responsive documents produced to the Committee? Please describe all legal bases that you believe support the decision not to provide responsive documents.**

   b. **What role did the Office of General Counsel play in the decision not to produce documents responsive to the Committee's request? What role did you personally play in that decision?**

   c. **Did you agree with the decision or decisions not to produce responsive documents?**

Answer: In reviewing the correspondence between the committee and the department, I was reminded of the massive amount of work that was done between the date of the letter—December 30, 2005—and our responses to the committee on January 11 and January 30, 2006, which I can provide to the committee if necessary. They demonstrate a good-faith, intensive, quick effort to produce the documents and make available the witnesses that the committee prioritized. They also demonstrate our desire to communicate fully to the committee about, for example, various documents that we were not able to produce. Our responses, as well as the Chairman's letter at the end of the investigation, lead me to believe that the priority document requests set forth in the committee's December 30, 2005 letter were substantially satisfied. My January 11 letter recounts DHS's progress over two weeks during the holiday season, and indicates that "[w]e are continuing to aggressively pursue [the priority] requests." In addition, my January 30 letter sets dates for committee interviews of over 25 DHS witnesses, including the Deputy Secretary, the chief of staff, and other senior department officials. That letter also contained an attachment, "DHS Priority Documents Requested on December 30, 2005," listing the bates number ranges of documents satisfying each priority request.

7. **Michael Brown, the former Director of FEMA, produced a number of DHS documents to HSGAC at the time he testified before the Committee, or in interviews with Committee staff. Several of these documents were responsive to HSGAC's requests, but to the best of our knowledge, appear not to have been produced by DHS; copies of some of such documents are attached. For each of the attached documents (attachments a–l), answer each of the following questions individually:**

   a. **Explain why each attached document was not produced, or if it was produced provide the Bates number.**

   b. **Explain your involvement, if any, in determining whether to produce such document.**

c. **Explain if you agreed or disagreed with the decision not to produce the document.**

Answer: It is my understanding that these documents were not produced to the committee, and decisions regarding production of documents a–*l* (and I believe decisions about all of Mr. Brown's e-mails) were made without my involvement before I arrived at the department.

8. **On January 31, 2006, Citizens for Responsibility and Ethics (CREW) in Washington filed a lawsuit against DHS in the U.S. District Court for the District of Columbia alleging violations of the Freedom of Information Act. Pursuant to this litigation, DHS filed a Vaughn index cataloguing documents responsive to the CREW FOIA request.**

   a. **Describe any role you held in litigation of this lawsuit. What role, if any, did you play in reviewing documents responsive to CREW's FOIA requests and determining which documents could be properly withheld under legitimate FOIA exemptions.**

   b. **Were there any documents that DHS component agencies (including component legal offices) recommended be produced that were not ultimately produced? If so, please describe the nature of any such documents, the legal basis for withholding the documents, and your role in the decision not to produce such documents.**

   c. **Have all documents listed on the Vaughn index that are responsive to HSGAC requests made during the HSGAC investigation into the failed response to Hurricane Katrina been produced to HSGAC? Please identify any responsive documents on the Vaughn index that have not been produced to HSGAC and explain why such documents were not produced. Did you agree with the decision or decisions not to produce each of these documents?**

Answer: Lawyers in the FEMA chief counsel's office, in conjunction with DOJ litigators, were primarily responsible for the litigation of this matter, including the FOIA exemption determinations, and one headquarters lawyer, who was involved in the Katrina investigation, assisted and worked with them because of her familiarity with Katrina-related documents. I personally had at least two meetings with the litigation team to discuss strategy. I have been told that the documents listed on the Vaughn index were not produced in response to the committee's request.

9. **Each of the four letters sent by the Committee to the Department and its components on September 28, 2005, included instructions that if a document was being withheld because the Department believed it was covered by a valid privilege, that the Department should identify the document, provide the Committee with general information about the document, and indicate the privilege claimed. The request that the Department itemize the documents withheld from the Committee was reiterated in the December 30, 2005 letter from Senators Collins and**

Lieberman to Secretary Chertoff. However, no privilege log or other index of documents withheld from the Committee was ever provided to the Committee.

a. Why was no privilege log or other index of withheld documents provided?

b. Describe any involvement you had in the determining whether to provide the requested itemization of withheld documents.

c. Will you commit to providing an index of withheld documents to the Committee when requested with respect to future document requests?

Answer: It is my understanding that no privilege log was produced. If in the future documents were withheld from the committee because of a claim of privilege—a circumstance I would seek to avoid in the first place—I would let the committee know the reasons for such documents being withheld.

10. The four letters that the Committee sent to the Department and its components on September 28, 2005, contained not only document requests, but also a number of requests for information – for example, the identities of key personnel and information about when the National Response Plan and its various annexes were activated. A subset of these information requests was also included on the priority list submitted by Senators Collins and Lieberman in their December 30, 2005 letter to Secretary Chertoff. Then-General Counsel Philip Perry, in a January 9, 2006, response to the December 30 letter, assured the Senators that "we can and will respond to many of these inquiries." A subsequent letter, dated January 30, from you to then-HSGAC majority staff director Michael Bopp, indicated that responses to the priority information requests were "In process." No responses, however, were ever provided to any of the Committee's information requests.

a. Why did the Department not respond to the Committee's information requests? Please describe all legal bases that you believe support the decision not to provide answers to the Committee's questions.

b. What role did the Office of General Counsel play in the decision not to answer the Committee's information requests? What role did you personally play in that decision?

c. Did you agree with the decision not to provide answers to the Committee's information requests?

Answer: While I understand that the department did not provide answers to the committee's information requests in writing, there were many opportunities for communication about the subjects of those information requests with committee staff. Additionally, by the end of the investigation, the committee had and used the opportunity to ask 70 DHS witnesses about the subjects of those information requests.

11. Senators Lieberman, Levin, Akaka, Carper, Lautenberg and Pryor filed additional views to "Hurricane Katrina: A Nation Still Unprepared," the Committee's report

on the findings of its investigation into the response to Hurricane Katrina. Among other things, those additional views address the lack of Administration cooperation with the Committee and include a section on the difficulties the Committee encountered in its dealings with DHS. One of the items discussed in the additional views is the significant delays the Committee faced in being given access to conduct interviews of witnesses from DHS headquarters, including DHS leadership and what was then called the Homeland Security Operations Center (HSOC). The additional views, moreover, cite two examples of such witnesses that Committee staff requested to interview but who were never made available: the Senior Watch Officer on duty at the HSOC during the time the HSOC disseminated a critical but erroneous situation report concerning the situation in New Orleans, and a member of the Secretary's staff who was responsible for FEMA-related issues.

a. Why were these two individuals never made available to Committee staff for interviews?

b. What role did the Office of General Counsel play in the decision not to make these individuals available for interviews? What role did you personally play in that decision?

c. Did you agree with the decision not to make these individuals available for interviews?

Answer: I worked with committee staff to determine the committee's priority witnesses and to facilitate their appearance. This took DHS personnel and committee staff to New Orleans, Austin, Chicago, and other places, to interview DHS employees still managing the response and recovery effort. Committee staff interviewed Deputy Secretary Michael Jackson, John Wood, the DHS chief of staff, and Admiral Thad Allen. The committee itself had Secretary Chertoff testify. I believe that the committee's access to witnesses was very good. I am not familiar with any discussions that took place on the witnesses cited in the question, and I note that they were not part of the list of 22 priority witnesses in the committee's December 30, 2005 letter.

12. In some of the interviews conducted by HSGAC on the failed response to Hurricane Katrina, DHS lawyers objected to questions about discussions with the Secretary or Deputy Secretary of DHS and in some instances would not let the witness answer questions regarding discussions with the Secretary or Deputy Secretary of DHS, citing executive communications as the reason for the objection. In other objections to questions about witness discussions with the Secretary or Deputy Secretary, the DHS lawyer refused to let the witness answer, claiming these were confidential communications within DHS at the most senior levels, but said DHS would address such questions if they were submitted in writing. In later interviews, DHS appeared to drop this position. Describe any involvement you had with DHS's initial position on objections regarding communications with the Secretary or Deputy Secretary of DHS.

a. **Do you believe there is any legal authority to prohibit DHS witnesses from responding to HSGAC questions regarding communications with the Secretary or Deputy Secretary of DHS? If so, explain the basis.**

b. **If you do not think there was a basis for such objections, explain why such objections were made during HSGAC's Katrina investigation. (See, for example, the Committee staff interview with Brooks Altshuler, transcript at pp. 147-153, attachment 4).**

c. **If there was a change in policy concerning whether DHS witnesses would be permitted by counsel to discuss communications with the Secretary or Deputy Secretary, please explain the nature of the change in policy, and when and why the policy changed.**

Answer: I believe we put very few limitations on the scope of witness testimony. Given the fact that these instructions were given in informal interviews, the question of legal authority—in this case, should communications with a department head be disclosed—never arose. Instead, the department attorney set a boundary as part of the inter-branch discussion on the parameters of the inquiry. I do believe that discussions with a department head are sensitive, because if such discussions cannot be had in confidence, the ability of a department head to receive unvarnished advice is necessarily diminished.

13. **In some interviews HSGAC conducted during its investigation into the failed response to Hurricane Katrina, DHS lawyers would not allow witnesses to answer questions concerning who the witness had spoken to at the White House, or even whether any conversations with anyone at the White House had occurred. In other interviews of DHS witnesses HSGAC conducted, DHS and FEMA lawyers would not allow DHS employees to discuss the substance of conversations with certain White House officials. For example, during the December 22, 2005 HSGAC interview of Patrick Rhode, you instructed Rhode not to answer a question regarding the contents of a communication between a FEMA employee and a White House employee, even though DHS had produced to HSGAC an email of this communication. (See pp. 119-126 of Committee staff interview, attachment 5. For another example, see the January 23, 2006 Committee staff interview with Michael Brown at p. 194-196, attachment 6). Although the DHS and FEMA lawyers did not assert executive privilege in making such objections, they asserted the witness could not discuss executive level communications because they were considered confidential.**

a. **What was your understanding of what communications with White House officials the White House would not allow witnesses to testify about?**

Answer: In this interview, I implemented what had been discussed between DHS and lawyers at the White House (as well as lawyers from the White House and the committee): that witnesses would answer questions about the substance of communications between the witness and White House personnel, but that, if the White House personnel were of such a high level that the communications would be likely to

have substantial confidentiality concerns attached to them, the witness would be instructed not to answer.

b. Describe any involvement you had with forming positions on such objections discussed in the question.

Answer: I believe I helped the general counsel in developing these positions, and likely communicated with our attorneys about the positions once they were developed.

c. Do you believe there is any legal authority for such objections? If so, explain the legal authority.

Answer: Given the fact that these instructions were given in informal interviews, the question of legal authority did not arise. It is clear, however, that the executive branch has the right to engage in a process of discussing with the legislative branch what information is appropriate to provide, which I believe was happening during these interviews.

d. If you do not think there was a basis for such objections, explain why such objections were made during HSGAC's Katrina investigation.

Answer: Please see answer to subpart *c*.

e. After you instructed Rhode not to answer a question regarding the contents of a communication between a FEMA employee and White House employee, you stated that you thought the White House had been very accommodating in the types of communication that it would let witnesses testify about. Why did you believe the White House had been very accommodating?

Answer: As did the department, the White House provided what I understood to be unprecedented access to the committee during its investigation. This position is corroborated in the letter of then-Chairman Collins of March 15, 2006, in which she concluded that the committee had received "a coherent picture of what occurred" through its investigation, with specific regard to documents and information provided by the White House.

14. In his January 9, 2006, letter to the Committee, then-DHS General Counsel Philip Perry asserted that "DHS witnesses may discuss communications of a factual or operational nature between themselves and certain White House personnel." He further asserted that this position was an "accommodation" that had resulted from communications between the Committee and the White House. (To the extent Mr. Perry was suggesting that the Committee had agreed to such an "accommodation," his assertion was erroneous; three days after Mr. Perry's letter, Senators Collins and Lieberman sent a letter to the President's Chief of Staff, complaining that DHS Office of General Counsel attorneys had in a number of cases instructed witnesses not to answer any questions related to the White House, and demanding that this practice "simply must cease").

a. **Which individuals were and were not included among the "certain White House personnel" about whom DHS witnesses were to be permitted to speak? What was the legal basis for preventing witnesses from testifying about conversations with individuals other than the "certain White House personnel?"**

b. **What is the legal basis for permitting witnesses to discuss only communications with White House personnel of a "factual or operational nature?"**

c. **What was your role in the decision to limit DHS witnesses' testimony in this fashion?**

d. **Do you agree, as a general matter, that DHS witnesses should be permitted to discuss communications with White House personnel only if those communications are "of a factual or operational nature" and only if the conversations are with "certain" White House personnel?**

Answer: What had been discussed between lawyers at the White House and the committee was that witnesses would answer questions about the substance of communications between the witness and White House personnel on factual or operational matters, but that, if the White House personnel were of such a high level that the communication might have executive branch confidentiality interests attached to it, the witness would be instructed not to answer. Though I do not recall who was above the line and who was below, I believe the cut-off was based on the employee's position: communications with those who were below the position of special assistant to the President were disclosed. The basis for such instructions was to allow Congress as much access to executive branch information as possible, while being mindful of the legitimate confidentiality interests in the information.

15. **On February 6, 2007, Comptroller General David Walker, in testimony before the Subcommittee on Homeland Security of the House Appropriations Committee, said the following:**

"My understanding is that every document that we seek to review has to be reviewed by the General Counsel's Office. That is unacceptable."

a. **Was Mr. Walker's understanding accurate as of February 6, 2007? Is Walker's understanding accurate today? If it is not accurate in your opinion, please explain in detail why.**

Answer: The comptroller general's understanding was not accurate then, and is not accurate now. Even so, I would suggest that any access problems that the comptroller general had identified last year have been significantly reduced one year later. The best evidence of this is the comptroller general's testimony to the same committee one month ago: Mr. Walker made clear that access to departmental information has improved due to discussions between GAO and DHS over the past year. I plan to continue this productive dialogue with the GAO.

b. Describe in detail any role of the General Counsel's office in a GAO investigation.

Answer: OGC provides legal advice to DHS officials and employees throughout the course of a GAO audit or investigation. For example, attorneys may attend GAO entrance or exit conferences or provide assistance in responding to GAO requests for information or interviews as requested by DHS employees handling the requests. OGC may also play a role in coordinating responses to certain GAO requests that involve sensitive information or documents, such as those related to ongoing investigations or proceedings, or those containing personal privacy, intelligence or law-enforcement information. In such instances, department attorneys ensure that such information is properly handled and appropriately marked. OGC may also assist in coordinating responses when multiple requests have been received from the GAO, members of Congress, or other requesters. In these cases, OGC seeks to ensure that disclosures are consistent and complete, and that any sensitive information is appropriately marked and handled. OGC may also provide comments on draft GAO reports and on DHS's responses to them.

c. What has been your personal role in GAO investigations, including in decisions regarding GAO access to documents and information?

Answer: I have discussed certain GAO inquiries with GAO staff, but I believe the number of GAO investigations I have been involved in is not more than a handful. One inquiry that I was involved in was regarding access to documents relating to a particular interagency continuity of operations exercise. Discussions with GAO staff resulted in an outcome that allowed GAO to have access to all of the information it required: certain documents were produced unredacted, certain other documents were produced redacted, but access to unredacted versions of those documents was provided to GAO as well.

d. What are the current criteria for deciding whether GAO will be allowed to review a document that they have requested? Please provide any and all written guidance that outlines these criteria.

Answer: The department's written guidance on GAO access is found in Management Directive 0820.

e. Do you interpret Management Directive 0820 as written or implemented to be that attorneys are to review all documents before the Department provides those documents to GAO?

Answer: No.

f. GAO has taken the position that screening of documents by DHS counsel should be made on an exception basis, with most documents being provided directly to GAO without prior review or approval by counsel. Do you agree with this position? Will you agree to operate in this manner?

Answer: I believe that most documents are currently being provided to GAO without prior review by the Office of the General Counsel, and few interviewees are accompanied by lawyers. I will continue to engage with GAO officials to ensure that the GAO is able to obtain the information it needs to complete its job without undue delay.

Comptroller General Walker went on to say at the hearing:

"It is also my understanding that selectively the General Counsel's office wants to sit in when we want to interview officials. Inappropriate."

g. Do you believe it is appropriate for staff of the General Counsel's office to sit in on GAO interviews of DHS officials in all circumstances? If your answer is "no," in what specific circumstances do you believe it is appropriate for staff of the General Counsel's office to sit in on GAO interviews of DHS officials?

Answer: The comptroller general correctly indicated that lawyers sit in on interviews only on a "selective" basis. However, the comptroller general's statement seems to have led to an impression—an incorrect one—that lawyers sit in on *every* interview. They do not. In fact, our GAO liaison suggests that the number of GAO engagements in which OGC attorneys were involved is not more than a few. There may be instances where an attorney's presence may be helpful and necessary, such as when sensitive information is must be appropriately identified and handled, or when an employee requests that a department attorney attend.

h. Are there any policies or practices on whether a DHS attorney will sit in on a GAO interview of a DHS official? Describe any such policies or practices. Where such policies are in writing, please provide copies of the written policies.

