

**BRIEFING BY REPRESENTATIVES FROM THE DE-
PARTMENTS AND AGENCIES REPRESENTED ON
THE COMMITTEE ON FOREIGN INVESTMENT
IN THE UNITED STATES (CFIUS) TO DISCUSS
THE NATIONAL SECURITY IMPLICATIONS OF
THE ACQUISITION OF PENINSULAR AND ORI-
ENTAL STEAMSHIP NAVIGATION COMPANY BY
DUBAI PORTS WORLD, A GOVERNMENT-OWNED
AND -CONTROLLED FIRM OF THE UNITED ARAB
EMIRATES (UAE)**

HEARING

BEFORE THE

COMMITTEE ON ARMED SERVICES

UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

—————
FEBRUARY 23, 2006
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BRIEFING BY REPRESENTATIVES FROM THE DEPARTMENTS AND AGENCIES REPRESENTED ON THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) TO DISCUSS THE NATIONAL SECURITY IMPLICATIONS OF THE ACQUISITION OF PENINSULAR AND ORIENTAL STEAMSHIP NAVIGATION COMPANY BY DUBAI PORTS WORLD, A GOVERNMENT-OWNED AND -CONTROLLED FIRM OF THE UNITED ARAB EMIRATES (UAE)

THURSDAY, FEBRUARY 23, 2006

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The committee met, pursuant to notice, at 11:01 a.m. in room SD-106, Dirksen Senate Office Building, Senator John Warner (chairman) presiding.

Committee members present: Senators Warner, Levin, Kennedy, Byrd, and Clinton.

Committee staff members present: Charles S. Abell, staff director; Leah C. Brewer, nominations and hearings clerk; and John H. Quirk V, security clerk.

Majority staff members present: William C. Greenwalt, professional staff member; Ambrose R. Hock, professional staff member; Gregory T. Kiley, professional staff member; Sandra E. Luff, professional staff member; Elaine A. McCusker, professional staff member; Lucian L. Niemeyer, professional staff member; Lynn F. Rusten, professional staff member; and Sean G. Stackley, professional staff member.

Minority staff members present: Richard D. DeBobes, Democratic staff director; Evelyn N. Farkas, professional staff member; and Creighton Greene, professional staff member.

Staff assistant present: Benjamin L. Rubin.

Committee members' assistants present: Susan Magill and Cord Sterling, assistants to Senator Warner; Jeremy Shull, assistant to Senator Inhofe; Meredith Beck and Matthew R. Rimkunas, assistants to Senator Graham; Russell J. Thomasson, assistant to Senator Cornyn; and Stuart C. Mallory, assistant to Senator Thune; Mieke Y. Eoyang, assistant to Senator Kennedy; Erik Raven, as-

assistant to Senator Byrd; Frederick M. Downey, assistant to Senator Lieberman; Darcie Tokioka, assistant to Senator Akaka; Eric Pierce, assistant to Senator Ben Nelson; and Andrew Shapiro, assistant to Senator Clinton.

**OPENING STATEMENT OF SENATOR JOHN WARNER,
CHAIRMAN**

Chairman WARNER. The briefing will now commence.

Two days ago, I went over to the Department of Defense (DOD) and visited with the Secretary and the Deputy Secretary, who joins us here this morning, and the Chairman of the Joint Chiefs of Staff, regarding this port matter. I was carefully following, as all of us were, the intensity of public interest. In the course of the briefing, we consulted with Secretary Kimmitt, who has also joined us here this morning, on the telephone in that meeting. At the conclusion, I said that my best advice was that there's a need to get out, and get out promptly, a full and complete factual picture of what took place by way of the process of decision. Quite frankly, I offered some observations what did not, in my judgment, take place.

In the ensuing 48 hours, I made the decision to do this as a briefing, for the reason that so many of our colleagues are, understandably, on the recess period, back in their respective States, or otherwise engaged, and that, in consultation with Senator Levin, we would determine, next week, as to whether or not this committee would once again come together for a formal hearing.

I also made the decision that I would not have the principal Cabinet officers themselves here this morning, out of deference to the other committees of the Senate which have expressed an interest in having their own hearings. I know the Senate Banking Committee is contemplating one. The Homeland Security Committee, which I sit on, together with Senator Levin, likewise is having one. They all have indicated that the Cabinet officers would be there. But I felt that this very distinguished array of witnesses we have this morning would give an adequate opportunity for all the facts to be heard.

I also made the unusual decision that we'd have this configuration, such that, at the conclusion of the briefing and the questions and answers from members to the witnesses, we could then establish a routine by which press who desire to ask questions could do so. Having now, for 28 years, been in this room for hearings and tried to manage press availabilities in the hallway, I said this subject is entirely too important than to try and do those hallway press conferences. So, this is the reason for this set-up. I take full responsibility.

With that, I welcome everybody here, and particularly my colleagues who have joined, Senator Levin, Senator Kennedy, I believe, is going to come, and Senator Clinton.

We meet today with regard to the pending acquisition of the Peninsula and Oriental Steamship Navigation Company (P&O) by Dubai Ports (DP) World, a government-owned and -controlled firm of the United Arab Emirates (UAE). We'll discuss the specifics of this case, and seek some clarity here in this open forum. We'll try to ensure that the relevant facts be put forth on the record. It's im-

portant that this record be compiled now for Members of Congress who are actively engaged in their home districts with the debate on this subject—to determine what deliberations occurred pursuant to section 721 of Public Law 100–418, as well as what coordination took place to ensure for the continuing safeguard and protection of the ports, their cargo, and their surrounding communities.

In my press statements over the last few days, I have stressed the need to get the facts out in the public domain. This morning, the President, at a meeting of the Cabinet, further stressed, wholeheartedly, the importance of getting those facts out. This briefing today will help facilitate that.

Senator McCain, a valued colleague who is on this committee made a similar observation here to those that I have made, and I quote him, “We all need to take a moment and not to rush to judgment on this matter without knowing all the facts. The President’s leadership has earned our trust in the war on terror, and surely his administration deserves the presumption that they would not sell our security short. Dubai has cooperated with us in the war on terror, and deserves to be treated respectfully. In other words,” McCain concluded, “let’s make a judgment when we possess all the pertinent facts.” I certainly concur, and have concurred publicly, with similar statements.

To accomplish our oversight, we must discuss a very important interagency organization whose charter is to oversee the foreign acquisitions of U.S. companies and determine whether a particular acquisition has national security implications. That organization is called the Committee on Foreign Investment in the United States (CFIUS). Although CFIUS was codified by Congress in 1988, the history of this type of review by successive administrations goes back for over 50 years. It’s interesting, since 1988 about 1,500 cases have been handled. It seems that this structure has served our country well.

Briefing us today are some of the leaders that represent agencies that are members of the CFIUS. These public servants bring a wealth of experience and knowledge to their positions. I’d like to briefly introduce each member of our panel.

The Deputy Secretary of Treasury is Robert Kimmitt, former Ambassador to Germany, General Counsel to the U.S. Treasury Department, and a distinguished veteran of the Vietnam war.

The Deputy Secretary of Defense is Gordon England, whom I have known for many years and worked very closely with, a former Secretary of the Navy, and he served as the first Deputy Secretary of the Department of Homeland Security prior to returning to the DOD.

The Under Secretary for Arms Control and International Security, Department of State, is Robert Joseph. Secretary Joseph held a private meeting in S–407 the other day, and I think I, and many others, were very impressed with the depth of your knowledge on Iraq and Afghanistan and those trouble-spots in the world.

Further, we have the Deputy Secretary of Homeland Security, Michael P. Jackson, who also served as a former Deputy Secretary of the Department of Transportation.