Answer: The department's policy with regard to GAO requests for interviews is set forth in Management Directive 0820. This policy recognizes that attorney involvement should be evaluated on a case-by-case basis, as it is.

i. Have you sat in on GAO interviews of DHS officials during the period of time between October 2005 and the present? If so, please indicate how many times, which DHS officials were being interviewed, and the subject of the GAO investigation. What factors do you consider when judging whether to sit in on a GAO interview? During any GAO interviews you attended, have you raised to objections to GAO's questions or advised DHS officials not to answer those questions?

Answer: I do not recall sitting in any interviews of DHS officials between October 2005 and the present, even though I would not be surprised if I sat in an interview related to Hurricane Katrina.

j. GAO has stated that it would be much more efficient for GAO staff to deal directly with program officials after an initial entrance conference, without having to work through layers of liaisons and counsel. Would you support this change in process?

Answer: We are currently working with GAO to clarify and streamline the process for providing information, with the goal of an even more efficient and effective system for GAO to have prompt access to documents and witnesses. This will involve a revision to Management Directive 0820, and is designed to satisfy Congress's mandate in the 2008 DHS Appropriations Bill. Discussion with GAO's general counsel are ongoing and we hope to have a final product soon.

Later, in the same hearing, CG Walker stated:

"Thirdly, I think there needs to be an understanding, if the General Counsel's office is going to get involved it has clearly got to be the exception rather than the rule. Right now the system is structured to delay, delay, delay. It is really more delay than denial."

k. Do you agree that the involvement of the Office of General counsel has delayed GAO investigations? Will you commit to changing this situation, and ensuring that the role of the Office of General Counsel does not impede or delay the work of the GAO and of the DHS Inspector General?

Answer: I do not believe that the involvement of counsel has unduly delayed GAO investigations. I will commit to working with the GAO and the inspector general—as we currently are—to improve the relationship between the department and their offices.

l. What is the Department's definition of "pre-decisional information?" What is the Department's current policy with respect to providing "pre-decisional information" to GAO? What is the Department's current policy with respect to providing "pre-decisional information" upon request of Congress? Describe the legal basis for such policies.

Answer: I do not believe that the department has a policy defining "pre-decisional information." The definition may include sensitive internal information relating to a decision being contemplated, such as the discussion of various policy choices that the department may be considering in a rulemaking. This, as well as other information in which DHS has a confidentiality interest (such as that related to ongoing investigations or proceedings, or containing personal privacy, intelligence or law-enforcement information), might require discussion with the relevant committee of Congress on how to provide information that the legislative branch seeks while taking executive branch sensitivities into account.

m. Do you believe the Department may decline to comply with GAO requests for information or documents from the Department? If so, describe any authority for doing so.

Answer: The department makes every effort to fully comply with GAO's requests for information, or make an appropriate compromise when the documents sought by GAO contain information in which there is a confidentiality interest. There are legal, constitutional, and statutory questions to consider when confronted with a question about GAO access, but in all cases the department attempts to have discussions with OMB that allow quick and open access.

n. **What are, in your opinion, legitimate reasons to withhold documents or information from GAO? Please explain in detail the legal basis for your views.**

Answer: Please see my answer to subsection *m*.

o. **Do you believe any of the following categories of documents or information may appropriately be withheld from GAO: pre-decisional documents; draft plans that are made available to stakeholders outside of the Department (including private sector organizations); program life cycle cost estimates and the basis for these; budget justification data; and contracts and related files, such as contractor deliverables and performance reports? Do you believe any of these categories of documents may be withheld from Congress? If the answer to either question is "yes," please provide the legal basis for your views.**

Answer: Answers to these questions depend upon the circumstances. In all cases, I will seek—as I have—to provide a quick resolution to any access question that is brought to my attention from around the department, in a way that satisfies the GAO's need for access while being mindful of executive branch interests.

16. **Since DHS was established in 2003, it has continued to encounter serious problems related to its acquisition process. GAO has issued numerous reports addressing deficiencies in the DHS acquisition process, including a review of the DHS acquisition workforce and a review of the FEMA acquisition process for goods and services for victims of hurricane Katrina.**

a. **Do you believe that DHS acquisition processes could benefit from increased Office of General Counsel participation? If so, how would you propose to improve counsel participation in the acquisition process? What role should the DHS General Counsel's office play in the acquisition process? What role does it currently play?**

Answer: At headquarters, OGC has an established role in the acquisition process and works with the office of acquisitions, the chief procurement officer, and other DHS components. We currently support various acquisitions at varying levels depending on the dollar value and complexity of the acquisition. For example, OGC assigns attorneys to major program acquisitions from the requirement development stage. Our goal is to have the same attorney follow the procurement through all stages, including contract award and even contract administration support. In addition, we currently provide a legal review for all contract actions over $550,000, which includes inter-agency agreements, contract awards, task order and delivery order awards and contract modifications. We have found the greatest success with in-depth, early involvement of our attorneys and I believe that increased participation and involvement in the acquisition planning and in contract administration would improve the acquisition process. As our procurement attorney staff has increased, we have also been able to provide more proactive support such as training and the development of templates and standardized processes and procedures. We have built a positive and productive

relationship with the DHS acquisition community and look forward to continuing to strengthen the relationship to establish OGC as valued team members in the process.

In addition, OGC has an important oversight role with respect to all DHS acquisitions, even those conducted at the component level. This has been one of the more challenging areas that we have encountered. DHS has eight components that have their own contracting activities: headquarters, FEMA, the Coast Guard, ICE, CBP, the Secret Service, FLETC, and TSA. Other programs procure goods and services as well. Most of these components have long established contracting groups supported by component procurement attorneys. While the chief procurement officer also has oversight of component procurement shops, this is an evolving relationship. While we cannot review or provide advice on all component procurements, OGC has assigned procurement counsel to assist on sensitive or complex procurements at the request of components, the CPO or the under secretary for management.

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

Answer: I will largely defer to the CPO on efforts to integrate the component agencies' procurement capabilities, but I do know that this is a continuing effort. The CPO is working to increase communications across the department by hosting a monthly meeting including CPO leadership and the component procurement chiefs. In addition, the CPO, in conjunction with the under secretary of management, instituted monthly program management council meetings to facilitate integration of acquisition policy across the contracting and program management activities of the department.

OGC has supported CPO integration by providing legal advice to the CPO and the office of procurement operations as they develop processes, update the homeland security acquisition regulations, the homeland security acquisition manual, and other internal guidance documents. By way of example, lawyers have provided support to CPO as it updates key directives such as the acquisition line of business and the DHS investment review process.

17. In October 2007, the Committee held a hearing that assessed DHS' reliance on contractors. From the testimony provided, it was clear that the witnesses believed that DHS reasonably turned to contractors to start programs and initiatives shortly after the Department was established. GAO expressed concern, however, that DHS has continued to rely on contractors to perform services that closely supported inherently governmental functions without fully assessing the risk of doing so.

a. What role is your office playing in ensuring that the Department's reliance on contractors does not put the department at risk of losing institutional knowledge or control over decision making?

Answer: OGC offers early assistance to program offices during the requirements drafting process and routinely reviews significant acquisition plans (including updates to those

plans) and solicitation and award documents and files. This activity includes reviewing work statements that require the contractor to provide advice, opinions, recommendations, ideas, reports, or analyses. In the course of these reviews, the attorneys critique and revise work statements and acquisition planning documents that might allow contractors or their employees to have discretionary decision-making authority over inherently governmental activities. The reviews also include assuring the existence of plans or contract terms that provide and allow for: contract assessment, management, and reporting; the protection of reports as special works; and the reservation of tools and intellectual property rights, which combined should allow the government to assume the work of the contractor, given adequate staffing and a transition period. Procurement attorneys also participate in workforce planning groups at the agency component level, where options are discussed and recommended for decision. Personnel law attorneys assist headquarters and components in resolving legal issues that arise in the employee hiring process and provide assistance to human resources that might help expedite the process of hiring federal employees.

b. What role is your office playing with respect to protecting against conflicts of interests on the part of DHS employees working with contractors, or contractor personnel working for the Department?

Answer: The designated agency ethics official serves as a source of guidance, education, and determination with respect to DHS employees whose proximity to, or working relationship with, contractor employees raises a potential conflict of interest or other ethical issue. The DAEO provides the required general ethics training and makes available formal and informal advice, advisories, and information, including material and advice dealing with the particular problems of the blended workforce to DHS employees.

OGC procurement attorneys also work with the DHS office of procurement policy to facilitate implementation of the new FAR rules on contractor codes of business ethics and conduct. However, the DAEO's office has for some time already collaborated with agency procurement attorneys in commenting on contractor organizational conflict of interest detection and mitigation plans and business conduct rules. The DAEO's office also collaborates with agency procurement attorneys in drafting notices, instructions, and disclosure commitments for contractor employees regarding circumstances that might pose a conflict of interest for government employees or that may compromise the contractor employee's unbiased performance of duties on behalf of the government. OGC also strives to sensitize DHS offices to conditions that can lead to confusion of appropriate roles for contractor employees and government staff in the procurement context.

The DAEO's office collaborates with agency procurement attorneys in providing briefings on ethics, procurement integrity, and organizational conflict of interests to source selection bodies (which sometimes include private sector advisors, and, less often, private sector members). As part of its acquisition planning and solicitation review responsibilities, procurement attorneys recommend or direct the inclusion of agency organizational conflict interest clauses, such as 48 C.F.R. 3052.209-72, where the potential for an organizational conflict of interest has been identified.

c. What role is your office playing with respect to ensuring the DHS is not having contractors complete inherently governmental functions? How do you interpret the term "inherently governmental" function?

Answer: OGC interprets the term "inherently governmental function" as it must, that is to say, as it is defined by statute, in OMB Circular A-76, and under the FAR for the purposes of the FAIR Act processes, competition for commercial activities, and general procurement purposes. The essence of those definitions, and the office's interpretation of the term, is that such functions include those activities which require either the exercise of discretion in applying government authority or the use of value judgments in making decisions for the government. This includes binding the government to some action by contract, policy, or regulation; determining the department's interest in military, diplomatic, or judicial proceedings; to commission, appoint, or direct government employees; to significantly affect the life, liberty, or property of citizens; or to control government property disposition. Certain kinds of contracted support pose an increased risk that the support, originally envisioned as commercial in nature, can without monitoring and precaution become inherently governmental or otherwise confuse the role of government employees and contractor employees. *See generally* 48 C.F.R. §§ 37.114, 37.104. The reviews, activities, and advice discussed above, throughout the acquisition lifecycle, allow OGC to guard against contracts and contract performance that includes or leads to the performance of inherently governmental activities by contractors and their employees.

18. In October 2007, the DHS Inspector General issued a report on the Department's award of a $475 million, sole-source contract to an Alaskan Native Corporation in 2003 for logistics and operations support services. This contract would have a period of performance of 10 years if all option periods are exercised. In part, the Inspector General cited DHS for selecting an incorrect industry classification code that enabled DHS to award the contract on a sole-source basis and raised questions about whether DHS directed the contractor to hire certain contractors to act as key subcontractors.

a. What role did the DHS Office of General Counsel play in developing or reviewing the acquisition strategy, and subsequently, when approving the contract for award, or exercising options?

Answer: My understanding is that no headquarters lawyers played a role in this matter. However, the chief procurement officer with the assistance of counsel issued a policy statement after this action about the use of ANCs.

b. What role did the Office of Chief Counsel at Customs and Border Protection (CBP) play?

Answer: CBP's OCC provided occasional legal advice to CBP's office of procurement during the conduct of the procurement. In addition, in accordance with the federal acquisition regulation and DHS's acquisition policy, CBP's OCC reviewed and found the contract legally sufficient. The legal review consisted of a review of the contract file to

ensure that the contracting officer had complied with all applicable acquisition statutes, regulations, policies and procedures.

c. Did you, or anyone else in the DHS Office of General Counsel or CBP Office of Chief Counsel, raise any objections or concerns regarding the proposed strategy or contract?

Answer: CBP's OCC determined that the contract award to Chenega Technology Services Corporation was legally sufficient. Please note that 13 C.F.R. 124.503(b) requires the Small Business Administration to verify the appropriateness of the North American Industrial Classification System (NAICS) code assigned to the requirements by the contracting officer. Consistent with this regulation, CBP sought and received SBA's verification of the NAICS code that CBP used for the contract award. While the DHS OIG may have selected a different NAICS code, the federal agency with expertise in verifying the appropriate industry classification code—the SBA—verified the code that CBP selected.

d. Would you describe the role of your office in acquisitions such as this as principally to assure that the acquisition is legally permissible or to assure that the acquisition is in the best interests of the government?

Answer: CBP's OCC ensured that the acquisition was legally permissible.

19. DHS has some of the most extensive acquisition needs within the federal government, and often relies on the use of other agencies' contracts and contracting services, a process known as interagency contracting. In September 2006, GAO found that the DHS did not always consider alternatives to ensure good value when selecting among interagency contracts, systematically monitor its total spending on interagency contacts, or assess the outcomes of its use of this contracting method. DHS agreed to take a number of corrective actions to improve its use of interagency contracts.

a. Please describe the role your office plays in reviewing proposed use of interagency contracts by DHS personnel?

Answer: DHS policy requires that legal counsel review all interagency agreements entered into under the Economy Act and implemented by the Federal Acquisition Regulation if the dollar value of the agreement is more than $500,000. Legal counsel are also required to review all IAAs not covered by FAR regardless of dollar amount. In addition, OGC reviews any IAA, regardless of dollar amount, if the transaction is sensitive or complex or anyone in the department requests a legal review. OGC proactively works with the office of procurement operations in developing and reviewing policy governing the department's use of IAAs.

b. Does your office have sufficient visibility over the use of interagency contractors to enable your office to provide timely legal advice?

Answer: Lawyers work closely with the office of procurement operations and the servicing agency to draft well defined contract requirement documents, ensuring that the department's legal and policy issues are resolved prior to executing the interagency agreement or contract award. OGC reviews the majority of interagency agreements for contract and fiscal law issues and is able to provide timely advice and guidance to the office of procurement operations and other DHS entities entering into interagency agreements. When IAAs involve other agencies, their legal offices also conduct a legal assessment adding an additional level of review and assessment.

SENATOR SUSAN COLLINS

Pre-Hearing Questions for the Nomination of Gus P. Coldebella to be General Counsel of the Department of Homeland Security

March 17, 2008

During the Committee's investigation into the failed response to Hurricane Katrina, DHS failed to provide a number of the Committee's requests for documents and objected at various points to a number of the Committee's questions to witnesses.

1. For those documents responsive to the Committee's requests that DHS did not produce to the Committee, please describe:

a. your role, if any, in advising DHS on the appropriate response to these requests;

b. with respect to any withholding by DHS of documents requested by the Committee in which you played a role, please identify or describe:

i. the specific categories of legal privileges, objections, or other bases for not providing the requested documents;

ii. for each identified category of legal privilege, objection, or basis relied upon, the legal justifications and supporting authorities for applying such privilege, objection, or basis in the context of a congressional request for documents from an Executive agency in furtherance of Congress's constitutional oversight responsibilities; and

iii. for each legal privilege, objection, or basis relied upon, whether it is your legal judgment that such privilege, objection, or basis properly applies in the context of a congressional request for documents from an Executive agency in furtherance of Congress's constitutional oversight responsibilities and, if so, why.

Answer: My role with regard to committee's requests for documents was helping the general counsel and the rest of the department respond to them in a timely way. As I stated in response to Question 33 of the committee's questions, the September 28, 2005 letter to the Secretary requested all documents about Hurricane Katrina held by anyone in the department. Production of all of those documents all at once would have been an impossible undertaking. Committee staff—in particular Michael Bopp of your staff—recognized the size and difficulty of the request, and worked with us to prioritize. One way in which we did so was to concentrate our resources on documents associated with the witnesses that the committee sought to interview, which allowed the committee to have and review those documents before the interview took place, which I believe we

largely accomplished. By the end of the committee's work, DHS had produced more than 350,000 pages of documents and facilitated the interview of more than 70 witnesses.

Given the scope of the original request—which was subsequently modified as the committee homed in on its priorities—I cannot begin to determine the documents responsive to the original request that were not produced. However, I do know that certain components forwarded documents to the task force that components had determined were potentially responsive. Given a number of factors—the limited staff on the task force, the focus on producing the committee's priority documents (i.e., documents of employees scheduled to be interviewed by the committee, before the witness was interviewed), the frequent changes in those priority documents, and the frequent changes in which witnesses the committee sought to interview—I am told that certain documents were not produced by the time the committee's investigation closed. Additionally, while I understand that no decision was made to permanently withhold documents from the committee, certain documents that had executive branch confidentiality interests attached to them were under continuing review, such as the Michael Brown e-mails referenced in the Chairman's Question 7, and were not produced by the end of the committee's investigation.

2. **For those questions asked by the Committee to witnesses to which DHS declined to provide answers, please describe by category of question:**

   a. **your role in advising DHS on the appropriate response to those questions;**

   b. **with respect to any question to which DHS declined to provide answers in which you played a role, please identify or describe:**

      i. **the specific legal privileges, objections, or other bases for declining to provide an answer to the question;**

      ii. **for each identified category of legal privilege, objection, or basis relied upon, the legal justifications and supporting authorities for applying such privilege, objection, or basis in the context of a congressional query to an Executive agency witness in furtherance of Congress's constitutional oversight responsibilities; and**

      iii. **for each legal privilege, objection, or basis relied upon, whether it is your legal judgment that such privilege, objection, or basis properly applies in the context of a congressional query to an Executive agency witnesses in furtherance of Congress's constitutional oversight responsibilities and, if so, why.**

Answer: I believe we put very few limitations on the scope of witness testimony. One, discussed in my answer to committee Question 37, regards testimony about witness preparation, and another, discussed in committee Questions 38 and 39, regards testimony about communications with certain White House officials. Chairman Lieberman asked about another, in Question 12 of his supplemental questions, involving communications with a department head. I believe I may have helped the general counsel in developing

these positions, and likely communicated with our attorneys about the positions once they were developed.