Before we begin, I think it’s important to recognize that every single one of us in this room, and all across the United States—

most importantly, our President—shares the same goal: ensuring our national security. It's important to recognize that, in my view, the United Arab Emirates (UAE) has played a key role in working with the United States in the war on terror. For example, the UAE provides the largest number of port calls by our naval ships and our merchant ships. Their airfields have been made available for our military aircraft in missions in both Afghanistan and Iraq. So, while we must always ensure that any proposed foreign acquisition does not threaten our national security, we must also, as a Nation, ensure that just, fair, equitable treatment be given our allies and coalition partners in a wide range of transactions.

I'd like to end with a quote from our President, who said, "If there was any chance that this transaction would jeopardize the security of the United States, it would not go forward." I share that sentiment. I'm very supportive of the President's objectives.

Senator Levin.

STATEMENT OF SENATOR CARL LEVIN

Senator LEVIN. One of America's greatest vulnerabilities in defending against terrorist attacks is our ports. With over 11 million containers coming into our ports every year—95 percent of which are never opened or inspected—port security probably leads the list of our Nation's Achilles' heels.

At the same time, it's been a constant struggle to devote adequate funds to strengthen port security. According to the Wall Street Journal, while \$18 billion has been spent on airport security since September 11, the amount spent on port security has been only \$630 million.

Now we discover through the media that the administration has approved transfer of ownership of port facilities at six major U.S. ports to a company owned by the Government of Dubai in the United Arab Emirates. This decision was made without any consultation with Congress.

The UAE has had an uneven history when it comes to the war on terrorism. On the one hand, the UAE was apparently one of only a handful of countries in the world to recognize the Taliban regime in Afghanistan, whose support of Osama bin Laden and al Qaeda led to the events of September 11. Millions of dollars in al Qaeda funds went through UAE financial institutions. The Pakistani nuclear scientist A.Q. Khan reportedly used the UAE as a clandestine transshipment point for nuclear-related materials to Libya and Iran.

On the other hand, as the chairman mentioned, the UAE has provided the U.S. with access to its ports and territory, overflight clearances, and logistical assistance for our military forces in the region. UAE ports host more U.S. Navy ships than any port in the world outside of the United States.

What is deeply troubling to me about this proposed sale is the combination of one of America's greatest vulnerabilities to terrorist attack—our ports—with what appears to me to be a casual approach to reviewing the sale of U.S. port facilities to a country with an uneven record of combating terrorism. This approach has been so casual that the President, as well as the Secretary of the Treasury, who chairs the Committee on Foreign Investment in the

United States and the Secretary of Defense, who serves on the committee, learned of the U.S. Government's approval of the sale the same way that Congress did—after the fact, through media reports. America's port security is too critical to be subjected to this kind of casual approach. Managing U.S. port facilities enables a company's employees to more easily obtain visas, driver's licenses, and bank accounts that open a window of vulnerability that could be exploited. The events of September 11 demonstrate that America is entitled to total confidence that a country allowed to acquire assets that are key to our security is as committed as we are to combating terrorism.

With some decisions, we have to weigh risks. Port security is one area where it is not in our national security interest to accept any arrangement that might increase our already substantial risks and vulnerabilities.

The administration assures us that the pros and cons of this sale have been weighed and the sale should go forward. But as I indicated, we now know that the most senior levels of the administration learned of this decision in the last few days by hearing about it in the media. As so often happens around here, the administration now seeks to avoid the checks and balances of congressional involvement. The White House Press Secretary recently said that, "On hindsight, perhaps Congress should have been notified sooner." We weren't notified at all, unless watching CNN and reading the morning paper constitute notification. More to the point, Congress should have been consulted, and not merely notified.

The President's threat to veto any legislation that even delays this sale in order to give Congress more time to analyze it shows how out of touch the administration is with the public's and Congress's legitimate concerns about the vulnerabilities of our ports. It also demonstrates presidential disdain for outside views, in general, and congressional views, in particular.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you, Senator Levin.

Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman—and I thank you, Senator Levin—for holding this briefing today. I thank all of our witnesses for appearing before the committee.

The question that must be addressed is whether, and how, national security was factored into this decision at every stage. The American people need to have confidence that the port deal won't undermine national security and that the administration isn't outsourcing our national security.

The administration isn't known for its competence in handling critical situations. The only surprise is that the administration is surprised by the intense reaction of the American people.

Nearly 4½ years after September 11, it's obvious that our ports continue to be extremely vulnerable. The 9/11 Commission warned that terrorists would look for opportunities like that to do harm as great or greater than September 11. Last December, the 9/11 Commission issued its final report and reviewed Federal efforts to implement its recommendations. The findings were an alarming indictment of Federal failings. With respect to the Nation's ports, it

issues grades of D for critical infrastructure assessments and cargo screening.

If terrorists were attempting to sneak a nuclear explosive device into this country, they might include it in 1 of the 9 million containers arriving at our ports every year, 95 percent of which go undetected.

Over the next 10 years, the Coast Guard believes we need at least \$5.4 billion to secure our ports. That's their estimate, the Coast Guard's estimate. Yet the administration is only seeking \$46 million for port security in 2006, and its recent request, for 2007, would actually have eliminated the only grant program we have that is dedicated solely towards port security.

If port security is not a top priority for our own Government, how can we expect it to be a priority for a foreign government? We cannot risk contracting out our national security, and we cannot keep nickel-and-diming the Coast Guard and port security. We need to finally get serious, and we need to get this right.

Thank you.

Chairman WARNER. Thank you, Senator.

Senator CLINTON.

Senator CLINTON. Thank you, Mr. Chairman.

Well, I join both Senators Levin and Senator Kennedy, and I'm sure, to follow, Senator Byrd, in expressing our deep concerns about this decision.

The CFIUS process has been subject to several critical reports in the last several years; most recently, a Government Accountability Office (GAO) report last fall which pointed out that one of its failures was its inability to focus effectively on national security issues as the statute establishing CFIUS intended it to do.

This particular decision by CFIUS raises a number of red flags. The reaction that has been forthcoming by people throughout our country, I think, is understandable, for three reasons.

First, we know, from the work of the 9/11 Commission and other expert commissions, that port security is one of our weak links. We have not funded it adequately. We have not taken it seriously. That's a particular concern to me, as a Senator from New York.

Second, we know, from the press reports—and I assume we'll get additional information from this briefing—that the process used to review this transaction appears to be cursory, at best. A number of provisions were not required of the company, and it appears, similarly, that the mandatory requirement for an additional 45-day review, when the entity involved is government-owned, was ignored.

Third, the track record of this administration on homeland security, its inadequate funding, its bureaucratic dysfunction at the Department of Homeland Security, as evidenced, most tragically, with Hurricane Katrina, but in many other similar instances over the last 4½ years, does not create an atmosphere of confidence when looking at this particular matter.

Moreover, according to the Associated Press, this transaction was approved without many of the ordinary conditions that are placed on such investments. The administration did not require Dubai Ports to keep copies of business records on U.S. soil, where they would be subject to court orders. It did not require the company to

designate an American citizen to accommodate U.S. Government requests. If September 11 was a failure of imagination, and Katrina was a failure of initiative, this process is a failure of judgment.

In the post-September 11 world, port security is too important an issue to be treated so cavalierly. Only 5 percent of the cargo entering the United States is inspected. Every expert whose reports I have read suggest we should be closer to 15 to 20 percent. We have not yet deployed the kind of technology that everyone knows we need to. We do not yet have the radiation detectors that everyone has called for. According to the 9/11 Commission Report, "While commercial aviation remains a possible target, terrorists may turn their attention to other modes. Opportunities to do harm are as great, or greater, in maritime or surface transportation."

Port security is national security, and national security is port security. Instead, we have a decision making process that did not alert the President, the Secretary of the Treasury, the Secretary of Defense that several of our most critical ports were about to be transferred to a foreign government entity. We've heard, from numerous administration spokespeople, that those of us who are raising concerns are somehow out of place, because, after all, it was a British company that was engaged in these activities selling to the Dubai company. For many of us, there is a significant difference between a private company and a foreign government entity.