Given the fact we were in informal interviews, the question of legal authority never arose. Instead, the department attorneys set boundaries (which those attorneys suggested that the department or White House counsel would discuss with the committee if it so desired) as part of the inter-branch discussion on the parameters of the inquiry.

With regard to the reluctance to have witnesses testify about the substance of their preparation: It is beyond dispute that inquiries about communications with lawyers have an effect on whether people will seek legal advice in the future, and whether, if they do, they will be as open, honest, and complete in their discussions as they need to be to receive the best advice. This applies to government employees just as it does to individuals and corporate officers, and, as the deputy general counsel, I had and still have an interest in encouraging DHS employees to consult with lawyers to make sure their proposed courses of action are lawful. With regard to communications with a department head, I do believe that such discussions are sensitive, because if such discussions cannot be had in confidence, the ability of a department head to receive unvarnished advice is necessarily diminished.

It is important to note that the way that the department handled these limitations on the scope of testimony actually facilitated the quick transmission of information from department witnesses to the committee. Instead of negotiating about all matters of scope before the interviews began, the department and the committee agreed to swing into action immediately, and—in order to preserve whatever potential protections the executive branch might have over sensitive information—the department clearly stated to the committee the types of communications that it would instruct witnesses not to answer. This process allows Congress to pursue further any previously-withheld information that it seeks.

More generally:

3. For document requests from Congress to an Executive agency, please identify or describe:

a. all legal privileges, objections, or other bases to withhold documents from Congress, other than those identified in response to question 1, that you believe properly apply; and

b. for each identified category of legal privilege, objection, or basis, the legal justifications and supporting authorities for applying such privilege, objection, or bases in the context of a congressional request for documents from an Executive agency in furtherance of Congress's constitutional oversight responsibilities.

Answer: It is my belief that, outside of a claim of executive privilege, it should always be possible to reach a solution that meets the needs of the executive branch and the

legislative branch regarding requests from Congress for information, documents, and witnesses from the department.

4. For questions asked of Executive agency witnesses by Congress, please identify or describe:

a. all legal privileges, objections or other bases for declining to provide an answer to a question asked of a witness by Congress, other than those identified in response to question 2, that you believe properly apply; and

b. for each identified category of legal privilege, objection, or basis, the legal justifications and supporting authorities for applying such privilege, objection, or bases in the context of questions asked of Executive agency witnesses by Congress in furtherance of its constitutional oversight responsibilities.

Answer: It is my belief that, outside of a claim of executive privilege, it should always be possible to reach a solution that meets the needs of the executive branch and the legislative branch regarding requests from Congress for information, documents, and witnesses from the department.

SENATOR JOSEPH I. LIEBERMAN

Additional Pre-Hearing Questions for the Nomination of Gus P. Coldebella to be General Counsel of the Department of Homeland Security

June 2, 2008

Role and Responsibilities of General Counsel of the Department of Homeland Security

1. Follow up to Committee Question 11.[1]

a. If a Congressional committee asked for your interpretation of a statute that was binding on the Department of Homeland Security ("DHS" or "the Department"), would you have an obligation to provide it?

Answer: It depends upon the circumstances. If a congressional committee such as yours asked a general counsel for the statutory basis for agency action, the general counsel should provide it, and as the general counsel (or acting general counsel), I would. As a matter of separation of powers between the executive and legislative branches, however, it seems to me that an agency's general counsel's obligation to provide advice and opinions on questions of law (rather than, as discussed above, providing the legal basis on which an agency decision was made) runs to the department, the Secretary, and the President; not to the Congress.

b. If a Congressional committee asked for your interpretation of a statute that was binding on the Department, would you base your answer on your interpretation or would you provide an answer that you believed to be consistent with the Department's plans, policies, or best interests?

Answer: I would answer with my interpretation of the statute.

General Legal Issues

2. In response to Committee Question 27(a), you cited two general statutory provisions as the justifications for the appointment of Assistant Secretaries not otherwise appointed pursuant to explicit statutory authorization.

a. Do you believe that these statutory authorities grant the Secretary unlimited discretion to appoint high-level officials who would otherwise constitute officers or inferior officers under the appointments clause of the U.S. Constitution?

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[1] References to question numbers refer to the pre-hearing questions submitted to you by the Committee or its members on February 15, 2008.

Answer: The Constitution limits the creation and appointment of principal officers. Courts have held that general statutory authorization—of the type Congress put in the Homeland Security Act—is sufficient for appropriate executive branch officials to create and appoint officials who may be "inferior officers" of the United States. *See, e.g.*, *Willy* v. *Administrative Review Board*, 423 F.3d 483 (5th Cir. 2005). In my original answer, I did not conclude that the assistant secretaries you mention are "officers or inferior officers under the appointments clause," or would "otherwise constitute" such officers. However, under the relevant statutes, Congress has authorized the Secretary to create and fill those positions.

b. If the authority is limited, what laws limit that authority, and how do you reconcile those limitations with your reference to Section 102(b)(1) of the Homeland Security Act and Title 5 USC Sections 301 and 302?

Answer: This authority—the authority for a department head to delegate his own authority—is limited by Congress's statutory authorization.

c. Has the DHS Office of General Counsel (OGC) or Department of Justice Office of Legal Counsel ever published a legal opinion or otherwise promulgated an interpretation that would justify your conclusion?

Answer: OLC has published guidance relevant to this area. *See, e.g.*, *Officers of the United States Within the Meaning of the Appointments Clause* (April 16, 2007). OGC has not.

3. In response to Committee Question 27(c) you state that you believe Congress intended to grant the DHS Secretary the authority to appoint an unlimited number of non-PAS Assistant Secretaries but to limit the number of Senate confirmed Assistant Secretaries to twelve. Why would Congress want to limit its own Constitutional role in confirming high-level DHS officials but grant unlimited authority to the Secretary to appoint Assistant Secretaries and to decide which Assistant Secretary positions should be submitted for Senate confirmation? How would the Secretary decide which Assistant Secretaries to submit for Senate confirmation?

Answer: Guidance for determining which federal officials are "officers" and must be submitted for Senate confirmation is found in relevant case law, the opinion of the Office of Legal Counsel cited above, and elsewhere. The Secretary's decisions on "which Assistant Secretary positions should be submitted for Senate confirmation" are guided by the principles found in these authorities.

4. In a March 20, 2008 statement announcing the appointment of Rod Beckstrom to be Director of the National Cyber Security Center, Secretary Chertoff stated that Mr. Beckstrom "will serve the department by coordinating cyber security efforts and improving situational awareness and information sharing across the federal government." The Director of the National Cyber Security Center would presumably have to exercise significant authority and discretion to carry out the

important and wide ranging duties Secretary Chertoff described, yet it is a position that has not been established in statute. However Congress did authorize in statute an Assistant Secretary for Cyber Security and Communications, indicating that Congress viewed leadership of cybersecurity initiatives as a substantial responsibility.

a. **What was the role of the OGC in reviewing the legality of the appointment of Mr. Beckstrom?**

b. **Will the Director of the National Cyber Security Center exercise sufficient authority or discretion to meet the Constitutional threshold for "inferior officers?"**

c. **Under what legal authority was the position established? What is the basis for the apparent conclusion that the position does not require explicit statutory authorization?**

Answer to (a), (b), and (c): A classified directive from the President (which has been briefed and made available to the Committee) authorized and directed the Secretary to establish the Center and appoint a director. It is my understanding that such directives receive appropriate legal review before they are issued. DHS OGC did not opine on the legal authority to establish the position of director.

Congressional Oversight

5. **Committee Question 28 asked on what bases, other than a valid claim of executive privilege, you believe that DHS is entitled to withhold information or documents from Congress. In response you indicated that it seemed to you that, outside a claim of executive privilege, "it should always be possible to reach a solution that meets the needs of the executive branch and the legislative branch." By this answer, do you mean that you believe that there is not any basis for DHS to withhold information or documents from Congress other than executive privilege? If that was not your meaning, on what bases do you believe DHS <u>is</u> entitled to withhold information or documents from Congress, and what is the legal authority for that view?**

Answer: Your request for me to catalog the "bases [on which] DHS is entitled to withhold information or documents from Congress"—both in this question and in the original questionnaire—is difficult to answer comprehensively for a number of reasons. First, the language employed in the questions—"withhold" especially—is not representative of how the executive branch has been instructed to approach questions of oversight. As I said in my answers to the initial set of pre-hearing questions, it should always be possible to reach a solution that accommodates both branches' needs. The process of reaching that solution is discussion, negotiation, and accommodation; executive branch agencies are to take their and the legislative branch's interests into account in reaching agreement on what documents and information will be produced to Congress. Given that future agency activity, and the requests that could be made by

Congress about it, are almost limitless and difficult to predict with any certainty, it is beyond my talents to attempt to predict where future discussions will end up. The legal authority for this view has been stated many times, perhaps most comprehensively in President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information."

6. **Committee Question 29 asked under what circumstances you believe an official or employee of DHS can decline to testify before a Congressional committee. In your response, you did not answer that question but stated only that you were "committed to cooperating with Congress . . . in ways that take into account both executive and legislative branch concerns." Please specify the circumstances, if any, under which you believe an official or employee of the Department may decline to testify before a Congressional committee, and explain the legal basis for your conclusions.**

   Answer: As I said in my answers to the initial set of pre-hearing questions, it should always be possible to reach a solution that accommodates both branches' needs. The process of reaching that solution is discussion, negotiation, and accommodation; executive branch agencies are to take their and the legislative branch's interests into account in reaching agreement on what information or testimony will be produced to Congress. Given that future agency activity, and the requests that could be made by Congress about it, are almost limitless and difficult to predict with any certainty, it is beyond my talents to attempt to predict where future discussions will end up. The legal authority for this view has been stated many times, perhaps most comprehensively in President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information."

GAO Access

7. **In response to Committee Question 43, you indicated that you "anticipated that the revised guidance [on relations with GAO] will be issued shortly." What do you anticipate will be the most significant changes in the new guidance from the version of Management Directive 820 in effect at the time of your response to the Committee's initial pre-hearing questions (March 17, 2008)? What mechanisms does the Department plan to put in place to ensure that employees of the Department comply with the updated directive?**

   Answer: We are still consulting with GAO about the revised management directive. Even though it is not yet complete, I anticipate that it will direct department employees to provide GAO with access to records as soon as possible, and not more than twenty calendar days from the date of the request, unless there is a reasonable basis to miss that deadline. I anticipate it will also provide that the department arrange a mutually-agreeable time for interviewing a department official as soon as possible after receiving the request, and that such an arrangement should normally be reached in seven calendar days.

The management directive is planned to also call for periodic meetings between GAO and DHS's audit liaison to discuss any overdue requests for records or interviews with DHS officials, and to discuss timeframes for provision of such records and officials to the GAO.

The directive will most likely also call for the creation of an appropriate electronic monitoring system to track the status of ongoing GAO audit and investigative activity and DHS responses to GAO requests for records or interviews. This system is intended to improve accountability and provide more useful information for the effective management of these activities across the department.

8. **In your response to Lieberman Question 15(a), you wrote: "Mr. Walker made clear that access to departmental information has improved due to discussions between GAO and DHS over the past year," referencing remarks he made at a House Appropriations hearing in February 2008. But at that hearing, Mr. Walker also said that "we continue to believe that DHS needs to make systemic and systematic changes to its policies and procedures for providing GAO with access to information and to individuals in a more timely manner," and "the number of delays and the extent of the delays have decreased, but we still have an issue."**

   a. **What types of "systemic and systematic" changes is the Department, and in particular the Office of General Counsel, making to improve its policies and procedures for providing GAO with access to information?**

Answer: We are still consulting with GAO about the revised management directive. Even though it is not yet complete, I anticipate that it will direct department employees to provide GAO with access to records as soon as possible, and not more than twenty calendar days from the date of the request, unless there is a reasonable basis to miss that deadline. I anticipate it will also provide that the department arrange a mutually-agreeable time for interviewing a department official as soon as possible after receiving the request, and that such an arrangement should normally be reached in seven calendar days.

The management directive is planned to also call for periodic meetings between GAO and DHS's audit liaison to discuss any overdue requests for records or interviews with DHS officials, and to discuss timeframes for provision of such records and officials to the GAO.

The directive will most likely also call for the creation of an appropriate electronic monitoring system to track the status of ongoing GAO audit and investigative activity and DHS responses to GAO requests for records or interviews. This system is intended to improve accountability and provide more useful information for the effective management of these activities across the department.

   b. **In particular, what process, if any is there by which a GAO employee can appeal to DHS officials that he or she is facing a delay in accessing information, and what is the process for resolving such an issue?**

Answer: The department's audit liaison is to meet periodically with the GAO to discuss any overdue requests for records or interviews with DHS officials, and to discuss timeframes for provision of such records and interviews to the GAO. The management directive under development will also require the audit liaison, and his or her component-level counterparts, to notify the Under Secretary for Management and appropriate component officials when responses to GAO requests for records or interviews are not provided in the timeframes set forth in the management directive. Senior leadership at DHS has also encouraged GAO to call component heads or other members of senior management to quickly resolve access issues.

9. **Lieberman Question 15(o) asked whether certain categories of documents and information could appropriately be withheld from GAO. You responded by sayings these answer depends on the circumstances. Please explain under what circumstances, if any, you believe the categories of documents and information listed in Question 15(o) may appropriately be withheld from GAO.**

Answer: As I said in my answers to the initial set of pre-hearing questions, it should always be possible to reach a solution that accommodates both branches' needs. The process of reaching that solution is discussion, negotiation, and accommodation; executive branch agencies are to take their and the legislative branch's interests into account in reaching agreement on what documents and information will be produced to Congress. Given that future agency activity, and the requests that could be made by Congress about it, are almost limitless and difficult to predict with any certainty, it is beyond my talents to attempt to predict where future discussions will end up. The legal authority for this view has been stated many times, perhaps most comprehensively in President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information."

Conflicts of Interest

10. **Committee Question 51 asked whether the Office of General Counsel performs a thorough review of an employee's financial disclosure report when he or she is first hired by the Department and when an employee transfers positions within the Department. In your response, you indicated that the designated agency ethics official (DAEO) – who is within the OGC structure – or his delegate reviews and certifies all financial disclosure report filings. Please indicate when this review takes place – *i.e.*, does the review occur when the employee is first hired and whenever an employee transfers positions within the Department?**

Answer: NB: The designated agency ethics official, or DAEO, is within the Office of General Counsel's structure, but under Management Directive 0400.2, OGC provides only administrative and other appropriate support to the DAEO, and the functions of the DAEO are not vested in the general counsel. Therefore, the answers in this section, while containing my best understanding of the issues discussed, have been based on information from the DAEO, except where otherwise noted.

Except in the cases of nominees to positions requiring Senate confirmation and those coming from another position requiring the filing of SF-278, public financial disclosure reports are required to be filed not later than 30 days following a new entrant's assumption of duties in a position requiring the filing of the report. 5 C.F.R. 2634.201. In the cases of nominees to positions requiring Senate confirmation, SF-278s are submitted, reviewed, and pre-cleared by OGE prior to a nomination being forwarded to the Senate. 5 C.F.R. 2634.201(c).

Thereafter, SF-278 reports are required to be filed not later than May 15 of the year following a year in which the employee occupied a position that required the filing of a report for more than 60 days (an incumbent report) (5 C.F.R. 2634.201(a)), and not later than 30 days after the employee leaves a position that requires the reporting without subsequently entering a position that requires filing an SF-278 within 30 days of leaving the prior one (a termination report) (5 C.F.R. 2634.201(e)). There is no requirement to file upon the change of duties, unless the new position does not require filing an SF 278. In such cases, a copy of the most recent filing in the prior position is forwarded and reviewed in relation to the new duties.

Filing of the confidential financial disclosure report, OGE Form 450, is required of those entering a position that requires the filing of the report within 30 days of assuming the position, unless the employee is coming from another position requiring the filing of OGE Form 450 with not more than 30 days between positions. 5 C.F.R. 2634.903(b). Those occupying a position requiring the filing of OGE Form 450 for more than 30 days in a calendar year must file an annual report not later than February 15 of the year following. 5 C.F.R. 2634.903(a). Termination reports are not required of OGE Form 450 filers. 5 C.F.R. 2634.903(e).

Regulations require that at least an initial review of financial disclosure reports be completed within 60 days of filing. 5 C.F.R. 2634.605(a).

11. **Committee Question 53 asked whether the Office of General Counsel requires DHS employees with potential conflicts of interest to submit written documentation of a recusal, divestiture, or resignation of an outside position and if not, why not. Please provide an answer to this question, including a description of the DAEO's practice, if appropriate.**

Answer: The DAEO does not require written recusal in every situation. The regulations do not require such measures. 5 C.F.R. 2635.402(c)(2). The DAEO's practice in each case is to encourage, at a minimum, oral notification of an employee's potential conflict of interest to his or her first-line supervisor. The DAEO's practice is to require written recusals in the cases of Senate-confirmed appointees, to comply with ethics agreements, and in other cases where the interest from which an employee is recused is expected arise in matters handled by or coming to the attention of the employee.

The DAEO does not require a written record of divestitures and resignations from outside positions in every situation. Divestitures and resignations usually occur after a focused evaluation of the employee's duties in light of the employee's interests—and the

employee's interests are frequently the subject of written memoranda between the supervisor, the employee, and the ethics advisor. Therefore, in most cases, written documentation of the required action beyond the representation of the employee is not required. Divestiture is often connected with a request to defer realizing a gain earned on a sale. Divestitures would be documented in those cases.

OGC Budget and Spending

12. **In response to Committee Question 60(b), you listed Econometrica, Inc. as a contractor that provided technical support services to analyze the economic impact of the no-match rule on small entities. However, DHS failed to provide any economic analysis as part of its rulemaking. *See 71 Fed. Reg. 34,284; 72 Fed. Reg. 45,623.* In March 2008, DHS stated that it does not have the data necessary to determine the number of small entities that would be affected by the no-match rule. *See 73 Fed. Reg. 15,952.* Given that the results of Econometrica's analysis are not apparent in the no-match rulemaking, please provide detailed information on the services that Econometrica performed and the results from its economic analysis.**

Answer: We sought to make Econometrica's analysis apparent in the no-match rulemaking. *See* 73 F.R. 15944, 15952, referencing the 104-page economic analysis produced by Econometrica, available at docket entry number ICEB-2006-0004-0233. DHS's statement that it "does not have the data necessary to determine the *precise* number of small entities expected to receive a no-match letter," 73 F.R. 15952 (emphasis added), discloses limitations on the data available to DHS and Econometrica for the economic analysis. As the small entity impact analysis explains in detail, the economic analysis was based on the information provided by the Social Security Administration that allowed for Econometrica to estimate the number of small entities that would be affected by the rule.

Visa Waiver Program

13. **Please provide separate answers for each of Committee Questions 67(a), 67(b), and 67(c). Note that these questions are asking for your interpretation of a statute that was enacted last August and which your office has been considering for many months. The questions are not asking what your future advice to the Secretary will be.**

Answer: Since the time of my initial response, the department has determined essential elements of how ESTA will be implemented. We plan to issue an interim final rule this week that will create the system. To your questions pertaining to the term "fully operational": It is clear that ESTA must at least meet the description of the system in § 217(h)(13)(A) before the Secretary may certify that ESTA is fully operational; the Secretary, of course, may require additional showings before making his certification. While subsection (d) does not define "fully operational," it is clear that the phrase refers to the same thing in subsection (d) as it does in subsection (c). When subsection (d) is effective, a certification by the Secretary that the ESTA is fully operational will trigger the requirement in that subsection—that is, that "each alien traveling under the program

electronically provide . . . the information as the Secretary shall determine necessary. . . ." That provision is not effective until "60 days after the date that the Secretary . . . publishes notice in the Federal Register of the requirement under such paragraph." 8 U.S.C. § 1187 note.

14. **You responded in your answer to Committee Question 67 that "fully operational" is not defined in the statute and that it is open to agency interpretation. Section 711(d) makes clear that when the Electronic Travel Authorization (ETA) system is "fully operational" all aliens traveling under the Visa Waiver Program (VWP) must use the system before they can apply for admission to the United States. If you believe this provision is open to agency interpretation, please give an interpretation of the statute that would permit the ETA system to be certified as fully operational before all aliens traveling under the VWP can use the ETA system.**

Answer: It is clear that ESTA must at least meet the description of the system in § 217(h)(13)(A) before the Secretary may certify that ESTA is fully operational; the Secretary, of course, may require additional showings before making his certification. While subsection (d) does not define "fully operational," it is clear that the phrase refers to the same thing in subsection (d) as it does in subsection (c). When subsection (d) is effective, a certification by the Secretary that the ESTA is fully operational will trigger the requirement in that subsection—that is, that "each alien traveling under the program electronically provide . . . the information as the Secretary shall determine necessary. . . ." That provision is not effective until "60 days after the date that the Secretary . . . publishes notice in the Federal Register of the requirement under such paragraph." 8 U.S.C. § 1187 note.

15. **On April 2, 2008 Secretary Chertoff testified before the Senate Judiciary Committee that implementing the ETA system was a predicate for admitting a new country into the VWP and that the Department would be implementing the ETA system "with the new countries" in a few months and that "all the old countries" will be brought in later. This testimony seemed to confirm that new entrants to the VWP would be admitted into the program before the ETA system had been implemented in all VWP countries.**

    a. **Does the Department have plans to admit new countries into the VWP program before ETA system has been implemented in all VWP countries?**

Answer: New countries may be admitted to VWP under the alternate standard when two conditions obtain: (1) the Secretary makes the required certifications, and (2) the country meets the requirements for entry. We currently anticipate that the system will initially be available in English to process applications beginning on August 1, 2008, and that the system will be available in a variety of different languages to facilitate the application process for the overwhelming majority of VWP travelers by October 15, 2008. We anticipate that by January 12, 2009, all VWP travelers will be required to obtain an ESTA approval prior to boarding a carrier to travel by air or sea to the United States. Given the uncertainty of negotiations with new VWP countries, the department cannot at this time determine when new entrants will be admitted.

b. Has OGC provided legal advice to other components of DHS regarding the meaning of Section 711 of the Implementing Recommendations of the 9/11 Commission Act?

Answer: Yes.

c. Is OGC waiting to provide to Congress its interpretation of Section 711 until the Secretary is closer to certifying the ETA system as "fully operational?" If not, why is OGC currently refusing to provide Congress its interpretation of Section 711, given the advanced stage of planning for the implementation of the ETA system and the numerous Memorandums of Understanding the United States government has been signing with countries applying for admission to the VWP?

Answer: Since the time of my initial response, the department has determined essential elements of how ESTA will be implemented. We plan to issue an interim final rule this week that will create the system. To your questions pertaining to the term "fully operational": It is clear that ESTA must at least meet the description of the system in § 217(h)(13)(A) before the Secretary may certify that ESTA is fully operational; the Secretary, of course, may require additional showings before making his certification. While subsection (d) does not define "fully operational," it is clear that the phrase refers to the same thing in subsection (d) as it does in subsection (c). When subsection (d) is effective, a certification by the Secretary that the ESTA is fully operational will trigger the requirement in that subsection—that is, that "each alien traveling under the program electronically provide . . . the information as the Secretary shall determine necessary. . . ." That provision is not effective until "60 days after the date that the Secretary . . . publishes notice in the Federal Register of the requirement under such paragraph." 8 U.S.C. § 1187 note.

16. Please provide a specific answer to Committee Question 68(a). Note that the question is not asking what your future advice to the Secretary will be.

Answer: Section 711(c) requires DHS to establish an air exit system "that can verify the departure of not less than 97 percent of foreign nationals who exit through airports of the United States." DHS will use the air exit records collected to compare departures of foreign nationals through airports with records relating to those foreign nationals, including entry and other immigration records, and determine visa overstay rates.

Miscellaneous Issues – CNN's FOIA Request

17. In response to Committee Question 91(b), you answered that OGC was not directly involved in responding to CNN's FOIA request for photographs ordered deleted by senior Immigration and Customs Enforcement (ICE) leadership, and that you do not believe any legal advice was provided to other DHS components on it. Committee staff has determined that at least one attorney from the ICE Principal Legal Adviser office was directly involved in responding to the FOIA request. Committee staff also has information that Julie Dunne in OGC had some involvement in the matter. In light of this information please provide a

comprehensive answer to the Committee's original question with respect to all OGC attorneys, including ICE PLA attorneys who report to OGC. In your capacity as Acting General Counsel, please do your best to ensure that the answer is fully accurate with respect to the conduct of your subordinates and not limited to facts of which you are currently personally aware.

Answer: To clarify my initial response: ICE attorneys provided legal advice in responding to the referenced FOIA request. Julie Dunne on OGC HQ staff was kept appraised of the situation by ICE, but the FOIA response was handled by the ICE FOIA office, and legal advice regarding the FOIA response was provided by ICE attorneys.

18. **In response to Committee Question 91(c), you answered that there was no conflict of interest for ICE personnel to process a FOIA request for photos ordered deleted by senior ICE leadership, and that the results show that there was no conflict as the photos were ultimately released. You did not answer the Committee's question as to why OGC determined there was no conflict of interest. At the time of CNN's November 6, 2007 FOIA request, the photos provided probative evidence regarding the controversial incidents at the ICE Halloween party and several Senators were on record stating their concerns about these incidents in the context of the pending nomination of Julie Myers to be DHS Assistant Secretary. The photos were ultimately released after Julie Myers was confirmed by the Senate.**

    a. **Please explain why the OGC determined that there was no conflict of interest for ICE personnel.**

    Answer: OGC did not make that determination. Please note that an important reason that lawyers throughout the department report to the general counsel rather than component heads is to avoid even the appearance of conflicts in the giving of legal advice.

    b. **Do you agree that under these circumstances the handling of the FOIA request might have had a direct bearing on the interests of ICE senior leadership? Explain your answer.**

    Answer: It should not have. Although I was not at the committee briefings on this topic, it is my understanding that the circumstances of the incident were described in detail to committee staff.

    c. **Do you agree that under these circumstances the speed with which ICE personnel processed the request and the timing of the release of the photos might have had a direct bearing on the interests of ICE senior leadership? Explain your answer. At the time did you or your office consider this factor in making the conflict of interest determination?**

    Answer: It should not have. Although I was not at the committee briefings on this topic, it is my understanding that the circumstances of the incident were described in detail to committee staff.

d. Which lawyers were involved in reviewing and deciding the conflict of interest issue? When was the decision made?

Answer: OGC did not make that determination. Please note that an important reason that lawyers throughout the department report to the general counsel rather than component heads is to avoid even the appearance of conflicts in the giving of legal advice.

Hurricane Katrina Investigation

19. Lieberman Questions 2 - 5 asked a series of questions about the Department's response to four document requests sent by the Committee to DHS as part of the Committee's investigation into the response to Hurricane Katrina. These questions include whether all documents responsive to the Committee's requests were produced to the Committee.

a. In your response, you acknowledge that, even among documents forwarded from components of the Department as potentially responsive to the Committee's requests, "I am told that certain documents were not produced by the time the Committee's investigation closed."

i. Please list all responsive documents from DHS headquarters or forwarded from component agencies that were not produced to the Committee.

Answer: As I stated in my response to the initial set of questions, the September 28, 2005 letter to the Secretary requested all documents about Hurricane Katrina held by anyone in the department. Producing all of those documents would have been a massive undertaking, particularly considering that we were also coordinating the documents responses of other DHS components (e.g., Coast Guard, FEMA). Therefore, we worked closely with the committee to satisfy its priorities for investigation. The catalog of documents you request in this question (subparts (a)(i) and (b)(i)) would require a significant amount of time and manpower to review documents for an inquiry that has been long closed, for which a comprehensive report has already been produced, and on a subject on which Congress has already enacted new legislation.

ii. For each document listed above, please indicate the legal basis for not producing that document to the Committee.

Answer: Of those documents that were not produced to the committee, I think it is safe to say that the majority of them were not produced not because of any legal reason, but because the department was concentrating considerable effort attempting to satisfy the committee's priorities. For the documents that DHS thought may have had executive branch confidentiality interests attached to them that were not produced by the end of the committee's investigation, the legal basis for the department's action is discussed in my response to question 5, above.

iii. When do you consider the Committee's investigation to have "closed"? At what point do you believe the Department was no longer under any obligation to produce documents responsive to the Committee's requests?

Answer: I believe the committee's requests to the department ended on or around January 30, 2006, and that committee staff may have told the department that it was beginning to draft its report around that time.

b. You further state that "while I understand that no decision was made to permanently withhold documents from the committee, certain documents that had executive branch confidentiality interests attached to them were under continuing review...and were not produced by the end of the committee's investigation."

i. Please identify all documents withheld from the Committee based on "executive branch confidentiality interests."

Answer: The catalog of documents you request in this question (subparts (a)(i) and (b)(i)) would require a significant amount of time and manpower to review documents for an inquiry that has been long closed, for which a comprehensive report has already been produced, and on a subject on which Congress has already enacted new legislation.

ii. For each document identified, please explain what specific "executive branch confidentiality interests" you believe justified the failure to produce the documents.

Answer: For the documents that may have had executive branch confidentiality interests attached to them that were not produced by the end of the committee's investigation, the legal basis for the department's action is discussed in my response to question 5, above.

iii. Please explain what you mean by the statement that no decision was made to "permanently" withhold documents from the Committee. On what basis were the documents withheld temporarily, without notification to the Committee? For what period of time, and under what circumstances, do you believe is it acceptable to withhold such documents?

Answer: As I stated in my response to the initial set of questions, the September 28, 2005 letter to the Secretary requested all documents about Hurricane Katrina held by anyone in the department. Producing all of those documents would have been a massive undertaking, particularly considering that we were also coordinating the documents responses of other DHS components (e.g., Coast Guard, FEMA). Therefore, we worked closely with the committee to satisfy its priorities for investigation. The catalog of documents you request in this question (subparts (a)(i) and (b)(i)) would require a significant amount of time and manpower to review documents for an inquiry that has been long closed, for which a comprehensive report has already been produced, and on a subject on which Congress has already enacted new legislation.

iv. Were any documents ever determined by DHS to be subject to a claim of executive privilege? If so, please indicate which documents you believe were protected by such a claim. For documents not determined to be covered by a claim of executive privilege, why have they never been produced to the Committee? If no decision was made to withhold these documents

"permanently," does the Department intend to eventually produce these documents? If so, when?

Answer: Because the agency was engaged in informal discussions with the committee, the administration was not required to determine whether executive privilege applied.

20. Lieberman Question 6 asked whether all documents responsive to the priority document requests set forth in the Committee's December 30, 2005 letter to Secretary Chertoff were produced to the Committee and requested information about any responsive documents that were not produced. You replied that "Our responses, as well as the Chairman's letter at the end of the investigation, lead me to believe that the priority document requests in the committee's December 30, 2005 letter were substantially satisfied." You did not, however, answer the specific questions set forth.

a. Were all documents responsive to the Committee's priority requests in its December 30, 2005 letter produced to the Committee?

Answer: Because of the broad nature of the requests, it is impossible to state definitively that every potentially responsive document was produced. However, our communications with the committee on the December 30, 2005 requests were quite explicit on what documents were produced, and discussions between DHS and committee staff took place after the letter was sent, further modifying the requests.

b. Was any decision made not to produce either specific documents or categories of documents responsive to the December 30, 2005 letter from the Committee? If so, please describe all documents that were not produced and the legal bases that you believe support the decision not to provide responsive documents.

Answer: Of those documents that were not produced to the committee, I think it is safe to say that the majority of them were not produced not because of any legal reason, but because the department was concentrating considerable effort attempting to satisfy the committee's priorities. For the documents that DHS thought may have had executive branch confidentiality interests attached to them that were not produced by the end of the committee's investigation, the legal basis for the department's action is discussed in my response to question 5, above.

c. If documents responsive to the Committee's December 30, 2005 priority requests were not produced, what role did the Office of General Counsel play in the decision not to produce such documents? What role did you personally play in the decision or decisions?

Answer: OGC provided legal advice related to the committee's investigation, and played a coordinating role in producing documents and witnesses to the committee in response to its stated priorities. I assisted the general counsel in responding to these requests, including by directing the task force to concentrate on the production of documents and the scheduling of witnesses listed, and writing responses to the staff.

d. If documents responsive to the Committee's December 30, 2005 priority requests were not produced, did you agree with the decision or decisions not to produce responsive documents?

Answer: It is my recollection that the department and the committee had discussions after the December 30 letter further modifying the committee's priorities; therefore, I cannot say definitively whether the committee sought any documents in addition to what was produced.

e. What role did the Office of General Counsel play in deciding which files and which offices or components within DHS were to be searched for documents responsive to the priority document requests? What role did you personally play in the decision or decisions?

Answer: OGC provided legal advice related to the committee's investigation, and played a coordinating role in producing documents and witnesses to the committee in response to its stated priorities.

f. As apparent evidence of DHS's substantial compliance with the Committee's December 30, 2005 priority requests, you note that your January 30, 2006 letter contained an attachment "listing the bates number ranges of documents satisfying each priority request." This attachment is addressed in the additional views of Senators Lieberman, Levin, Akaka, Carper, Lautenberg and Pryor that were included in the Committee's report on the findings of its investigation into the response to Hurricane Katrina:

A cursory look at the table might suggest that most of the requests have been complied with, but in fact any such suggestion would be highly misleading. For example, the December 30 letter asked for all documents related to the Federal Protective Service's preparation for or response to Hurricane Katrina, including any actions taken at the Superdome and the Convention Center; what Coldebella's letter lists as produced in response comprises simply the e-mails for a single individual, the head of the Federal Protective Service. ("Hurricane Katrina: A National Still Unprepared," p. 699, n. 87).

Is it your view that the documents listed in the table attached to your January 30, 2006 letter comprise all the Department documents responsive to the Committee's priority requests in its December 30, 2005 letter?

Answer: Because of the broad nature of the requests, it is impossible to state definitively that every potentially responsive document was produced. However, our communications with the committee on the December 30, 2005 requests were quite explicit on what documents were produced, and discussions between DHS and committee staff took place after the letter was sent, further modifying the requests.

g. In your answer, you refer to "the Chairman's letter at the end of the investigation," as well as to your January 11, 2006 letter. Please provide a copy of each of these documents.

Answer: I believe that I referred to a January 11 letter mistakenly; I was referring to my January 13 letter to the committee.