Under the Exon-Florio statute, which governs these foreign investments and the process that you undertook, if we are at all impacting national security, the full 45-day investigation of an investment by a foreign government is mandatory if it, "affects national security." Yet the CFIUS board voted unanimously, according to our information, not to conduct an investigation that, by my reading of the statute, is required. Since DP World is controlled by a foreign government, under the statute the transaction requires a 45-day investigation if it affects national security.

Secretary Chertoff has claimed, "We have a very disciplined process—it's a classified process—for reviewing any acquisition by a foreign company of assets that we consider relevant to national security. That process worked here." Well, on the face of it, it did not work, because the mandatory 45-day investigation was not conducted.

So, Mr. Chairman, there are numerous problems with this review process that I think we need answers to. But, in the larger context of port security, particularly given the problems we've been having with the Department of Homeland Security—apparently, the White House is about to issue their report about Hurricane Katrina, which, just based on the press reports, has to make you cry, because—What is it saying? Guess what? We need interoperable communications. Guess what? We need command and control. Well, guess what? It's 4½ years after September 11, and many of us have been saying all of that for that long. So, it's very troubling that we find ourselves in this position. I, for one, hope that there are answers, but, at the very least, I hope the 45-day investigation is carried out, as required under the statute.

Chairman WARNER. Thank you, Senator Clinton.
Senator Byrd.

Senator BYRD. Thank you.

Mr. Chairman, I authored the 1992 amendment that requires these sorts of transactions to be subject to a 45-day investigation. This briefing should help to answer the questions of why that investigation was not carried out and why there was no consultation with Congress.

I thank you for conducting this hearing. I thank all other the members, as well.

Chairman WARNER. Thank you very much, Senator Byrd.

We'll proceed.

Secretary Kimmitt, my understanding is that we should start with the Deputy Secretary of Defense.

Again, Secretary England, I thank you and the Secretary for meeting with me 2 mornings ago and having an extensive briefing on this subject. I think you, at that time, concurred, in my observation, it was imperative to get a full set of facts before the American public so they could, in an informed way, reach their own individual opinions on this. We respect the concerns of those that have been expressed so far, but I think these facts will help allay some of those concerns.

Please proceed.

STATEMENT OF HON. GORDON ENGLAND, DEPUTY SECRETARY OF DEFENSE, U.S. DEPARTMENT OF DEFENSE; ACCOMPANIED BY PETER FLORY, ASSISTANT SECRETARY OF DEFENSE FOR INTERNATIONAL SECURITY POLICY

Secretary ENGLAND. Senator, I thank you for following up after that meeting to provide this venue and opportunity to bring more facts and more clarity to this issue.

First, I do want to provide a perspective from the DOD point of view regarding our relationship with the United Arab Emirates, because they are a friend and ally of the United States, and they do stand side by side with us in this war on terror. They provide the United States, and also our coalition forces, unprecedented access. We have overflight clearances and a lot of logistical support from United Arab Emirates.

Now, as the Senator commented, we have more of our Navy ships in United Arab Emirates than any other port outside the United States. Last year in the UAE we had 590 of our military sealift command ships in the UAE. We had 56 of our warships in their ports. Last year in the UAE we had 203 ships (naval warships and Military Sealift command ships) make 502 visits to UAE ports in fiscal year 2005. By the way, the port at Jebel Ali is managed by Dubai Ports, so we rely on them, frankly, for the security of our forces there. There were 75 coalition partner ships there. Perhaps more importantly, the most important commodity we have here in the United States, we had 77,000 of our military men and women on leave in the UAE in fiscal year 2005. That's average at any given time. So, we rely on them for our security in their country. I appreciate and thank them for that.

This close military-to-military relationship includes, by the way F-16s, our very latest version, which we share with them. They have centers there that we use for training our forces. We appreciate all their vital military help.

Now, Mr. Senator, specifically regarding this transaction, first of all, I do want to say that, at the DOD, this review definitely was not cursory, and it definitely was not casual. Rather, it was in-depth and it was comprehensive. This was staffed within the DOD to 17 of our agencies or major organizations within the Department. During this review process, there were no issues raised by any agency within DOD, including our U.S. Transportation Command. That is significant, because that was a special review measure we put in place to ensure that any military transportation security issue would be identified.

For example, as part of the review of these 17 agencies, which include the Under Secretary of Defense for Intelligence, our Defense Technology Security Administration, which eventually approved this transaction. It was approved by the United States Army. It was approved by the United States Navy. It was approved by the United States Air Force, by the Defense Security Service, by the Defense Intelligence Agency, by the National Security Agency, by the Defense Information Systems Agency, and, as I said, by the U.S. Transportation Command, and many others. So, we had a very comprehensive and in-depth review of this transaction, and no issues were raised by any of those agencies or departments within DOD. My view is, this was very clear, it was very comprehensive, it was very direct. We are very comfortable with the decision that was made.

I also want to just comment that, Senator, you've invited us to appear before this committee in about 2 weeks and discuss our Quadrennial Defense Review, and I thank you for that opportunity. In that review, we have pointed out that, in this war, this very long war, it is very important that we strengthen the bonds of friendship and security with our friends and allies around the world, and especially with our friends and allies in the Arab world. So, it is important that we treat our friends and allies equally and fairly around the world, and without discrimination. Otherwise, it will be harmful in this war.

The terrorists want us, they want our Nation to become distrustful, they want us to become paranoid and isolationist. My view is, we cannot allow this to happen. It needs to be just the opposite.

So, the DOD, again, Senator, did this in-depth and comprehensive review. Of course, we were only one part of all the agencies, but I believe we did this fully in compliance with the law and our responsibilities.

I thank you for the opportunity for making those comments.

Chairman WARNER. Thank you very much. Mr. Secretary, would you introduce your colleague with you?

Secretary ENGLAND. Yes. This is Secretary Peter Flory with me, and the Defense Technology Security Administration reports to Secretary Flory.

Chairman WARNER. Thank you.

We'll now hear from the Department of State. Secretary Joseph?

STATEMENT OF HON. ROBERT JOSEPH, UNDER SECRETARY FOR ARMS CONTROL AND INTERNATIONAL SECURITY, U.S. DEPARTMENT OF STATE; ACCOMPANIED BY ANTHONY WAYNE, ASSISTANT SECRETARY, BUREAU OF ECONOMIC AND BUSINESS AFFAIRS, DEPARTMENT OF STATE

Secretary JOSEPH. Mr. Chairman, thank you very much for the invitation to participate today.

By way of introduction, I would just emphasize that the UAE is a longstanding friend of the United States. It has been working with us for many years to create a more stable political and security environment in the Middle East, a region of vital importance to not only the United States, but the broader international community.

As others have stated, the UAE is a key partner in the war on terror. It does provide outstanding support to U.S. and coalition ground, air, and naval forces in their operations involving Iraq. It also provides vital military and political support to our efforts in Afghanistan, as well as humanitarian support in both Iraq and Afghanistan.

In addition, I would note that the UAE has worked very closely with us to disrupt proliferation activities. For example, the UAE was the first state in the Middle East to join the Container Security Initiative, which is an effort to screen containers destined for the United States. It was also the first state in the Middle East to join Megaports, which seeks to stop the illicit movement of nuclear and radiological sources.

In terms of the process, I can assure you, as well, that State has a very rigorous internal review process for CFIUS transactions. All transactions are referred to experts in a wide number of the bureaus, including the Bureau of International Security and Non-proliferation, the Political Military Bureau, the Intelligence and Research Bureau, as well as all relevant regional bureaus that would be involved in any particular transaction.

In addition, we would also, depending on the transaction, bring in other experts. One example is that, on telecom transactions and on the DP World case, our office that works maritime security issues was fully involved.

Let me just conclude by noting that Secretary Rice is in the UAE today. That is a reflection of our strong partnership, our deep relationship. Secretary Rice has made very clear that the UAE is a stalwart ally of ours and that this deal does serve our national interests.

Thank you.

Chairman WARNER. Thank you very much.

Secretary Kimmitt.