21. **Lieberman Question 7 asked about certain documents produced by former Federal Emergency Management Agency (FEMA) Director Michael Brown that appear not to have been produced by DHS in response to the Committee's requests. In, you indicated that you believe decisions regarding production of Mr. Brown's e-mails were made without your involvement before you arrived at the Department. Regardless of your personal involvement in those decisions, what is your legal analysis today, *i.e.,* do you believe that there is a legal basis for the Department to withhold the documents a-l (as the attachments were numbered in the original question)? If so, please explain that basis with respect to each document.**

Answer: While I have not analyzed this question, the legal authority for agency action in this area has been stated many times, perhaps most comprehensively in President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information."

22. **Lieberman Question 8 deals with documents at issue in litigation filed by Citizens for Responsibility and Ethics (CREW) against the Department under the Freedom of Information Act.**

    a. **Lieberman Question 8(a) asked what role, if any, you played in reviewing documents responsive to CREW's FOIA requests and determining which documents could be properly withheld under legitimate FOIA exemptions. Please provide the answer to this question.**

Answer: As I answered in my earlier responses, I personally had at least two meetings with the litigation team to discuss strategy. It would be inappropriate for me to discuss the government's internal deliberations on litigation strategy, especially when the matter is currently pending.

    b. **Lieberman Question 8(b) asked whether there were any documents that DHS component agencies (including component legal offices) recommended be produced that were not ultimately produced? Please provide an answer to this question and, if there were any such documents, please describe the nature of the documents, the legal basis for withholding the documents, and your role in the decision not to produce such documents.**

Answer: It would be inappropriate for me to discuss the government's internal deliberations on litigation strategy, especially when the matter is currently pending.

    c. **Lieberman Question 8(c) asked about documents listed on the Vaughn index in the CREW litigation. In response, you indicated that have been told the documents on the Vaughn index were not produced in response to the Committee's requests in its investigation into the response to Hurricane Katrina. For those documents on the Vaughn index that are responsive to the**

Committee's requests (particularly, those documents withheld from CREW on grounds other than a claim of executive privilege or a "presidential communications privilege"), please explain why such documents were not produced to the Committee.

Answer: These documents were not produced to the committee for the reasons stated in my answers to earlier questions.

23. Lieberman Question 9 asked about the Department's failure to produce a privilege log or other index of documents withheld from the Committee in the Committee's investigation into the response to Hurricane Katrina.

a. Please provide an answer to Question 9(a), which asked why no privilege log or other index of withheld documents was provided.

Answer: I do not know if a decision was made by the department to not produce a privilege log, or if a privilege log was not produced because the department's time and energy was spent in fulfilling the committee's priority requests.

b. Please provide an answer to Question 9(b), which asked you to describe any involvement you had in determining whether to provide an itemization of withheld documents.

Answer: I do not know if a decision was made by the department to not produce a privilege log, or if a privilege log was not produced because the department's time and energy was spent in fulfilling the committee's priority requests.

24. Lieberman Question 10 asked about the Department's decision not to respond to any of the Committee's information requests. Please answer each of the following questions, which were not not addressed in your response to the Committee's initial pre-hearing questions:

a. Why did the Department not respond to the Committee's information requests? Please describe all legal bases that you believe support the decision not to provide answers to the Committee's questions.

Answer: Mr. Perry's letter of January 9, 2006 discusses information requests. Because of several factors, including the limited staff on the task force, the focus on producing the committee's priority documents (i.e., documents of employees scheduled to be interviewed by the committee, before the witness was interviewed), the frequent changes in those priority documents, and the frequent changes concerning which witnesses the committee sought to interview, the vast majority of the task force's time was spent in responding to priority document requests and not working on responses to information requests.

b. What role did the Office of General Counsel play in the decision not to answer the Committee's information requests? What role did you personally play in that decision?

Answer: Mr. Perry's letter of January 9, 2006 discusses information requests. Because of several factors, including the limited staff on the task force, the focus on producing the committee's priority documents (i.e., documents of employees scheduled to be interviewed by the committee, before the witness was interviewed), the frequent changes in those priority documents, and the frequent changes concerning which witnesses the committee sought to interview, the vast majority of the task force's time was spent in responding to priority document requests and not working on responses to information requests.

c. Did you agree with the decision not to provide answers to the Committee's information requests?

Answer: Mr. Perry's letter of January 9, 2006 discusses information requests. Because of several factors, including the limited staff on the task force, the focus on producing the committee's priority documents (i.e., documents of employees scheduled to be interviewed by the committee, before the witness was interviewed), the frequent changes in those priority documents, and the frequent changes concerning which witnesses the committee sought to interview, the vast majority of the task force's time was spent in responding to priority document requests and not working on responses to information requests.

25. Lieberman Question 14 asked a series of questions concerning instructions by the DHS Office of General Counsel to DHS witnesses not to testify about certain conversations with White House personnel. In your response, you stated that the "basis for such instructions was to allow Congress as much access to executive branch information as possible, while being mindful of the legitimate confidentiality interests in the information." Please explain what "legitimate confidentiality interests" there might be in such information, apart from a claim of executive privilege.

Answer: As I said in my answers to the initial set of pre-hearing questions, it should always be possible to reach a solution that accommodates both branches' needs. The process of reaching that solution is discussion, negotiation, and accommodation; executive branch agencies are to take their and the legislative branch's interests into account in reaching agreement on what documents and information will be produced to Congress. Given that future agency activity, and the requests that could be made by Congress about it, are almost limitless and difficult to predict with any certainty, it is beyond my talents to attempt to predict where future discussions will end up. The legal authority for this view has been stated many times, perhaps most comprehensively in President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information."

26. Please describe what you believe are DHS's obligations to produce documents, information and witnesses in response to a formal request from a Congressional Committee where no subpoena has been issued?

Answer: As I said in my answers to the initial set of pre-hearing questions, it should always be possible to reach a solution that accommodates both branches' needs. The process of reaching that solution is discussion, negotiation, and accommodation; executive branch agencies are to take their and the legislative branch's interests into account in reaching agreement on what documents and information will be produced to Congress. Given that future agency activity, and the requests that could be made by Congress about it, are almost limitless and difficult to predict with any certainty, it is beyond my talents to attempt to predict where future discussions will end up. The legal authority for this view has been stated many times, perhaps most comprehensively in President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information."

[Signature page follows.]

AFFIDAVIT

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

Subscribed and sworn before me this 2nd day of June, 2008.

Lydia Stampley
Notary Public

Lydia Stampley
Notary Public, District of Columbia
Commission Expires 8/14/2010

Senator Joseph I. Lieberman
Additional Questions for the Record
Nomination Hearing of Gus P. Coldebella
July 15, 2008

1. **The Additional Views of Senators Lieberman, Levin, Akaka, Carper, Lautenberg, and Pryor included in the Committee's report "Hurricane Katrina: A Nation Still Unprepared" reported that there were indications that the Coast Guard had produced documents responsive to many of the Committee's written requests but that DHS had not turned all of them over to the Committee (see report at 688). In a pre-hearing interview with Committee staff, you acknowledged that there were likely boxes of documents that were determined by Department component agencies that were responsive to this Committee's written requests, and were sent to the Office of General Counsel for review, but which your office never turned over to this Committee. You indicated to Committee staff that it was possible that as many as 20 boxes of documents that fell into this category may never have been produced.**

   a. **Please indicate which DHS component agencies forwarded documents to the General Counsel's office that those component agencies identified as responsive, or potentially responsive, but which were not ultimately produced by your office. If possible, please also indicate the nature and subject matter of any such documents.**

Answer: As I stated in my response to the initial set of questions, the September 28, 2005 letter to the Secretary requested all documents about Hurricane Katrina held by anyone in the department. Assembling and producing all of those documents from headquarters and DHS's components (e.g., Coast Guard, FEMA) simultaneously, prior to prioritization by the committee or review of the materials, was simply not possible. Therefore, we worked closely with the committee to satisfy its priorities for investigation. I am told that certain documents from components including Immigration and Customs Enforcement, Transportation Security Administration, and headquarters offices such as science and technology and civil rights and civil liberties were among those forwarded but not produced, and it is my understanding that these documents were not specified as priorities of the committee during the investigation.

   b. **What was the legal basis, if any, for not turning over documents determined by component agencies to be responsive to the Committee's requests?**

Answer: Documents that were forwarded by components to headquarters for review were not produced not because of any legal reason, but because the department was concentrating all of its effort attempting to satisfy the committee's priorities.

c. Why did you fail to inform the Committee of the existence of such documents at any time before the staff interview?

Answer: I informed the committee of these documents in response to the first relevant pre-hearing question, three months prior to the staff interview. *See, e.g.*, Gus P. Coldebella, *Responses to Questions for the Record of Senator Joseph I. Lieberman*, at 2-3 (Mar. 17, 2008) ("Certain components forwarded documents to the task force that the components had determined were potentially responsive. Given a number of factors—the limited staff on the task force, the focus on producing the committee's priority documents . . . . the frequent changes in those priority documents, and the frequent changes in which witnesses the committee sought to interview – I am told that certain documents were not produced by the time the committee's investigation closed.").

d. What happened to any boxes that were given by component agencies to the Office of General Counsel for review but which were not produced to the Committee? Did the Department or its component agencies have in place a system to track such documents?

Answer: The department did have a system to keep track of the documents that were given by component agencies to OGC for review but which were not produced to the committee. I believe these boxes were put into storage.

2. Title I of the 9/11 Commission Recommendations Act authorizes two major homeland security grant programs – the State Homeland Security Grant Program (SHSGP) and the Urban Area Security Initiative (UASI). That title allows states and urban areas to use up to 50% of the grant funds they receive under these programs for personnel costs in support of any otherwise permissible use of the grants. We included this provision because we recognized that so much of what states need to do to be prepared in the event of either a natural disaster or terrorist attack inevitably involves significant expenditures on personnel – whether hiring planners, staffing fusion centers, or paying the overtime and backfill costs necessary to ensure that police, fire fighters and other first responders can participate in training and exercises.

As enacted, the provision (new section 2008(b)(2) of the Homeland Security Act) is quite clear: it states that grant recipients may spend not more than 50% of the amount awarded to them for personnel. It further provides that the grant recipient may request a waiver of even this limitation. The report that accompanies the 9/11 Commission Recommendations Act further confirms that Congress intended to allow states and urban areas to spend up to 50% of their homeland security grant funds on personnel costs, at the discretion of those states and urban areas. There is no provision that allows DHS to modify these limits, other than at the request of a grant recipient seeking a waiver.

Despite the clear statutory direction, however, DHS issued grant guidance

earlier this year that prohibited states from spending more than 15% of their SHSGP funds for intelligence analysts at fusion centers (25% for UASI cities) and 15% for personnel costs related to planning, training, exercise, and equipment activities. In other words, DHS imposed limits of a total of 30% for personnel costs under SHSGP and 40% for personnel costs under UASI – and further limited the kind of personnel costs for which those funds could be used.

In response, Senator Collins and I, as well as the Chairman and Ranking Member of the House Homeland Security Committee – the four principal authors of the 9/11 Commission Recommendations Act – wrote to Secretary Chertoff on April 11, 2008, reiterating the intent of the personnel provision. On June 16, 2008 we received a response from the Secretary in which he refused to modify the grant guidance and seemed to assert that the 9/11 Commission Recommendations Act gave him flexibility to change the personnel limit.

I understand that the Office of General Counsel was consulted in interpreting the personnel cap provision in Title I of the 9/11 Commission Recommendations Act. Please explain why, in the face of a statutory provision that expressly allows states and urban areas to spend up to 50% of their grant funds on personnel costs, the Department believes it can impose a limit on personnel costs of 30% or 40% for states and urban areas, respectively, and whether you agree with that view. Please cite all relevant statutory provisions and explain the basis for your interpretation of those provisions.

Answer: This issue, like many legal issues at the department, seems to have been dealt with at a lower institutional level than mine, and was not presented to me until raised by your staff at my committee interview. The department's current position is expressed in the Secretary's letter of June 16, 2008. I would be glad to see if the department would further consider your position on this provision based upon the points made in the question.

3. **In your testimony before the Committee, you indicate that you have tried to bring to the Office of General Counsel a spirit of "forward-leaning lawyering." You suggest that a good agency lawyer, determining that the law does not allow for a particular course of action should, where possible, suggest an alternative to achieve the department's goals.**

   a. **On one hand, such an approach reflects an admirably proactive approach to lawyering. On the other hand– and particularly in the context of a government law office – it seems also to have the potential to encourage efforts to circumvent the will of Congress. For instance, if Congress enacts a statute that seeks to prohibit a particular activity by the Department, do you believe it is appropriate for DHS lawyers to parse that statute to come up with some other, presumably non-intended**

interpretation that would allow the Department to continue to engage in the disfavored activity, if engaging in that activity were the Department's goal?

Answer: Congressional intent is important in statutory interpretation. Given that there are 535 members of Congress voting on a bill, the best evidence of congressional intent is the statutory text that those members voted on. And, to be clear regarding the question posed above, a statute should not be interpreted to permit an activity that it prohibits.

b. More generally, as you interpret the statutes Congress enacts, and advise officials in the Department accordingly, to what extent, if at all, do you take into account Congressional intent?

Answer: We consider congressional intent when interpreting federal statutes. As mentioned above, the best expression of congressional intent is the statutory text that the members of Congress voted on. When available, we will review other materials evidencing congressional intent when construing a statute, including committee reports and floor statements.

4. On May 1, 2008, Senators Lieberman and Collins wrote to Secretary Chertoff asking for information on the Comprehensive Cyber Security Initiative (CNCI), specifically stating that one of the reasons for the letter was to facilitate information sharing with the public on the Department's cyber security activities. However, Secretary Chertoff's June 2nd reply was marked "For Official Use Only" (FOUO) making public dissemination of the letter challenging. The letter clearly contains information that is not sensitive and could be disseminated publicly. The FOUO designation is not binding on Congress and has no legal significance, but as a general matter the Committee considers it prudent in these circumstances to seek clarification from the Department regarding which facts the Department considers sensitive. On June 11th, Senators Lieberman and Collins sent another letter to Secretary Chertoff requesting that a redacted, non-FOUO version of his June 2nd letter be delivered to the Committee by June 20th. Over the past month, committee staff has had numerous conversations with Department officials regarding the status of this redacted letter, but, to date, no response has been received by the Committee. This is not the first instance in which the Department has designated an entire letter as FOUO or "law enforcement sensitive" and then took a very long time to supply a redacted version. In at least one such case only small portions of the letter were ultimately redacted.

a. Please describe what role, if any, the Office of General Counsel had in determining the June 2nd letter should be marked FOUO.

Answer: OGC was not involved in that decision.

b. Please describe what role, if any, the Office of General Counsel has had in reviewing the request for a redacted version of the June 2 letter and preparing a response.

Answer: OGC reviewed the proposed response and provided comments consistent with the department's Management Directive 11042.1 on FOUO.

c. What is the current status of the Department's consideration of the request from the Chairman and Ranking Member for a redacted version of the letter? When will a redacted version of the letter be provided to the Committee?

Answer: It is my understanding that such a letter was provided on July 18, 2008.

d. Do you agree that the Department should not claim a document is law enforcement sensitive or FOUO unless it has made determinations that specific portions of a document are in fact sensitive, and that having done so, the Department should be able to quickly communicate its sensitivity determinations upon request?

Answer: The department identifies sensitive but unclassified information consistent with the above-mentioned management directive and applicable law and policy, and strives to be responsive to questions about the sensitivity of the information that is so designated. As I suggested during my staff interview, when the department is aware that a communication contains sensitive information, but the committee requires a response quickly, the goal of quick production to Congress may be furthered by forwarding a generally-marked document to the committee. We will urge law enforcement components to more specifically mark materials provided to committees of Congress.

5. The Battered Immigrant Women Protection Act of 2000 (title V of P.L. 106-386) (BIWPA) allows T and U non-immigrants — individuals who are victims of serious trafficking crimes and crimes of violence and who have provided assistance to U.S. law enforcement agencies — to apply for adjustment of status to that of a Lawful Permanent Resident (LPR) based on their showing of continued assistance to law enforcement, their good moral character, and the extreme hardship that they would face if removed. Status as an LPR helps them gain protection from retaliation, reunite with their families, and attain employment opportunities. Because of the Department's failure to issue regulations implementing the immigration provisions of the BIWPA, Congress mandated in the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Pub. L. No. 109-162, § 828, 8 U.S.C. § 1101 note) (enacted Jan. 5, 2006) that the Secretary of Homeland Security issue such regulations within 180 days of passage of the law, i.e., by July 5, 2006. We are now nearly two years beyond the July 5, 2006, Congressional deadline. Individuals in lawful T or U nonimmigrant

status are at risk of falling out of that status, which is limited to 4 years, likely rendering them ineligible for LPR status.

a. What has been the role of the Office of General Counsel in drafting and reviewing the regulations?

Answer: The Office of the General Counsel reviews draft regulatory actions for compliance with applicable law, including for immigration regulations the Immigration and Nationality Act. OGC also reviews regulatory actions for compliance with laws and executive orders pertaining to rulemaking. OGC is working with USCIS and the Department of Justice in the development and review of regulations to implement T&U adjustment of status requirements to ensure that such regulations comply with applicable laws and executive orders, and I anticipate quick work in this area.

b. What is the current status of the draft regulations?

Answer: DHS is working with the Department of Justice and other interagency partners to finalize the draft interim final rule. We anticipate that the draft rules will be submitted to the Office of Management and Budget for review under Executive Order 12866 by the end of this month.

c. When will the Department issue the regulations?