STATEMENT OF HON. ROBERT KIMMITT, DEPUTY SECRETARY OF TREASURY, U.S. DEPARTMENT OF THE TREASURY; ACCOMPANIED BY CLAY LOWERY, ASSISTANT SECRETARY FOR INTERNATIONAL AFFAIRS, DEPARTMENT OF THE TREASURY

Secretary KIMMITT. Thank you, Mr. Chairman and members of the committee, for this opportunity.

Building on the comments by Deputy Secretary England and Under Secretary Joseph, I would like to discuss the Committee on

Foreign Investment in the United States, a not-so-secretive organization now widely known as CFIUS. I'm joined by Assistant Secretary of Treasury Clay Lowery, who chairs CFIUS at the policy level, as I do at the deputy's level.

CFIUS is an interagency group comprised of the Departments of the Treasury, State, Defense, Justice, Commerce, and Homeland Security, and six White House offices, including the National Security Council, National Economic Council, and U.S. Trade Representative.

The committee was established by executive order in 1975 to evaluate the impact of foreign investment in the United States. In 1988, Congress passed the Exon-Florio amendment, which, as Senator Byrd noted, was amended in 1992, empowering the President to suspend or prohibit any foreign acquisition of U.S. corporation if the acquisition is determined to threaten U.S. national security.

CFIUS has evolved over time to keep pace with changes in the concept of national security. For example, following September 11, the newly created Department of Homeland Security (DHS) was added to the committee, and DHS has played a primary role in reviewing many transactions, including the case at hand. Further, agencies that are not formal members of the CFIUS are often called upon to lend their expertise.

CFIUS operates through a process in which Treasury, as chair, receives notices of transactions and coordinates the interagency process. Upon receipt of a filing, CFIUS staff conduct a 30-day review, during which each CFIUS member examines the national security implications of the transaction. In addition, the Intelligence Community Acquisition Risk Center, which is an office under the Director of National Intelligence (DNI), provides an assessment of the foreign acquiror.

All CFIUS decisions are made by consensus. Any agency that identifies a potential threat to national security has an obligation to raise those concerns within the review process. If any member of CFIUS raises a national security concern, then the case goes to an extended 45-day investigation period.

Let me turn now to the DP World review. In contrast to some accounts, the DP World transaction was not rushed through the review process in early February. On October 17, 2005, lawyers for DP World and P&O informally approached Treasury staff to discuss the preliminary stages of the transaction. This type of informal contact enables CFIUS staff to identify potential issues before the review process formally begins. In this case, Treasury staff identified port security as the primary issue, and immediately directed the companies to DHS.

On November 2, Treasury staff requested an intelligence assessment from the DNI. Treasury received this assessment on December 5th and circulated it to the staff members of CFIUS.

On December 6, staff from all agencies on CFIUS met with company officials to review the transaction and to request additional information. Ten days later, on December 16, after almost 2 months of informal interaction, the companies officially filed their formal notice with Treasury, which circulated the filing to all CFIUS departments and agencies and also to the Departments of Energy and Transportation, because of their statutory responsibil-

ities and experience with DP World. As Secretary England noted, each Department then circulates the information throughout their own Departments.

During the 30-day review period, members of the CFIUS staff were in contact with one another and the companies. As part of this process, DHS negotiated an assurances letter that addressed port security concerns. The letter was circulated to the committee on January 6 for its review. CFIUS, on the basis of information that they had received from the companies, information that had been generated inside the Government, information garnered from the public domain and on the basis of the assurances letter, concluded its review on January 17. Far from rushing the review, members of the CFIUS staff spent nearly 90 days reviewing this transaction.

Another misperception is that this deal was conducted in secret. Although the Exon-Florio statute requires us to safeguard business-confidential information while the transaction is pending, these transactions often become public through actions taken by the companies. Here, as is often the case, the companies issued a press release announcing the transaction on November 29, 17 days before their formal filing. In addition, beginning in late October, dozens of news articles were published regarding this deal, well before CFIUS officially concluded its review.

Mr. Chairman, we believe the CFIUS process worked, from a substantive standpoint, and we are not aware of a single national security concern raised recently that was not part of the CFIUS staff review. However, we respect the oversight responsibilities of Congress, and, therefore, think it is important to improve the transparency of the CFIUS process to Members of Congress.

After testimony before Chairman Shelby of the Senate Banking Committee last October, we initiated more frequent briefings on cases that had been cleared by CFIUS. Although CFIUS operates under legal restrictions on public disclosures regarding pending cases, we have tried to be responsive to inquiries from Congress. I am open to suggestions on how we can foster closer communication on pending cases in the future.

In closing, Mr. Chairman, let me stress that all members of CFIUS understand that their top priority is to protect U.S. national security. As President Bush said this morning, "This deal would not be going forward if we were not certain that our ports would be secure."

Thank you, Mr. Chairman.

Chairman WARNER. Thank you, Mr. Secretary. Would you introduce your colleague that you've brought?

Secretary KIMMITT. Again, this is Assistant Secretary of the Treasury for International Affairs, Clay Lowery, who chairs the CFIUS Committee at the policy or assistant secretary level.

Chairman WARNER. Secretary Joseph, would you identify your colleague and his role?

Secretary JOSEPH. Thank you, Mr. Chairman. This is Secretary Tony Wayne, who is the Assistant Secretary for the Economic Bureau at the State Department. He plays a key role in all of these issues.

Chairman WARNER. Fine, thank you.

Now we'll hear from Secretary Jackson.

STATEMENT OF HON. MICHAEL JACKSON, DEPUTY SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; ACCOMPANIED BY RADM THOMAS GILMOUR, USCG, ASSISTANT COMMANDANT FOR PREVENTION, DEPARTMENT OF HOMELAND SECURITY; STEWART BAKER, ASSISTANT SECRETARY FOR POLICY, DEPARTMENT OF HOMELAND SECURITY; AND JAYSON AHERN, ASSISTANT COMMISSIONER, OFFICE OF FIELD OPERATIONS, U.S. CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF HOMELAND SECURITY

Secretary JACKSON. Thank you, Mr. Chairman and members. Thank you for having us here today. I appreciate the opportunity to elaborate upon this transaction and any questions you may have.

As Deputy Secretary Kimmitt said, we, at DHS, are the newest member of the CFIUS community inside the Federal Government. We are taking a very aggressive role in that review obligation that we have as participants in CFIUS.

I would echo what my colleagues have said. This transaction received a very sustained, professional, and careful review within the whole CFIUS group and, in particular, within DHS.

Our first look at this in a formal way came on October 31, after we had been notified by the applicant that there might be a transaction such as this. We met with the Justice Department and several parts of the DHS to review the contours of this deal, and began working on understanding better the issues associated with this potential transaction. We met with CFIUS in mid-November. As Bob Kimmitt has explained, the process itself then took us through January.

During that time, at the DHS, we involved, in particular, the Coast Guard and Customs and Border Protection (CBP). I'll introduce three of my colleagues that I've brought with me today, Mr. Chairman. Rear Admiral Thomas Gilmour is the Assistant Commandant for Marine Safety and Security, and had principal responsibilities for our review of this, as well as the ongoing security role within Coast Guard. Next, I have Assistant Secretary Stewart Baker, who heads our policy shop and who has the primary responsibility at the policy level for managing our CFIUS review process. Finally, I have Jay Ahern, who is our Assistant Commissioner for Field Operations inside of CBP. These organizations and others within the Department, our legal office and appropriate other parts of the Department, all engaged in this process.

The concerns that I assume that we'll have a chance to explore further in response to your questions, sir, will focus, in large part, I suspect, on port security and how adequate are our protections in this particular transaction.

Chairman WARNER. I would suggest you take the initiative now to go into that detail.

Secretary JACKSON. Okay, I'll be happy to launch into that and then take any additional questions, sir.

Since September 11, the Federal Government has made dramatic changes and improvements in port security. I'm going to try to unpack the various parts of that responsibility, and just begin, at the

overview level, an understanding of some of those material changes and material improvements that we have made in port security.

First, I'll describe the role of the Coast Guard a little bit, in that the Coast Guard has the primary responsibility for port security. It owns the captain-of-the-port responsibility. It owns the overall management of security within a port. Our approach to security is a layered systems of systems. We do not rely on any one tool, any one person, any one review, any one single activity to strengthen our port security adequately. The Coast Guard begins by pushing out our review prior to the arrival of vessels. It has substantial insight into, and assessment of, the arriving ships. That is managed through our Intel Coordination Center in Suitland, Maryland. This is a facility that involves close integration with the DOD and other Intelligence Community assets, as necessary. The principal focus is to look at vessels coming in, and the crews on those vessels, to make sure that we have an adequate understanding of any security risks and problems that may be associated with those inbound vessels.

At the same time, while containers are beginning to be loaded onto ships, we have, through a variety of programs, a process to look at that freight. That's a responsibility that principally resides at CBP. In that arena, we have, since September 11, made very significant changes in how we manage the screening of inbound cargo. I'll just mention a few parts of that.

First, in our Customs Trade Partnership Against Terrorism (CTPAT) participants who are voluntary, over 8,000 companies, participate in this. These include shippers, Customs brokers, and, in the United States, importantly, terminal operators, including P&O facilities. This is a program that is designed to bring a security set of measures, everything from physical security, background reviews of employees, maintenance of records, special training for security officers, notifications to the U.S. Government, and ongoing work with the U.S. Government to secure the supply chain in a multiplicity of ways.

We also have launched the Container Security Initiative (CSI) and have a related Megaports program with the Department of Energy that focuses, as has already been mentioned, on making sure that we protect against radiological materials being moved illicitly through the global supply chain.

So, we have, through the Container Security Initiative, pushed out our review of containers inbound. At the present, we have 42 locations where Container Security Initiative ports on foreign soil have signed up, participated, and agreed to work with us in this process. At present, that 42 locations accounts for 80 percent of the inbound container traffic. By the end of the year, we expect that, with other additions to the CSI program, we will have 50 locations, with up to 90 percent of the inbound cargo participating.

Why is this important? It begins with the cargo container headed our way, and we have to have notice 24 hours prior to the lading. That means that before that container is put up on a ship, we have, in these CSI ports, a notification. This goes to our National Targeting Center here in Washington, DC, which is a hub for analysis based upon past movements and practice, intelligence analysis, the history of the container that's being moved by the shippers, by

the ocean carriers. We do a risk analysis. In that analysis, we are screening 100 percent of all inbound containers. If we find an anomaly that concerns us, prior to departure, prior to loading in the CSI ports, we are able to take that container, to run it through various evaluation tools and decide whether or not we need to do a physical inspection. If we do need to do a physical inspection, we do it.

So, we have, on the inbound, a very considerable new regime of container security that's at work. One of the partners in this is the DP World in their location in the UAE. They are the first of the Mid-East nations to join the Container Security Initiative. They are a valued partner. We have had experience with them. They are very aggressive in working to cooperate and to comply with the rules and the guidance that we have through the various measures we've put in place with CSI.

So, we have had experience in adding to the layers of security for ports. When we get a container in the United States, if we have not had a chance to inspect it overseas, if it is a concern, we immediately take that into account and do an inspection with our inspection forces here in the United States.

So, if I can summarize just this portion, what we have is a supply chain that is global in nature, which is owned, in very large measure, by global corporations operating ships and moving freight through a global supply chain. We have, in this country, in ports, many foreign-owned corporations operating in ports. Our ports are owned by public authorities in the United States. Terminals are owned, or leased, typically. There is a considerable amount of management from ports that is in foreign hands today, as is P&O. So, the terminal operators manage the arrival and the inspection and the movement of cargo in and out of the port.

Just to give you a general snapshot, in the 7 ports where P&O has their principal operations in the country today, there are some 829 different terminals, terminal facilities that move freight—off-load freight, store freight, move freight. Of these, P&O has about 24 terminals in those 7 ports. So, they are an important player, but they are certainly not the only player in this process.

When we looked through this transaction, we, therefore, had a new set of tools, a growing set of tools, an experience with this particular operator, and a confidence that we could work with them.

That being said, we took some additional precautionary measures and sought assurances from DP World that they would allow us to impose a greater degree of scrutiny than we have done on ports and port terminal operators already in existence.

First, they had to comply with all the security rules that the Coast Guard, the captain of the port, and the CBP put in place at a port. Then we asked for a variety of considerations, which the organization has agreed to, that we would insist, and they have agreed, that they continue to participate in the Customs Trade Partnership Against Terrorism, they would continue to participate in the Container Security Initiative, they would assist U.S. law enforcement officials, on demand, without a formal subpoena, without a lot of process, in giving us information about their terminal operations, their employees, their security programs, and any changes in the employee base that we sought to look at, on a voluntary

basis with immediate and swift cooperation with us. They agreed, further, that they would maintain P&O's existing security policies and procedures at the U.S. facilities. There is, by law, a requirement that any significant change in those security procedures must be reviewed and approved by the Coast Guard. The Coast Guard has the authority to come in and to insist upon any additional measures that it thinks must be taken.

So, the firm, in addition, agreed, as part of their assurances, to operate any facilities that they own or control in the U.S. with current U.S. management structure, to the extent possible.

So, we expect a great deal of continuity, and we have the capability of having a good deal of visibility into any changes in that management, into any changes in that operating process, any changes in that structure. We can get those in a timely fashion, and we can make any review that's necessary take place quickly through the existing rules and authorities that we have in the Department.

So, in sum, I would just say that we have conducted a professional, deliberate, and systematic review, that we found no objection to this transaction, that we went even further and asked that these assurances be provided to us, and the company complied with that request.

We are not bashful at DHS about pushing on CFIUS matters. Some of my colleagues who sit around here have firsthand experience of DHS pushing in areas where we thought we needed to push farther. The structure of this deal led us to believe that we have no national-security-interest concerns to its going forward.

Chairman WARNER. Mr. Secretary, given that your colleagues have specific responsibilities, and it's your representation there would be absolute continuity of what's been done in the past, in the future, I think it would be well to have on the record some opening comments by both the Coast Guard and the Customs and Border Security.

Secretary JACKSON. Admiral?

Admiral GILMOUR. Thank you, Senator.

Chairman WARNER. Also, you make reference to the "assurances." Now, is that a document that will be made available to Congress in open, or is there certain classified material—I ask both Secretary Kimmitt and Secretary Jackson—that would be in a classified state?

Secretary JACKSON. It is our intention, actually, to make this open. We have some legal work to finish off to make that available, but we want to be able to provide that to this committee and to have you review it and ask questions about it.

[The information referred to follows:]

Exon-Florio prohibits public disclosure of documents and other information filed with CFIUS and such information remains subject to this statutory prohibition on public disclosure even after the CFIUS process is concluded in a particular matter. There is a classified portion of the record.

Chairman WARNER. Secretary Kimmitt—and, therefore, all information relevant to this transaction will be given to the public through the committee or other means.

Secretary KIMMITT. We will make available as much as we are allowed to make public under the law. We can give you more under the law than we can make public directly.

Chairman WARNER. So, there'll be a classified segment to this record. Is that correct?

Secretary KIMMITT. There is, as I mentioned, Mr. Chairman, always an intelligence assessment that comes from the Intelligence Community. That is a classified document. That is being briefed today, and has been briefed, to members of the Intelligence Committee. I see no reason why it couldn't be made available to members of this committee, also.

Chairman WARNER. We'll, accordingly, attach the classification to it.

The assurance agreement, when is the date/time that that's likely to be made, to the extent possible?

Secretary JACKSON. I think, today.

Chairman WARNER. Thank you.

Admiral Gilmour.

Admiral GILMOUR. Thank you, Mr. Chairman. I'll make a very brief statement.