Answer: DHS is aiming for the regulations to be issued by or before November 1, 2008.

d. What can you do to ensure the interim final regulations are issued as soon as possible?

Answer: We have been working within the federal government to develop a process and standards for granting T&U nonimmigrant visas that allows adjustment of status while remaining consistent with homeland security.

The T&U non-immigrant visa categories permit aliens who have been victims of a severe form of trafficking in persons and who are assisting law enforcement in the investigation or prosecution of the acts of trafficking (T-visa non-immigrants) and aliens who are victims of certain crimes and are being helpful to the investigation or prosecution of those crimes (U-visa non-immigrants) to adjust status to lawful permanent resident.

The structure of the statute itself requires careful review and consideration within DHS and close coordination with interagency partners, including the Department of Justice, the State Department, and others. One area of complexity is harmonizing the intent of the statute—to provide T or U visa status to victims of certain crimes who are providing assistance to law enforcement—with national and homeland security concerns with granting lawful permanent resident status to such individuals if they have themselves perpetrated serious crimes. Similarly,

both T and U visa holders must cooperate with the appropriate law enforcement authorities to be permitted to adjust status to lawful permanent resident. We continue to work to develop a system that ensures the requisite cooperation without unduly burdening the individual alien.

6. **On March 11, 2008, DHS submitted to OMB its draft Interim Final Rule regarding the implementation of the Electronic Travel Authorization system (initially called ETA, later re-named ESTA) required by Section 711 of the Implementing Recommendations of the 9/11 Act (the 9/11 Act). The March 11th draft IFR, under a heading titled "Compliance Date for the ETA System" at page 11 of the document, provided that "enrollment of eligible countries would be phased in on a country-by-country basis"; the draft IFR also provided that Federal Register notices would inform citizens of respective Visa Waiver Program countries (VWP) where ETA was being implemented that citizens of those countries would have to obtain an ETA in advance of travel to the U.S., effective 30 days from the date of publication.**

On May 28, 2008, OMB concluded its review and cleared a revised version of the IFR. The May 28th IFR cleared by OMB, under a heading titled "Compliance Date for ESTA" at page 13 of the document, provided that "Citizens of countries that participate in the VWP on the date of publication of this interim final rule must comply with this rule by January 12, 2009." In other words, OMB's May 28th IFR stated that obtaining advance travel authorization through ESTA would become mandatory simultaneously for citizens of all VWP countries on the same day – January 12th, and that before January 12th use of the system would not be mandatory for citizens of any VWP nation. The compliance date was not tied to the publication of a notice being published in the Federal Register.

On May 30, 2008, DHS re-submitted a revised IFR for OMB review. The section "Compliance Date for ESTA" had been removed from this version, and replaced at p. 13 of the document with a section titled "Implementation Notice." This new Section was less clear on the compliance date than OMB's IFR. It provided that use of ESTA would be mandatory 60 days after the publication of a notice in the Federal Register, and that DHS anticipated this would occur on or before January 12th. Also on May 30th, OMB signed off on the revised language DHS had submitted that day.

a. **What was your involvement, and the involvement of your office, in preparing the Department's draft IFRs submitted to OMB in March and May?**

Answer: The Office of the General Counsel reviews DHS regulatory actions for compliance with applicable law, including laws and executive orders pertaining to rulemaking. In this capacity, OGC worked closely with U.S. Customs and Border Protection in preparing the draft IFR. I personally reviewed and commented upon drafts of the IFR.

b. What was your involvement, and the involvement of your office, in the communications between the DHS and OMB regarding the proposed IFR and various revisions to it?

Answer: OGC works with the Office of Information and Regulatory Affairs of the Office of Management and Budget on any significant regulatory action requiring OIRA review under Executive Order 12866, as amended. My staff communicated often and directly with OIRA during OIRA's review of the IFRs under Executive Order 12866, and I personally communicated with OIRA about them as well.

c. Why did the Department request that the language in OMB's May 28th IFR, requiring an implementation date of January 12th, be modified?

Answer: The department made adjustments to the language to better reflect the notices and triggers contained in the statute.

d. What is the legal significance of the differences between the referenced text in the May 28th OMB IFR and revised version DHS re-submitted to OMB?

Answer: The legal significance is that the statute requires mandatory use of ESTA sixty days after a Federal Register notice signed by the Secretary. The change from a firm compliance date of January 12, 2009 to a requirement that all VWP travelers must comply with ESTA sixty days from the date that the Secretary announces the implementation of a mandatory ESTA system by publication of a separate Federal Register notice both allows the department to assess the ESTA system before making it mandatory, and better reflects the notices and triggers contained in the statute.

e. Why did the draft IFR that DHS submitted on March 11th provide that use of ESTA would be mandatory 30 days after the publication of a notice in the Federal Register, considering that the 9/11 Act required 60 days advance notice before the requirement could be made mandatory for VWP travelers?

Answer: I cannot account for the difference between the thirty-day period in the earlier draft and the sixty-day period in the May 30 draft and in the statute, except to say that the process of editing and modification that occurred between March 11 and May 30 brought the IFR in line with the notices and triggers contained in the statute.

f. Would the draft IFR DHS submitted on March 11th have permitted the Secretary to exercise the waiver authority granted by Section 711(c) of the 9/11 Act before the date on which citizens of all VWP countries were required to use the ESTA? Please explain your answer.

g. **Would the IFR approved by OMB on May 28th have permitted the Secretary to exercise the waiver authority granted by Section 711(c) of the 9/11 Act before the date on which citizens of all VWP countries were required to use the ESTA? Please explain your answer.**

h. **Does the revised IFR re-submitted by DHS and approved by OMB on May 30th permit the Secretary to exercise the waiver authority granted by Section 711(c) of the 9/11 Act before the date on which citizens of all VWP countries are required to use the ESTA? Please explain your answer.**

Answer: The responses to the preceding three questions ((f) through (h)) are the same. Under the statute, the Secretary may exercise his waiver authority to admit a new country into the VWP before the ESTA is in place for travelers from all VWP countries, providing that several conditions are true: first, the Secretary's statutory authority to accept an alternate visa refusal rate must be in effect (*i.e.*, certification must have occurred); second, the country must meet the other security requirements in the statute; and third, the requirement that ESTA be mandatory for all VWP travelers—a requirement that ripens sixty days after the Secretary publishes a notice in the Federal Register—must not yet be in effect. I do not believe that any of the draft interim final rules could have been considered to be the Federal Register notice referred to in the statute, though it is certainly the case that the notices and triggers in the statute are clearer in the final IFR than in the earlier drafts.

7. **In your hearing testimony you stated that DHS would strive to provide all documents requested by the Committee, and in cases in which you had a particular concern about the release of a document, you or your staff would quickly contact Committee staff to explain your concern and to discuss a mutually agreeable solution.**

On June 11, 2008, I, along with Senator Collins, sent a letter to Secretary Chertoff requesting documents relating to our investigation of nuclear terrorism, including the Incident Management Planning Team's 10 Kiloton Improvised Nuclear Device (IMPT 10kt IND) Concept Plan. In the five weeks since we sent that letter, we have not received this plan, nor any written explanation as to why DHS has failed to provide this document or many of the other requested documents. In addition, we have not been contacted by the Office of the General Counsel to address any relevant concerns or an alternate way forward.

a. **Has the Office of General Counsel been involved in the consideration of the Committee's June 11, 2008 request for documents? What involvement, if any, have you personally had in considering this request? If you were aware of this request, when did you become aware of it?**

Answer: I was aware of the committee's initial February 8, 2008 request on this topic. I was not aware of the June 11, 2008 request, though I am told that department lawyers have been involved in responding to that letter.

b. Please explain:

i. Why these documents have not been provided to the Committee;

ii. Why the Committee or its staff have not been contacted by the Office of General Counsel (or relevant component legal offices) to discuss ways of resolving the dispute.

Answer: I am told that, in response to the committee's letter, committee staff was briefed on June 24, 2008 regarding the status and availability of many of the documents requested. At that briefing, DHS officials explained that the Integrated Planning System is in the final stages of interagency review and would be provided to the committee once completed. DHS has briefed committee staff on the development of the IPS on several occasions, and remains willing to provide additional briefings as requested. I believe that lawyers have been involved in facilitating information flow to the committee.

c. In response to previous document requests, DHS has refused to turn over certain documents, such as the IMPT 10 KT IND Concept Plan, based on a claim that these documents are "pre-decisional working documents" or drafts.

i. What is the legal basis for DHS's claim that it does not need to turn over "draft" documents to Congress?

Answer: The legal authority for this view has been stated many times, perhaps most comprehensively in President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information."

ii. As the June 11th letter explains, although DHS claims that the IMPT 10 KT IND Concept Plan, is a "pre-decisional working document" or "draft" plan, DHS has acknowledged that this document is an operational document that, after a nuclear attack, would be "pulled off the shelf" and help govern the federal government's response. Do you believe there is a legal basis for not producing such an operational document to Congress? If so, what is that basis?

Answer: Existing plans that would be "pulled off the shelf" to govern the federal government's response to an actual nuclear attack should be made available to the committee if they have not been already; I will make sure that officials responding to the committee's requests will provide any such documents. Other strategic, concept, and guidance documents requested in the committee's letter are not final, will not be "pulled off the shelf" during an incident, and are being written or are undergoing significant revisions. A response to the committee's June 11, 2008 letter will be sent shortly.

Senator Susan M. Collins
Additional Questions for the Record
Nomination Hearing of Gus P. Coldebella
July 15, 2008

1. **It is this Committee's job to perform oversight over the Inspectors General and ensure that they perform their jobs properly. Inspectors General perform a critical function in ferreting out waste, fraud and abuse in their Departments. And yet, not every Department and not every General Counsel of every Department welcomes involvement of the Inspectors General in their affairs. If confirmed, what you will do as DHS General Counsel to make sure that the DHS Inspector General has access to the necessary information and documentation to fulfill his responsibilities?**

   Answer: I think it is the department's responsibility to ensure that the inspector general is able to carry out his important statutory mission, including preventing waste, fraud, mismanagement, and abuse. To that end, the inspector general should be a valued partner in the review of departmental programs at an early stage, rather than after the fact. That way, the department can have the benefit of real-time advice from the inspector general.

   It is just as important to encourage DHS employees to cooperate with the Office of the Inspector General by timely disclosing complete and accurate information. I have advised, and will continue to advise, senior DHS officials, component heads, and other managers to ensure that such cooperation takes place. I will also advise leadership that they must protect employees' individual rights to speak with the Office of the Inspector General and must prevent retributive activity that might inhibit or chill an employee or contractor's communication or cooperation. I will also continue to meet periodically with the inspector general to discuss how I can help his office gain better access to information.

2. **The 2007 homeland security law established a new Department of Homeland Security interoperable emergency communications grant program to help ensure that our nation's first responders can communicate with each other in real time, on demand, during emergencies. The homeland security law clearly indicates Congress' intent for the Department to award funding for this new program on an all-hazards basis. Yet, it is our understanding that the Department did not, as required by law, incorporate any data related to natural disasters into its funding formula for FY 2008. Instead, the Department based its award allocation decisions on a slightly modified version of the terrorism-based risk formula used for the State Homeland Security Grant Program and the Urban Area Security Initiative. The Department's failure to use an all-hazards formula has resulted in grant allocation decisions that adversely affect States with significant natural disaster risk, such as my home State. As General Counsel, what will you do to ensure that the Department corrects this formula and that, in the future,**

the Department actually incorporates the risk of natural disasters into Congressionally-created all-hazards grant programs?

Answer: I am told that, for the 2007 interoperable communications grant program, the department revised its risk formula for terrorism prevention grants to reduce by half the impact of terrorism threat on the allocations—meaning the great majority of the allocation factor was consequence not terrorism—and applied the revised formula to the $1 billion interoperability grant program. The department recognized that it would be better to have an all-hazards formula for programs specifically aimed at all-hazards threats and response. The department suggested to our congressional appropriators that a National Academy of Sciences (NAS) study might be a good way to arrive at such a formula. The FY 2008 appropriation for the department provided funding for a NAS study. There was insufficient time before the FY 2008 interoperability grant program was announced to complete a review of the risk formulas, and, in fact, the NAS study is just now about to get underway. This study will enable us to institute a more rigorous formula for allocating funds for all-hazards programs. In the meantime, FEMA continues to examine alternatives for this all-hazards program if it is funded in FY 2009.

Senator Daniel K. Akaka
Additional Questions for the Record
Nomination Hearing of Gus P. Coldebella
July 15, 2008

1. **The DHS Office of Civil Rights and Civil Liberties notified your office about a possible conflict of interest with Immigration and Customs Enforcement (ICE) processing the Freedom of Information Act (FOIA) request for photographs of the ICE Halloween party, because the head of ICE, Julie Myers, had ordered them destroyed.**

   Nevertheless, the ICE Principal Legal Advisor directed the ICE FOIA office to process the request, and the ICE Principal Legal Advisor (PLA) reviewed the photographs before they were released.

   In your response to Committee Pre-Hearing Question 91.c, you stated:

   "OGC did not determine that there was an actual or possible conflict of interest for ICE personnel to process the FOIA request. And I believe that the result shows that there was no conflict: ICE personnel received the photographs, analyzed them under FOIA, and released them."

   a. **Please provide your rationale for judging whether there was a conflict of interest in this case on the basis of the end result.**

   Answer: As the acting general counsel of the department, I had little involvement in any of the matters related to the ICE Combined Federal Campaign fundraiser beyond general awareness. I was not personally involved in responding to the FOIA request or in responding to this committee's request for photographs. I was not aware of any congressional request for the photographs until the time that ICE was planning to produce the photographs in response to CNN's FOIA request. OGC HQ did not make a determination that there either was or was not a conflict of interest at the time, nor do I believe OGC was asked to do so. The end result shows that the dedicated ICE career staff—staff that deals with FOIA requests to that component—did its job; I have no reason to believe that they processed the request in other than the ordinary course of business.

   b. **When advising the Department on a potential conflict of interest, please describe your process and criteria for evaluating the appropriate action, including whether your recommendations would focus on the decision-making process or on the outcome.**

   Answer: The designated agency ethics official, or DAEO, is responsible for developing, implementing and coordinating the department's ethics program. The DAEO is to provide advice whenever a conflict of interest, or an appearance of a conflict of interest, is suspected, reported, or otherwise brought to the DAEO's

attention. The matter should be addressed and resolved with the DAEO's guidance, which may include recommendations for recusal, disqualification, divestiture of an asset, reassignment of duties, resignation, removal, waiver of conflict, or immunizing the tainted asset through a financial arrangement.

c. Please explain why your office did not specifically evaluate whether or not (1) the ICE FOIA office handling the request for the Halloween pictures and (2) the ICE PLA reviewing the FOIA response presented a conflict of interest.

Answer: My responses to pre-hearing questions suggest that there are structural safeguards within the department—such as the fact that ICE career staff runs the FOIA process, and that the ICE Office of Principal Legal Advisor reports to OGC, not the ICE Assistant Secretary—to militate against appearances of conflict of interest. Additionally, this question should cause us to consider the alternative to processing by the ICE career staff that typically handles such requests. If the alternative were a politically-appointed department official making a decision to take the processing of the request away from the ICE career staff that routinely processes such requests, and to have that request processed in another fashion, that decision might have been met with allegations of conflict of interest, politicization, or the appearance of impropriety. Moreover, ICE and other government agencies frequently receive requests for information relating to controversial matters or allegations of agency misconduct or mismanagement. Agencies have a duty to be responsive to Congress's oversight requests, and it seems to me that having entire agencies recuse themselves from responding to Congress when their leaders face congressional scrutiny could result in gridlock.

2. In response to the Committee Pre-Hearing Questions asking whether you agree that that the speed and handling of the ICE Halloween FOIA request might have had a direct bearing on the interests of ICE senior leadership, you stated:

"It should not have. Although I was not at the committee briefings on this topic, it is my understanding that the circumstances of the incident were described in detail to committee staff." (Response to Additional Pre-Hearing Questions from Senator Lieberman 18.b and 18.c).

a. Please explain the basis for your conclusion that the speed and handling of the FOIA request "should not have" had a direct bearing on the interests of ICE senior leadership, including whether that conclusion reflects a judgment that the description of the events that Ms. Myers provided committee staff was fully consistent with the photographs and, if so, how you reached that judgment.

b. If the photographs had been produced before Ms. Myers' confirmation and had revealed that the circumstances described to committee staff

were inaccurate, do you agree that they might have had a direct bearing on her pending nomination?

c. Did you evaluate whether or not the speed and handling of the FOIA request had a direct bearing on Ms. Myers' interests at the time that ICE was processing the FOIA request? If so, please state your rationale and conclusion. If not, please explain why not.

Answer: As stated above, as the acting general counsel of the department, I had little involvement in any of the matters related to the ICE Combined Federal Campaign fundraiser beyond general awareness. I was not present at the committee briefing or briefings on this topic, but I am told that the circumstances of the incident were described in detail to committee staff. If there were a disparity between what was described to the committee and the photographs that were ultimately produced– a suggestion that I have not heard before—I believe that to be a matter that the committee should take up with the parties involved. I have not evaluated the speed and handling of the FOIA request, or whether it had an effect on Ms. Myers' interests at the time, because the Secretary has not asked me to do so.