The Coast Guard, as Secretary Jackson said, is the Federal agency in charge of the physical security of our ports. We follow safety and security of vessels as they arrive, transit through the port, and as they moor at the facilities where they are destined.

New authorities given to us since September 11 are the Marine Transportation Security Act (MTSA) of 2002, which gives us the authority, and we've developed regulations to regulate both foreign vessels that come into our ports and domestic facilities. Also, the International Ship and Port Facility Code was negotiated concurrently with MTSA at the International Maritime Organization, and it provides worldwide security of vessels and facilities.

Also, through our MTSA authorities, we were given the authority to visit international ports throughout the world to ensure that their ports met the international requirements. As we have done this around the world, we have visited a number of ports in which DP World has facilities, and, indeed, have verified that those facilities in the countries we've visited do meet the international requirements.

Thank you.

Chairman WARNER. Please proceed.

Mr. AHERN. Thank you very much.

Chairman WARNER. Please restate your portfolio of responsibility once again.

Mr. AHERN. Yes, I will. My name is Jay Ahern, and I'm the Assistant Commissioner for Field Operations within United States Customs and Border Protection. I oversee our 322 ports throughout the United States.

As part of Customs and Border Protection's layered strategy, as the Secretary alluded to, I think it's important just to elaborate a bit further on that.

I think it's very important for everyone to realize that the ports here in the United States are not the first time the United States Government intervenes or interacts with a container or a transaction destined for the United States. That's particularly so in the

maritime model. I think that's an example where we have some great programs in place, and we do have a very detailed, layered defense that I would like to go through some detail.

It does begin on foreign soil. As was discussed, we do have a rule and a requirement that became enacted a couple of years ago, the 24-hour rule, where we get detailed manifest information that we can then take 24 hours prior to lading a vessel in a foreign port to be run through a centralized national targeting database here in the United States. We can take current intelligence information and expert rule-based systems to go ahead and score that particular container for risk. Based on those containers, 100 percent of all containers destined for the United States are scored and assessed for risk before they're placed on a vessel overseas.

Those containers that pose a risk—in the 42 ports where we currently have United States Customs and Border Protection officers today, 80 percent of the containers come through those ports, as Secretary Jackson alluded to, and any of those containers that pose a risk are then worked, with our targeters and our officers that are overseas, collaboratively with the host country counterpart, who have actually entered into a Declaration of Principles with us to do that. If the risk is not able to be mitigated or resolved, then we have a process where we will work with them to go ahead and do elaborate screening, using high-imaging technology to basically X-ray the container, and also use radiation detection capabilities to go ahead and make sure there's no national security concerns with that container before it gets put on a vessel for the United States.

Also, I think it's important to talk about the overseas application of the Customs Trade Partnership Against Terrorism. As the Deputy Secretary also alluded to, with the number of people we have in our CTPAT program, we also go foreign to the point of staffing, which is the suppliers, vendors, manufacturers premises overseas, where the greatest vulnerability exists, in my opinion, where we need to take a look at the security practices, the hiring practices to make sure that they're compliant with the agreement they've entered into under the Customs Trade Partnership Against Terrorism. We've actually concluded 1,536 of those, and we have another total of 3,389 underway at this point in time to make sure that we, again, at the point of greatest vulnerability, at the point of staffing, outside the ports in the foreign location, that our officers go and assess the risk and take a look at what is there for physical requirements of the security of the premises, employee background investigation compliance, things of that nature, and that's critical for us.

We also, upon arrival here in the United States, we continue to assess the risk of the vessel before it even comes into the ports, collaboratively with the Coast Guard. Ninety-six hours, we go ahead and assess the risk again through an electronic notice of arrival. We also continue to get entry information on that particular transaction by the commercial brokers, who represent the importers, where we then, again, assess the risk, as we have the ability then to cross-reference entry information and invoice information against the manifest information we initially scored.

So, at this point, we've had at least two or three shots to go ahead and assess risk and intervene if there's a critical national security risk demonstrated.

Then, upon arrival here in the United States, Customs and Border Protection officers will go out with the Coast Guard if there's a risk of vessel, or wait for the containers to be offloaded. Those at risk, we take our high-imaging technology again, and our radiation detection capabilities again, dockside as it's being offloaded, to assess and then to screen that container right there.

An additional layer—and, Senator Clinton, you alluded to the radiation portal monitors, and we need to move quicker with the deployment of that in our seaports. Certainly, you'll get no disagreement from us. We want to move with all deliberate speed to get it done. At this point, we have 181 radiation portal monitors deployed in our seaports, and that accounts for 37 percent of the containers that, after we've done all those layers that I've spoken to at this point, still receive irradiation screening as they're departing the port to enter into the commerce of the United States. As we continue to move forward through the rest of this year, we'll get up to 294 radiation portal monitors, which would get 65 percent of the containers. Then, as we move forward with the funding we have for calendar year 2007, we will get to 80 percent of the containers entering the United States through the radiation portal monitors.

So, those are some of the additional layers that we believe are important to lay out, because I think it's important to circle back to the 5 percent reference that continually gets made. Two or 3 years ago, it was 2 percent. I am often asked, what is the best percent to look at? It's the right percent. We look at 100 percent of every container, the information coming into this country, assess that for risk, making sure we focus our technology and our resources through a layered approach to focus on those containers that pose a significant risk, and not to stifle the global trade of this country as we continue to facilitate legitimate trade through our ports of entry, but to focus on those that pose a risk. We need to continue to hone our expert targeting systems and our use of technology and use of information to focus our resource and technology on the right percentage of containers.

Chairman WARNER. Thank you very much. I thank all of our witnesses.

We'll now proceed to rounds of questions by the members present. We will hope to have two rounds. But I'd like to also say that the chairman has tried to keep all members of this committee informed in the last 48 hours about the open session that was taking place, and that if a member was not able to attend, they could forward to the committee their questions, and they will be put into the record and responded to by the appropriate witnesses so that our record is complete.

Following the two rounds of questions, we will have a press availability. Again, I selected this format so that we could do it in an orderly and a careful manner, given, I think, the sensitivity and the importance of this information. There's a microphone on either side here, and, at your own initiatives, if you wish to ask a question, members of the press come up, identify themselves, and pro-

pound the question either to myself or any other members who might remain, or, of course, our witnesses.

Now, I'd like to lead off with this point. There was a reference made to this investigation of 45 days. That was an important point. The word "mandatory" was used. As I read the statute, it's more or less discretionary. But that discretion is exercised, Secretary Kimmitt, if any of the CFIUS members decide that it should be done. Perhaps you should clarify that procedure and the reason it was not done in this case, your judgment.

Secretary KIMMITT. Mr. Chairman, your description was an accurate description of how we interpret the Byrd amendment. First, let me say I have enormous respect for Senator Byrd, not least because of the great courtesy he showed after the death of my father, who served under then-Majority Leader Byrd as Secretary of the Senate.

Senator, we have a difference of opinion on the interpretation of your amendment. It is now a 14-year difference of opinion, because this amendment has been interpreted by successive administrations since 1992 as being discretionary, as the Chairman described, and that is it would require a member of CFIUS raising a potential concern for the process to move into the 45-day investigative period.

I would note, again, going to that point of consistency, in 1997 there was a Singapore Government company called NOL that bought an American port operating company called APL. That Singapore Government-owned company today operates ports in Los Angeles, Oakland, and Seattle. That did not go into the 45-day period either.

What I will say, though, is that we don't suggest at all that the amendment is without effect. Quite to the contrary, I think our most intensive review, this being one of them, is precisely the case when a foreign government-owned or -controlled company comes before us. I think you'll find there is particular scrutiny by the Intelligence Community. I think particular scrutiny by the security agencies on the CFIUS panel, most especially State, Defense, Justice, and DHS. But we do view the amendment as a quite-important one that creates an important standard that we have to follow, but we do, as the chairman suggests, see it as discretionary.

Chairman WARNER. Fine. Can you state for the record that the troubling facts to many citizens in this country—indeed, myself—of the UAE's involvement, to the extent with transfer of funds at the time of September 11, when, in the international banking system, the allegations that they facilitated transit of certain nuclear components, and, indeed, two individuals, of course, participating in 9/11 had citizenship there. Were those facts weighed in the context of deciding to have the 45-day, or not to have it?

Secretary KIMMITT. They were certainly factors that were taken into account during the course of the review, Mr. Chairman, and particularly taken into account on the assessment done by the Intelligence Community.

Chairman WARNER. Secretary Joseph and your colleague, do you have anything to add to this?

Secretary JOSEPH. No, sir, nothing to add on that point.

Chairman WARNER. All right. Fine, thank you.

Now, what is the normal procedure of CFIUS with regard to advising Congress? I think it's now been pointed out very clearly that facts relating to this transaction have been in the public domain as early as November. Is that correct?

Secretary KIMMITT. The first that we can find, Mr. Chairman, is in October.

Chairman WARNER. But it's in the public domain. Now, to what extent do you, in your normal types of cases, involve Congress? Do you talk to the committee staffs, or is there some memorandum that's sent up? Was that procedure followed in this case? Did not someone intuitively—even though you're not elected public officials, you certainly have a feeling for the political system, the strong two-party system we have in this country—couldn't someone sort of say, "You know, this looks like something we ought to talk to some of the committee chairmen about"?

Secretary KIMMITT. Mr. Chairman, the procedure is that we brief Congress regularly on cases that have been cleared by CFIUS. By the Exon-Florio statute, there are very strict limitations on what we can discuss with regard to pending cases. We have taken the position that we can respond to requests from Congress for information, but we cannot initiate briefings during the pendency of the review, based on the statute, as it now reads.

Chairman WARNER. All right.

Now, my next question, to Secretary England and Secretary Joseph. We've clearly established that the UAE is pivotal—I think that's the word that perhaps our President may have used—but certainly vital in the war on terror, as a partner. Now, putting yourself in the position of that nation, proud nation that it is, and proud of its participation by way of support to the coalition of forces, if this current question before both the executive branch and Congress is a full partner, so to speak, in this—at this point in time—is perceived by them as not fair, not objective, and they decide to pull back some of that support, what are the consequences to our forces fighting in Afghanistan and Iraq? What is the likelihood that other nations giving similar support—Qatar, UAE, Kuwait, others—might take notice of this and perhaps their support could be somewhat diminished? I'd like to ask about those risks and the consequences.

Secretary ENGLAND. Senator, I don't believe we've looked at that specifically, because, frankly, hopefully that's not going to happen. I'm not going to speculate on that. But, as I commented, we have, of course, a lot of our ships, people, and bases use their ports. So, obviously, it would have some effect on us. I care not to quantify that, because I don't have the facts to quantify. It would certainly have an effect on us.

I actually believe the issue, though, is a little larger and perhaps more profound than just the military effect. This is a very long war, and this is a war not just of military. I mean, this is a war of relationships, ideas, and values. In my judgment, it is very important that we maintain the friendship and the relationships with our friends and allies, and expand those—and, as I said before, especially in the Middle East and around the world. I believe there is an American sense of value here, of fairness, equity, and treating everyone the same, and not just putting populations or countries

in certain classifications. So, I believe this is a question of equality and fairness. It is a fundamental value of America. So, my view is, this is important, in terms of long-term relationships of the United States and how we treat other countries around the world. So, I do believe this is a question of equity and fairness; and, therefore, it's very important that we respond appropriately.

Chairman WARNER. Secretary Joseph, your views? Particularly at this very hour, when, in Iraq, we see signs that some are interpreting as the brink of civil war, and we superimpose this situation on top. I'd like to have your views.

Secretary JOSEPH. Mr. Chairman, I do think it's a very important question. It's one that's very difficult to answer.

I can tell you that this issue is now in the Arab media, it's in the Arab press. It is being portrayed in the context of the cooperation that the UAE has been providing on the war on terrorism, as well as in terms of its long-term relationship with the United States.

As Secretary England has said, the war on terror is a long-term proposition. It is a war that will go on for years, just as the war on combating weapons of mass destruction (WMD). In that context, I would say that the UAE plays a vital role. It has been a major supporter of our efforts to interdict the trafficking in weapons of mass destruction and missile-related materials. It has played an important role in unraveling the activities of the A.Q. Khan network, which was mentioned before, and in following up to ensure that all of those who were involved in that network are appropriately punished, both because of the actions that they took and also because of the need to deter others from getting into this business.

Chairman WARNER. Fine.

My last question, to the Treasury representatives. Given that committees of Congress, certainly the Senate—I know of two who are going to have hearings; possibly the other body as well—what impact will the time that is required to hold these hearings have, if any, on the contractual relations with this situation? Is there allowance and flexibility to allow these hearings to go forward without any impairment in the contractual relations?

Secretary KIMMITT. Mr. Chairman, I don't have an answer to that question. I'd have to have our staff contact the companies on that point.

[The information referred to follows:]

As an official of P&O Ports North America expressed to Congress in a letter on June 9, 2006, DP World is taking a range of steps to proceed with the planned sale of P&O to a U.S. buyer. The company recently provided potential buyers with financial information related to the properties. DP World intends to receive "first round" bids by the end of August. Based on the information that DP World has made available to Congress and to the public, and our own ongoing discussions with DP World, we believe it remains committed to selling its assets as promised.

Chairman WARNER. Well, I think it should be addressed, because, speaking for myself, I think it's important that these committee hearings go forward, that there be some deliberations; otherwise, obviously, some Senators have in mind legislation. That would be a time period. I would hope that things can remain in place until those steps are taken. As a consequence of those steps, I'm hopeful that this thing can be resolved.

I thank you.
 Senator LEVIN.

Senator LEVIN. Mr. Chairman, first I'd like to offer, for the record, a statement of Senator Bill Nelson and ask that that be included in the record.

Chairman WARNER. Without objection.
 [The prepared statement of Senator Bill Nelson follows:]

PREPARED STATEMENT BY SENATOR BILL NELSON

Over the last few days as details emerged about the Dubai company taking over operations at several American ports, a number of concerns have come to light with the administration's procedures for verifying the safety and reliability of these sorts of deals. One of the ports that Dubai Ports World would take over in this deal is the Port of Miami, so I am obviously very concerned that all precautions are taken to ensure that we are not letting our guard down and increasing our risk of being hit by terrorists.

My concern is to ensure that the Port of Miami and all the other important American ports are safe and unencumbered. Simply put, do we want the ports that supply us with everything from cars to food, to be controlled and run as a part of a foreign government, and particularly one of only three in the world whose foreign policy was to recognize the Taliban?

Dubai Ports World is wholly owned and controlled by the UAE government, so I look at this deal in the context of the United Arab Emirates' performance with regards to stopping international terrorism. What I have trouble with is a process that raises no flags for a country whose legal and financial systems were exploited by A.Q. Khan, the Pakistani scientist who supplied nuclear technology to Iran, Libya, and North Korea; a country that Mohammed El-Baradei said has a role in the nuclear black market; and a country whose banking system was used by Osama bin Laden and al Qaeda to finance September 11.

I am concerned that the system we have for analyzing these deals may be too permissive. This deal, in the opinion of the panel, raises no difficult questions regarding security, despite the general acknowledgment that our port infrastructure is one of the most serious weaknesses in our homeland defense. As I understand the approval process, a range of defense, intelligence and homeland security agencies reviews proposed transactions such as this, and if any of them raise concerns the deal goes to an additional 45-day period for intensive review. It has been reported that none of the agencies raised anything in this case, and so the review period was skipped.

This whole situation raises serious questions about the vetting of international investment transactions, particularly in the case of critical national security assets such as ports. Given what we know of the deal and the approval process, I oppose allowing it to go through. I for one will require a much higher standard of proof before I am comfortable with this transaction, and the process that approved it.