Senator George V. Voinovich
Additional Questions for the Record
Nomination Hearing of Gus P. Coldebella
July 15, 2008

1. **Many concerns have been expressed about the possibility that REAL ID could result in an increase in identity theft. The Department of Homeland Security's (DHS) REAL ID regulations state that "it would be difficult to draw any conclusions such as this since the effort or cost to individuals to obtain and use a passable fraudulent identification card is expected to be much higher than it is at present. Only those people who believe that they will reap substantial benefits would be willing to incur the cost of creating and using a fraudulent identification card." But many identity thieves do reap substantial benefits from such thefts. What is DHS doing to secure the databases associated with REAL ID and actively prevent the possibility of increased identity theft as a result of REAL ID?**

   Answer: DHS recognizes the importance of privacy protection and has sought to address privacy in a comprehensive manner under the REAL ID Act. It is important to remember that state driver's licenses—even ones that are REAL ID-compliant—remain under the control of the states. They are not federal documents, and states may enhance privacy protections as they see fit so long as they meet the minimum requirements of REAL ID.

   With respect to the machine-readable zone, or MRZ, the final rule requires a small amount of information be printed on the card and in MRZ. The MRZ on a driver's license (the 2D PDF 417 barcode) contains information already available on the front of the card, such as name, address, and date of birth. That barcode is on the licenses in 47 states today, unencrypted, so that a local law enforcement officer who stops a driver on the highway in any State is able to check a driver's record from any State for public safety. While DHS considered encrypting the MRZ, encrypting the bar code would introduce a complicated system of managing encryption codes for each State such that all law enforcement would still be able to read driver's licenses to access driving records. Recognizing that the barcode is read by swiping the card and the data in the barcode is displayed on the card itself for anyone holding the card to read, any benefit to encrypting the information is certainly outweighed by the need for law enforcement to easily use the barcode. Given law enforcement's need for easy access to the information, and the complexities and costs of implementing an encryption infrastructure, DHS chose not to require encryption of the MRZ.

2. **How will DHS protect the personal information stored in the machine readable zone (MRZ) of REAL IDs against unauthorized use?**

   Answer: The REAL ID Act does not provide DHS with authority to prohibit third party private-sector uses of the information stored on the REAL ID card. As

noted in the proposed rule and the PIA issued in conjunction with the rulemaking, some States, through their own legislation, currently limit third-party use of the MRZ, and the American Association of Motor Vehicle Administrators (AAMVA) has drafted a model Act that, if enacted by a State, would prohibit commercial users, except as provided by the State's legislation, from using a scanning device to: (1) obtain personal information printed or encoded on the card and; (2) buy, sell or otherwise obtain and transfer or disclose to any third party or download, use or maintain any data or database, knowing it to contain personal information obtained from a driver's license or identification card. The Model Act authorizes verification of age for purchasing alcoholic beverages or tobacco products, but with strict limitations on the storage and use of such information. DHS encourages the States to take similar steps to protect the information stored in the MRZ from unauthorized access and collection.

3. **Will a passport card or a passport book be accepted by the Federal government for purposes of boarding a commercial plane, entering a Federal building, or entering a nuclear power plant once all REAL ID requirements go into effect?**

Answer: On April 28, DHS and TSA provided greater clarity on the types of identification that will be accepted at checkpoints for boarding commercial planes in the United States. As of May 26, 2008, adult passengers (over the age of 18) are required to show a U.S. federal or state-issued photo ID that contains the following: name, date of birth, gender, expiration date and a tamper-resistant feature. The list of acceptable documents, including passports and passport cards, has been posted to the TSA website at *www.tsa.gov*, and is provided below:

- U.S. passport
- U.S. passport card
- DHS "Trusted Traveler" cards (NEXUS, SENTRI, FAST)
- U.S. Military ID
- Permanent Resident Card
- Border Crossing Card
- DHS-designated enhanced driver's license
- Drivers Licenses or other state photo identity cards issued by Department of Motor Vehicles (or equivalent) that meets REAL ID benchmarks (All states are currently in compliance)
- A Native American Tribal Photo ID

- An airline or airport-issued ID (if issued under a TSA-approved security plan)
- A Registered Traveler Card (that contains the following: Name; Date of Birth; Gender; Expiration date; and a Tamper-resistant feature)
- A foreign government-issued passport
- Canadian provincial driver's license or Indian and Northern Affairs Canada (INAC) card
- Transportation Worker Identification Credential (TWIC)

In terms of using a passport card or passport for entering a federal building or entering a nuclear power plant, this is subject to the policies of departments and agencies that operate the facilities. The REAL ID Act only prevents the federal government from accepting non-REAL ID identification cards for certain specified purposes.

4. **Do you believe there is a legal basis for requiring passport cards to meet International Civil Aviation Organization (ICAO) standards in order for such cards to be utilized for air travel between the United States and each of Mexico, Canada, Bermuda and the Caribbean?**

Answer: I understand that the passport card, a U.S. State Department-issued document, is intended to be a lower-cost means of establishing the identity and nationality of travelers crossing into the United States at land borders and arriving by sea, for purposes of compliance with section 7209 of the Intelligence Reform and Terrorism Protection Act of 2004. Because the State Department has determined that the passport card is not intended to be a globally interoperable travel document, it has decided that the passport cards need not be designed to meet ICAO standards and recommendations applicable to globally interoperable passports.

With respect to U.S. passports, the United States as a member of ICAO has committed to abide by standards issued by ICAO unless the United States has filed an exception. We defer to the State Department on the U.S. position with respect to this particular standard.

5. **In conducting cost/benefit analyses of proposed Hazard Mitigation Grant Program proposals, the Federal Emergency Management Agency (FEMA) has developed a methodology to calculate the benefits of proposed life safety measures to be taken in response to hurricanes and tornadoes, but has not developed a methodology to calculate the benefits of proposed life safety measures to be taken in response to floods. Why hasn't such a methodology been developed to date and when will such a methodology be developed?**

Answer: I understand that FEMA has developed and has made available numerous methods and tools to conduct benefit cost analysis (BCA) for various natural hazards related to mitigation activities. BCA is governed by OMB Circular A-94. FEMA does not exclude the calculation of benefits from life safety when conducting a BCA for flooding. However, historical statistical data indicates that, thankfully, death from flooding is rare—so rare that FEMA does not include those benefits as a built-in calculation in the flood BCA methodology.

The difficulty with developing methods for calculating benefits for potential life safety measures for floods has to do with the need to quantify the probability of life-safety risk due to a specific flood event and to associate the avoided loss of life to the project being funded. The unpredictability of human nature and the reaction to a natural disaster or event is difficult to quantify. For example, most deaths associated with past flooding events have been attributed to driving across flooded roadways.

Similarly, deaths attributed to hurricanes are difficult to calculate. During recent reengineering of FEMA's benefit cost analysis tools, a panel of technical experts was formed to address deaths associated directly to hurricanes. The only records found for deaths directly tied to hurricanes were individuals falling from their roofs while covering the roofs with tarps, or again, crossing roadways that were flooded and were swept away.

While it is recognized that deaths have occurred in the past for both flooding and hurricane events, the number of deaths is very small in relation to the total number of people impacted from the disaster. If you would like additional information on this issue, I would be glad to have our Office of Legislative Affairs make the most knowledgeable personnel from FEMA available to you or your staff.

6. **Similarly, in conducting cost/benefit analyses of proposed Hazard Mitigation Grant Program proposals FEMA has not developed a methodology to determine the benefits of proposed environmental improvement measures. Why hasn't such a methodology been developed to date and when will such a methodology be developed?**

Answer: While I have not personally confronted this issue, in response to your question I was told that FEMA does not exclude the calculation of environmental benefits when conducting a BCA for mitigation projects, though environmental benefits are difficult and expensive to quantify. To clearly understand the environmental benefits from a mitigation activity, the applicant would have to perform an environmental assessment to obtain the direct environmental benefits. To do this, the applicant would have to hire a contractor or technical expert to research and study the mitigation project area in order to quantify the environmental benefits that would result from the completion of the mitigation activity. This cost could easily reach tens of thousands of dollars. Many applicants do not address the environmental impacts in the benefit cost analysis

due to the cost and time associated with conducting the environmental impact study. Because the environmental benefits vary on a case by case basis, depending on the mitigation activity type and location of the project, it is very difficult to determine a generalized value for the environmental benefits associated with performing a given mitigation activity.

7. **DHS recently released an interim final rule entitled "Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization Program," which will require all Visa Waiver Program (VWP) travelers to either obtain advanced authorization to travel using ESTA or obtain a visa before traveling to the United States. How is DHS estimating the increased visa demand that will result from implementation of this rule, both because of VWP travelers who choose to get a visa rather than obtain advanced travel authorization and because of VWP travelers whose travel is denied by ESTA?**

Answer: Since the early stages of ESTA program development, DHS has worked with the State Department in coordinating ESTA screening methodologies, and has shared analysis of the number of anticipated travelers under the VWP and projections of the number of ESTA applications resulting in positive matches against law enforcement databases. DHS continues to coordinate closely with the State Department as the ESTA program is developed and implemented in an effort to forecast the potential increase in visa applications that may result from ESTA program implementation.

8. **How is DHS communicating with VWP countries and travelers about ESTA requirements?**

Answer: DHS continues to work closely with the State Department and the Department of Commerce to coordinate ESTA communication and outreach. In addition, DHS has been meeting with officials from VWP participating governments regarding plans for implementation. In partnership with the State Department, DHS initiated an aggressive outreach campaign on June 3, 2008, beginning with a briefing for representatives from the embassies of both the existing and aspirant VWP countries. DHS and State Department officials at our Embassies and Consulates continue these outreach efforts with the existing and aspirant VWP countries throughout the world. As part of these efforts, DHS and the State Department seek those countries' expertise in communicating with their nationals and citizens to inform them of the pending ESTA requirement.

DHS has also extended ESTA communication and outreach efforts to the travel industry, including the carriers and travel industry associations. We are developing and distributing print media, and are also taking advantage of internet options to broadcast details of the ESTA program and pending requirement. We will continue to work in close partnership with ESTA stakeholders, including the governments of VWP countries and the travel and tourism industries, to communicate ESTA requirements to all affected travelers.

9. **A comprehensive entry and exit system is a matter of vital importance to our national security, is in accordance with the recommendations of the National Commission on Terrorist Attacks Upon the United States, and is in furtherance of a number of federal laws dating back more than ten years. Such a system will also greatly enhance the overall integrity of our immigration system. However, I have some serious concerns with the Department's recent Notice of Proposed Rulemaking regarding US-VISIT exit procedures. How is requiring commercial air and vessel carriers to oversee fingerprint scanning of aliens departing the United States the appropriate approach for US-VISIT since the collection of aliens' biometric data is an immigration enforcement and security related duty that may best and most appropriately be considered an inherently governmental function?**

Answer: Requiring carriers to collect identity and other data on alien travelers is firmly within the tradition and history of immigration and homeland security law. DHS currently requires commercial aircraft and vessels to electronically submit passenger manifest information under U.S. Customs and Border Protections Advance Passenger Information System (APIS) in accordance with several statutory mandates, including, but not limited to the following: section 115 of the Aviation and Transportation Security Act (ATSA), Public Law 107-71, 115 Stat. 597; 49 U.S.C. 44909 (applicable to passenger and crew manifests for flights arriving in the United States); section 402 of the EBSVERA, INA section 231, 8 U.S.C. 1221 (applicable to passenger and crew manifests for flights and vessels arriving in and departing from the United States); and CBP's general statutory authority under 19 U.S.C. 1431 and 1644a (requiring manifests for vessels and aircraft). An "inherently governmental function" traditionally refers to those activities which require either the exercise of discretion in applying government authority or the use of value judgment in making decisions for the government. The collection of passenger manifest information—whether biometric as proposed under the US-VISIT Exit NPRM, or biographic as currently required under DHS's APIS regulations and domestic passenger screening requirements—requires neither. For example, in collecting passenger manifest data for submission to the government under APIS, carriers do not, and are not required to, exercise police powers, such as the arrest or detention of persons identified on government watch list databases. The carriers' responsibility, as the party with the greatest access to travelers and members of the travel industry, is to collect passenger manifest information for submission to the government which then allows the government to exercise its discretion in taking actions necessary to enforce immigration laws and protect transportation and national security. The same allocation of responsibilities would apply in the US-VISIT exit system proposed by DHS, although I would note that the department continues to consider comments in response to the proposed rule.

10. **I understand DHS is phasing in Transportation Worker Identification Credential (TWIC) requirements for owners and operators of maritime facilities between October 2008 and April 2009. How is DHS ensuring that**

affected owners, operators, and workers are aware of and complying with TWIC requirements?

Answer: While implementation of this program is not an OGC function, I understand that the United States Coast Guard, in conjunction with the Transportation Security Administration, continues to conduct extensive outreach to all industry segments that will require a Transportation Worker Identification Credential, or TWIC, in order to gain unescorted access to secure areas of Maritime Transportation Security Act regulated facilities or vessels.

As part of the lead-up to the compliance dates for Captain of the Port Zones, the Coast Guard will continue outreach efforts with local stakeholders including the owner/operators of MTSA-regulated facilities to ensure proper notification has been and continues to be given to all personnel requiring unescorted access to secure areas of MTSA-regulated facilities. Local Coast Guard units will maintain communication with their industry stakeholders to gauge the level of worker populations who have enrolled for a TWIC throughout this period.

Utilizing enrollment data provided by TSA, the Coast Guard will engage with stakeholders to ensure the population is aware of the requirements and has every opportunity to enroll in advance of the compliance date. To assist in this endeavor, the Coast Guard is recommending that facility owner/operators begin checking for TWICs voluntarily in advance of the compliance deadline. This strategy will allow owner/operators of facilities the opportunity to gauge the overall level of compliance of their workforce and stakeholders, and provide an additional avenue to educate those individuals who may still not be aware of the TWIC requirements. Moreover, the Coast Guard will continue to publicize TWIC requirements at Area Maritime Security Committee meetings, industry outreach events, through the Coast Guard's HOMEPORT web portal, and via meetings with owner/operators and facility security officers of MTSA regulated facilities.

11. **The September 2006 SBInet contract between DHS and the Boeing Co. calls for Boeing to implement SBInet along the United States northern and southern borders to detect, identify, classify, respond to and resolve illegal entry attempts at our land borders with Mexico and Canada. What types of technologies do DHS and Boeing plan to test on the northern border, where will such tests take place, and when will a specific plan be developed for testing these technologies?**

Answer: In FY 2007, Congress directed CBP to redirect $20 million of the Border Security Infrastructure and Technology Appropriation to "begin addressing the needs and vulnerabilities of the Northern Border."

I understand that CBP's Northern Border Demonstration Project is the integration and testing of technology in air, land and marine environments in the Detroit Sector. This technology will be displayed into a Common Operating Picture. Boeing is the prime integrator who will provide the COP software and the

integration of Aircraft (helicopters and an Unmanned Aerial System), CBP and USCG Vessels, and a CBP mobile surveillance system into the COP.

In addition, I am told that CBP will acquire technologies, to include sensors, day and night cameras, radar, and unattended ground sensors for the Swanton and Buffalo Sectors and surveillance capability for the Champlain Port of Entry. The overall project schedule is under development and will be finalized mid-September 2008. It is anticipated that the demonstration integration testing will occur early summer 2009 in the Detroit area.

12. Does Customs and Border Protection (CBP) have the authority to station a CBP Officer on a part-time basis at two different ports within a short distance of each other?

Answer. I understand from CBP that it does have such authority, as long as the assignment is within the area port. If the assignment represents a change in assignment practice for that area port, it would be necessary to notify the recognized bargaining representative of the affected employee and satisfy any associated bargaining obligations.

Senator Mary Landrieu
Additional Questions for the Record
Nomination Hearing of Gus P. Coldebella
July 15, 2008

1. **To remedy the lack of qualified leadership within FEMA's ranks, the Post-Katrina Emergency Management Reform Act required the FEMA Administrator to have demonstrated knowledge in emergency management and at least 5 years of executive management or leadership experience in the public or private sector. The President's signing statement took issue with this provision in the legislation and stated that it diminishes his ability to appoint executive branch leadership as he sees fit. In your response to the pre-hearing questions on this subject, you answered the Committee's question with another question, wondering aloud whether the provision is binding upon the President not to nominate someone who fails to meet that standard, or whether it is instead binding upon the Senate not to confirm a nominee who fails to meet the standard. In your legal opinion, which one is it?**

Answer: I agree with you that it is critical that the senior leadership of the Federal Emergency Management Agency be highly qualified. Any President would be well advised to make his or her appointment from the most experienced executives and emergency managers that the nation has to offer. This President has done so with R. David Paulison, who has done a commendable job of leading the rebuilding FEMA after Hurricane Katrina into the emergency management agency it is currently.

My original answer poses rhetorical questions because the issue has not been resolved by the courts. In my opinion, the cited provision is enforceable by the President or the Senate: the President will appoint a nominee, and the nominee will either meet or not meet the criteria in the statute. The Senate will either confirm or not confirm that nominee. If the nominee is appointed to the office of FEMA Administrator consistent with the Constitution, I do not find in the law a cause of action against the officer, the agency, the President, or the Senate based upon the officer's alleged failure to meet the qualifications in the statute. In fact, allowing such a cause of action could arguably undermine not only the President's constitutional appointment authority, but the Senate's constitutional "advice and consent" role. Your question is one that, at least currently, seems to be for the political branches to sort out in the nominations process.

That said, Justice Kennedy, in his concurrence in *Public Citizen* v. *U.S. Dept. of Justice*, 491 U.S. 440, 467 (1989), suggested that the President's power to appoint could not be circumscribed by legislation, and that the only limitation is found in the Constitution: that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States. . . ." U.S. Const., art. I, § 8, cl. 2.

2. The Committee has sought information from the Department about when the National Response Plan and its component annexes were activated during the response to Hurricane Katrina, but you have stated that it would take too much time and manpower to obtain this information and implied that it is not necessary at this point in time.

a. Did the Committee seek this information from the Department during the investigation?

Answer: Yes. This topic was discussed in many interviews of department personnel, including that of Assistant Secretary Robert B. Stephan. I believe it is most comprehensively covered in Mr. Stephan's statement and live testimony for this committee's hearing of February 10, 2006.

His statement and testimony contain the following relevant observations:

> The NRP is implemented in a cascading fashion according to the situation at hand. It is not turned on and off in a binary fashion like a light switch: in fact, certain core coordinating structures of the NRP, such as the Homeland Security Operations Center, are active 24 hours a day, every day of the year. Other elements of the NRP can be fully or partially implemented in the context of a threat, anticipation of a significant event, or in response to an incident. Selective implementation of core elements of the system allows significant flexibility in meeting the operational and information-sharing requirements of the situation at hand, as well as enabling effective interaction among Federal, State, local, and private-sector partners.
>
> As Hurricane Katrina approached, FEMA and other Federal agencies tactically prepositioned significant assets, to include essential equipment, supplies, and specialty teams, in critical locations throughout the projected hurricane footprint and established initial NRP-related coordinating structures at the national, regional, and State levels. Through these actions, the Department was leaning forward to prepare for a significant hurricane, informed by lessons learned from the previous hurricane season, the Hurricane Pam planning, and emergent analysis from the National Infrastructure Simulation and Analysis Center, as well as, of course, by specific requests and requirements that were pushed to us from the States of Florida, Louisiana, Mississippi, and Alabama. Additional Federal assets were deployed into the region following the issuance of the Presidential Emergency Declaration on Saturday evening. The type and quantity of prepositioned Federal assets were based upon previous hurricane experience as well as specific State and local government requirements. It should be noted that the NRP Catastrophic Incident Annex was not

implemented at this time because it was designed and constructed to be a no-notice--or to support a no-notice incident scenario that would not allow time for a more tailored approach. Subsequent FEMA analysis has indicated to us that as a minimum, 100 percent or greater of assets called for in the Catastrophic Incident Supplement were, in fact, deployed to the region some time during the course of the weekend prior to landfall.

As the events of that first week unfolded, I believe honestly three factors combined to negatively impact the speed and efficiency of the Federal response. The first was the sheer amount of unbelievable physical destruction, devastation, and disruption caused by Katrina regarding both wind damage and subsequent flooding. Response teams had to cope with the very severely restricted geographic access issue to core parts of the New Orleans downtown area due to the extent of the flooding. This significantly hampered response activities. Second, the tenuous initial security and law enforcement environment in New Orleans during the first several days of the response significantly impacted and impeded rescue and response efforts until a level of stability was achieved later during the first week.

Finally, as the week progressed after landfall, failure of various Federal officials to fully implement key aspects of the NIMS and the NRP impeded the Federal response. Specifically, the designated PFO, FEMA Director Brown, and core staff deployed with him did not after landfall establish a robust Joint Field Office and Emergency Support Function structure as called for in the National Response Plan. According to the NRP, the Joint Field Office serves as a key hub of Federal incident management coordination at the local level and enables integrated interaction with key State and local officials, as well as, very importantly, other Federal departments and agencies with considerable resources to assist in the response. Although the NRP envisions this operation normally to become fully activated in a 48- to 96-hour period after the initial occurrence of an event, the completely functional JFO in Baton Rouge, in fact, was not activated until much later, in fact, until some time during the middle of the second week of the response.

Moreover, the Principal Federal Official failed to establish a robust Federal unified command structure in Baton Rouge or in New Orleans as called for in the National Incident Management System. The concept of unified command is absolutely paramount as it provides for the coming together of senior representatives from each agency involved in incident response to enable informed, collective decision-making, resource allocation, and coordinated

multi-agency operations. While many support agencies had liaisons co-located at the Louisiana, Mississippi, and Alabama Emergency Operations Centers, full unified command was not accomplished in the first week. And, again, I will give Mr. Brown credit in that the sheer amount of devastation and destruction that he had to cope with to establish this certainly impeded his ability to do so. But that should not have gone on and dragged out into the middle and end of the first week of the response.

The lack of eyes and ears on the ground in New Orleans significantly hindered the ability of NRP entities at DHS headquarters to put together a common situational awareness and common operating picture for the Secretary and other DHS headquarters leadership. This situation was dramatically turned around following the arrival of Vice Admiral Thad Allen in theater and his assumption of overall Principal Federal Official responsibilities.

b. Have you made any attempt in the four weeks that have passed since your staff interview to obtain this information?

Answer: I do not recall being asked to obtain this information as part of the nominations process, either in the four sets of pre-hearing questions or in my staff interview. As shown in my answer above, the department has spoken extensively in the past about the topic, and while I regret any miscommunication, I want to respectfully make clear that I never said "it would take too much time and manpower to answer" questions about the NRP.

Senator Claire McCaskill
Additional Questions for the Record
Nomination Hearing of Gus P. Coldebella
July 15, 2008

1. **Please provide to the committee all documents in your possession, or in possession of the Office of General Counsel, related to the "ICE Halloween Party" of October 2007, including any and all e-mails between you or members of your staff and employees of ICE relating to the processing of the FOIA request from CNN and the request from the Senate Homeland Security and Government Affairs Committee for all relevant material.**

   Answer: As the acting general counsel of the department, I had little involvement in any of the matters related to the ICE Combined Federal Campaign fundraiser beyond general awareness. I was not personally involved in responding to the FOIA request or in responding to this committee's request for photographs. I was not aware of any congressional request for the photographs until the time that ICE was planning to produce the photographs in response to CNN's FOIA request. I have checked my e-mail files, and the only document that I found related to the incident is an e-mail received on February 4, 2008 that "ICE's response to CNN request for photos from the ICE CFC/Halloween gathering . . . is expected to go out today or tomorrow."

2. **When did you first learn of the incident involving an employee wearing an offensive costume at the ICE party? How did you learn of the incident? When and how did you learn of the Congressional request for the photos?**

   Answer: I learned about the incident at the time ICE briefed the department on it, which I believe to have been on the day of the event or the day after. I learned of it by telephone call, but I do not remember who told me about it. I was not aware of any congressional request for the photographs until the time that ICE was planning to produce the photographs in response to CNN's FOIA request, and I learned of that issue from the department's legislative affairs team.

3. **In your pre-hearing questions, you state that you do not believe it was a conflict of interest for employees of ICE, who report to Assistant Secretary Myers, to be in charge of responding to CNN's FOIA request. Do you believe it was a conflict of interest for employees who report to Assistant Secretary Myers to handle the congressional request, especially considering the fact that the nomination of Ms. Myers was pending before the Senate at the time the demand for the photos was made?**

   Answer: My responses to pre-hearing questions suggest that there are structural safeguards within the department—such as the fact that ICE career staff runs the FOIA process, and that the ICE Office of Principal Legal Advisor reports to OGC, not the ICE Assistant Secretary—to militate against appearances of conflict

of interest. Also, the question implicitly suggests an alternative to processing by the ICE career staff that typically handles such requests. If the alternative were a politically-appointed department official making a decision to take away the processing of the request from the ICE career staff that routinely processes such requests, and to have that request processed in another fashion, that decision might have been met with different allegations of conflict of interest, politicization, or the appearance of impropriety. Moreover, ICE and other government agencies frequently receive requests for information relating to controversial matters or allegations of agency misconduct or mismanagement. Agencies have a duty to be responsive to Congress's oversight requests, and it seems to me that having entire agencies recuse themselves from responding to Congress when their leaders face congressional scrutiny could result in gridlock.

4. **You state that the fact that the photos were eventually produced show there was no conflict of interest. Yet production of the photos took months, and only happened after Ms. Myers was confirmed in December, even though the photos were recovered by ICE in November.**

   a. **Does the timing of the production of the photos, especially the production to Congress, where there was no need to have them go through the FOIA review, not raise any red flags for you?**

Answer: I am told that the ICE career staff that handled the request did so in the ordinary course of business, and I have no reason to doubt that.

   b. **Do you really think that the fact that the photos were eventually produced "shows no conflict of interest." Is that the correct legal analysis to make to decide whether there was a conflict of interest?**

Answer: My responses to pre-hearing questions suggest that there are structural safeguards within the department—such as the fact that ICE career staff runs the FOIA process, and that the ICE Office of Principal Legal Advisor reports to OGC, not the ICE Assistant Secretary—to militate against appearances of conflict of interest. Also, the question implicitly suggests an alternative to processing by the ICE career staff that typically handles such requests. If the alternative were a politically-appointed department official making a decision to take away the processing of the request from the ICE career staff that routinely processes such requests, and to have that request processed in another fashion, that decision might have been met with different allegations of conflict of interest. Moreover, ICE and other government agencies frequently receive requests for information relating to controversial matters or allegations of agency misconduct or mismanagement. Agencies have a duty to be responsive to Congress's oversight requests, and it seems to me that having entire agencies recuse themselves from responding to Congress when their leaders face congressional scrutiny could result in gridlock. Finally, I was not present at the committee briefing or briefings on this topic, but I am told that the circumstances of the incident were described in detail to committee staff. If there were a disparity between what was described

to the committee and the photographs that were ultimately produced—a suggestion that I have not heard before—I believe that to be a matter that the committee should take up with the parties involved.

5. **Regarding the new policy related to GAO, do you think having all requests be vetted by a centralized office will "significantly streamline" the review process and provide GAO timely and complete access to necessary records and interviews?**

Answer: The key element of DHS's new management directive regarding relations with GAO—the item that distinguishes it from all other executive branch guidance on GAO access that we are aware of—is that it provides for documents and information to be produced to GAO within 20 days. DHS plans to hold itself to this high standard, and I am personally committed to making sure it is met.

The revised management directive regarding relations with GAO does not require all requests to be vetted by a central office. Rather, it directs that the components' audit liaisons receive all requests for interviews or documents in order to ensure accountability and management's visibility into the department's interactions with GAO. As I explained during the hearing, the various other requirements in the management directive—that document requests be written, that the materials and information sought be reasonably discernable, and that they be submitted to a liaison—are designed to make it possible for DHS to meet this high standard.

Submitting such requests to a liaison makes good sense on a number of levels. Were requests to be submitted to "program points of contact," as GAO's general counsel advocates, getting back to the GAO would be one of a series of important operational priorities for that program official—and might not be accomplished in twenty days. By contrast, it is a liaison's central job to ensure that the department is producing documents to GAO within the twenty-day timeframe. Having liaisons as part of the process will advance, rather than detract from, DHS's goal of quick production, and is intended to significantly streamline the process.

6. **Can you explain how demanding every request for documents and interviews be made in writing will "significantly streamline" this process? Can you explain how GAO can be expected to know which records they need to conduct their audit or review to such an extent that the only records requests which must be acted on within 20 days are those which are in writing and which "clearly identify the records requested?"**

Answer: It would be very difficult for DHS to provide GAO with rapid access to documents and interviews, and to fairly measure DHS's success or failure in producing documents to GAO in twenty days, if DHS and GAO do not have a mutual understanding of what was requested—a mutual understanding that is reasonably specific and recorded. The directive does not, of course, anticipate that GAO's request will include a list of specific documents. Rather, the directive seeks to ensure that GAO's requests are sufficiently clear in identifying the types

of materials to be produced so that the GAO and the department are operating from a shared understanding as to what will be searched for and what will be produced. Clear identification of the records requested will allow DHS to quickly access and produce the documents, and thereby significantly streamline the process.

7. **Who will make the determination whether the request "clearly indentifies" the records with enough specificity to trigger the 20 day requirement?**

Answer: The department's goal in working with GAO, as evidenced in the revised management directive, is to ensure that all participants have a shared understanding of GAO's needs and of DHS's plans for meeting those needs. Whether a request communicates with sufficient clarity to enable DHS to provide in a timely fashion what GAO seeks will be evident from the discussions that the GAO and the audit liaison will have when GAO submits its requests.

8. **Can you cite any legal authority whatsoever that would allow DHS to deny GAO to materials necessary for them to perform their duties?**

   a. **Do you believe GAO has access to classified material? If not, state the legal authority for your belief.**

   b. **Do you believe GAO has access to sensitive material? If not, state the legal authority for your belief.**

   c. **Do you believe GAO has access to "pre-decisional" material (as that term is used by DHS)? If not, state the legal authority for your belief.**

   d. **Do you believe GAO has access to draft material? If not, state the legal authority for your belief.**

Answer: While there are legal, constitutional, and statutory questions to consider when confronted with a question about GAO access, in all cases the department attempts to have discussions with GAO that allow quick and open access. Probably the most succinct summary of the authority for the executive branch's position on GAO access to the materials listed above is the memorandum on that subject from the Department of Justice Office of Legal Counsel, dated August 26, 1988, 12 Op. O.L.C. 171. Please also see President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information."

As discussed at the hearing, it is my opinion that the department should produce documents and information as quickly as possible, and in the small number of cases when confidentiality interests are at stake, to quickly reach a solution that accommodates both branches' needs. The process of reaching that solution is discussion, negotiation, and accommodation: executive branch agencies are to take their and the legislative branch's interests into account in reaching agreement on what documents and information will be produced.

9. I'm concerned by a couple other terms you have used in discussing this policy.

a. In your letter to GAO of July 1, you say that GAO should have timely and complete access to "appropriate" records and DHS employees. Given that GAO's work is at the direction of the Congress, what does this mean and who decides what's appropriate?

Answer: It seems to me that, if GAO or an executive branch agency believes that the position of the other on the propriety of a request is incorrect, the proper remedy is discussion, negotiation, and accommodation: executive branch agencies are to take their and the legislative branch's interests into account in reaching agreement on what documents and information will be produced.

b. DHS has to provide documents to GAO within 20 calendar days unless there is a "reasonable basis" for not meeting this timeframe. How big is this loophole and who gets to make these decisions?

Answer: Examples of a "reasonable basis" for extending the 20-day timeframe would be if the employee in possession of the information is working on a critical homeland security operation or project, and the operation or project would be compromised if the employee were forced to spend the time away from it to accommodate the GAO's request in twenty days. It is our intent to communicate such reasons to GAO so it is aware when the department will be unable to meet the twenty-day timeframe.

10. In your pre-hearing questions, Senator Lieberman inquired about the practice of having DHS counsel sit in on interviews GAO has with DHS employees. You noted two occasions where an attorney's presence may be "helpful and necessary": when sensitive information is discussed, or when an employee requests that a department attorney attend.

a. Are those the only two instances when department attorneys sit in on meetings between DHS employees and GAO?

Answer: While I would not exclude others, I think those two describe most instances when attorneys sit in on GAO interviews—recognizing that attorneys do not sit in on the vast majority of GAO interviews of department employees. Please note that the GAO access statute provides that "the Comptroller General may inspect an agency record to get the information": it does not provide for interviews. Interviews are an accommodation to the legislative branch to facilitate the efficient delivery of information.

The best outline of the department's position on this issue was in response to one of your questions to Secretary Chertoff in a hearing before this committee on February 13, 2007. He said, in pertinent part:

"There are times when there's a broad request for records. And I think it's important to make sure that we actually respond to the request accurately and comprehensively. And sometimes, actually, the lawyers facilitate that.

* * *

"As to the issue of lawyers' interviews, I don't know that it is true that lawyers are in interviews all the time. My understanding, from talking to the general counsel's office is that, in fact, in many cases, they're not in the interviews. However, in some cases, there are. I frankly don't understand why—putting aside whistleblowers, which is a separate issue and treated separately—I don't understand why that would have a chilling effect.

"I have to say I also have a lot of experience investigating and I was accustomed to having lawyers in rooms when I interviewed people and sometimes actually found it facilitating in terms of accuracy.

* * *

"I do think we have a desire to make sure we're accurate: that when we say we're turning things over and we're doing complete turnover, it is a complete turnover: that we're protecting whatever legal rights the department and the executive branch have so we're not giving something—taking the position that we shouldn't be taking or letting something go that we should be raising an objection to. So I'm very practical about these things, but—and I've talked to the acting general counsel about being as accommodating as possible. I cannot tell you, though, that I necessarily think it's always a bad thing or a wrong thing to have lawyers in an interview."

b. Who decides whether a DHS attorney sits in on an interview by GAO?

Answer: There is no rule for determining when an attorney sits in. One example would be when a program official or liaison seeks attorney assistance in anticipation of sensitive information being discussed.

c. Does the DHS employee being interviewed have any input into whether the attorney can be present? Is that employee forbidden from meeting with GAO without the attorney? Do you think that is legal?

Answer: I understand that it is generally the program official who is being interviewed that suggests attorney assistance may be necessary. When a department official is meeting with GAO as a representative of the department and the department determines an attorney should be present, that decision is

dispositive. As the Secretary said in the quotation above, whistleblowers are a separate issue and should be treated separately.

d. If a DHS employee indicates he/she would be more comfortable without the attorney, is that attorney instructed to leave?

Answer: Please see my previous answer.

e. Does DHS tell GAO why an attorney is there?

Answer: Again, there is no rule on this point, but I see no reason why the attorney would not tell GAO the reason he or she is there.