Senator LEVIN. The 9/11 Commission report had a number of critical statements relative to the UAE involving connections or links between UAE and terrorists, financing, and a number of other critical references that I'd like to ask you about.

First, this quote from the 9/11 Commission, "On March 7, 1999, Richard Clarke, who was the National Counterterrorism Coordinator, called a UAE official to express his concerns about possible associations between Emirate officials and Osama bin Laden."

Secretary Joseph, what did Mr. Clarke say about that conversation, the response of the UAE when you talked to him about this?

Secretary JOSEPH. Senator, I don't believe I've ever had a conversation with Mr. Clarke about this.

Senator LEVIN. Well, then I'm not sure who to ask on this panel here.

Secretary Kimmitt, maybe you know.

Secretary KIMMITT. Well, Senator, I didn't have a direct conversation with Dick Clarke on that subject either. What I would say, however, is that the facts that you just referred to, plus the

facts that have developed since September 11 in the relationship with the UAE, as well as the facts associated with the company, the acquiror, were looked at very carefully by the Intelligence Community.

Again, going back, if I could, to what Senator Byrd said, remember, Senator, anytime a foreign government-owned or -controlled company comes in, the intelligence assessment is both of the country and the company when we take a look at that. So, we take a look at the facts, certainly, Senator Levin, the historical facts, but also the facts that have evolved since then, How has the country responded to those instances that you've mentioned?

Senator LEVIN. I understand you've looked at the post-September 11 facts. You've given us your testimony on that. But I'm also now asking about the pre-September 11 facts, as to any links or relationships between UAE and bin Laden. I'm not suggesting they existed. I'm simply saying that, according to the 9/11 Commission, the national counterterrorism coordinator called a UAE official to express concerns about possible associations. I just need to know from some of you what Mr. Clarke said. You say, well, you're sure the Intelligence Community talked to him. Did you read the intelligence reports?

Secretary KIMMITT. I read the intelligence reports that were prepared on this case.

Senator LEVIN. Did they say that they had discussed this matter with Mr. Clarke?

Secretary KIMMITT. I did not see that in the reports.

Senator LEVIN. All right. Let me keep going here. It seems to me that since the 9/11 Commission made a representation about that, that somebody among this group here would have talked to Mr. Clarke or be certain that Mr. Clarke was talked to about that conversation that the 9/11 Commission found to have existed.

Here's what else the 9/11 Commission said, that the "United Arab Emirates was becoming both a"—"both," that's the key word, "both"—"a valued counterterrorism ally of the United States and a persistent counterterrorism problem." It's a mixed bag, according to the 9/11 Commission.

You have given us the one side, where there's a lot of evidence that there is an ally here which does some valuable things for us, but according to the 9/11 Commission—and we haven't had an opportunity to have our staff review the underlying facts, because this was called so hastily—but according to the 9/11 Commission, there's a "persistent counterterrorism problem" represented by the United Arab Emirates.

So, did any of you talk to the 9/11 commissioners about that representation or finding of theirs? Just raise your hand if anybody talked to the 9/11 commissioners. Did anybody talk to them? [No response.]

No, okay.

Next, the 9/11 Commission said that, "From 1999 through early 2001, the United States and President Clinton personally pressed the UAE, one of the Taliban's only travel and financial outlets to the outside world, to break off its ties and enforce sanctions, especially those relating to flights to and from Afghanistan. These efforts achieved little before September 11."

Now, did any of you talk to the people who pressed the UAE in the Clinton administration to break off its ties with the Taliban? Did any of you? If so, give me help here, give me a hand. [No response.]

Okay. So, none of you talked to the Clinton folks, who, according to the 9/11 Commission, actually pressed the UAE before September 11. Those are critical times, before September 11. I'm glad that the UAE has taken some steps, apparently afterwards, to address some of the antiterrorism needs that the world has, but there is some evidence in the 9/11 Commission Report that that was not true just not too many years ago.

Now, I want to read to you a reference one of you made to A.Q. Khan, and I want to read to you from a New York Times article, which I think summarizes a point on this question, that "the Emirates was also the main transshipment point for A.Q. Khan, the Pakistani nuclear engineer who ran the world's largest nuclear proliferation ring from warehouses near the port, met Iranian officials there, and shipped centrifuge equipment, which can be used to enrich uranium, from there to Libya," referring here to the port in Dubai.

Can you expand a little more as to the accuracy of that statement in the New York Times of February 22, Secretary Joseph?

Secretary JOSEPH. Senator, I can tell you that the A.Q. Khan network stretched over three continents. It had activities in a significant number of countries. Those countries included—and this has all been made part of the public record—Malaysia, South Africa, Turkey, a number of European countries, including the Netherlands, Germany, and Switzerland. Yes, the UAE was an important site for A.Q. Khan activities.

I can also assure you that the UAE authorities have been very helpful in unraveling the network and, as I said, in pursuing those individuals who were taking actions to facilitate the work of this network on their territory. They have been a very good ally in the effort to combat WMD proliferation.

Senator LEVIN. So, you can't comment then on this particular statement in the New York Times.

Secretary JOSEPH. Senator, I think I just did.

Senator LEVIN. No, you said that there were contacts in other countries, but that doesn't address this issue as to whether there were warehouses in Dubai, and that it was the main—the transshipment point for A.Q. Khan, who ran the world's largest nuclear proliferation ring from a warehouse—warehouses near the port and shipped centrifuge equipment from there to Libya. I mean, can you confirm that or deny that?

Secretary JOSEPH. Well, I can certainly confirm—and, again, it's part of the public record—that large numbers of centrifuge parts that were manufactured in Malaysia were shipped and did transit Dubai.

Senator LEVIN. Finally, on this one issue—

Secretary JOSEPH. Senator, if I could—

Senator LEVIN. Yes.

Secretary JOSEPH. —because I think this is very important, the actions that were taken in Dubai led to the interdiction of the B.B.C. *China*, which was carrying parts to Libya, and that had a

very important role in the Libyan decision to give up weapons of mass destruction.

Senator LEVIN. Finally, the report in February 2004 that President Bush said that A.Q. Khan's deputy was a man named Tahir, who ran a business in Dubai, which was a front for the proliferation activities of the A.Q. Khan network. Was the President accurate in that statement?

Secretary JOSEPH. The President was accurate in that statement.

Senator LEVIN. So, his deputy ran a business in Dubai which was a front for A.Q. Khan's network.

Okay, we haven't read the intelligence reports, folks. I assume we'll get them. But we have a lot of digging here to do.

Chairman WARNER. Senator Levin, I inquired about the intelligence. It was stated that that would be provided to this committee before sundown today. Is that correct?

Secretary KIMMITT. Actually, Mr. Chairman, I think it was the assurances letter that was going to be made available.

Chairman WARNER. All right.

Secretary KIMMITT. The intelligence would be available to be brought to you and briefed. I think it's happening with the Senate Intelligence Committee today. But I think it could be made available to the committee, it would just be a request to the National Intelligence Office.

Chairman WARNER. Fine. We'll do that. I'll consult with you as to a time that's convenient for our members.

Senator Kennedy.

Senator KENNEDY. Thank you. Thank you very much, Mr. Chairman. I thank our panel.

As Senator Levin has pointed out, the serious kinds of issues and questions about the activities of al Qaeda, one of the very significant observations that were made by the 9/11 Commission, and that was that the areas of most significant danger for the United States were its ports, its chemical plants, its nuclear power plants, and its subways and tunnels. It mentioned all of those areas. In the 9/11 Commission report, or in the most recent report, in December 2005, they again point out the grade level in terms of port security is down to a D. All of us have responsibility in raising that, but it's an extremely vulnerable area.

I'd like to ask the panel, was there any voice of dissent in considering the national security issue raised when the approval for this application came through? Did anyone on the panel raise any national security concerns at all, or was it virtually unanimous in the panel that there were no national security issues that we should be concerned with?

Secretary KIMMITT. Senator Kennedy, I think it would be fair to describe the process as one that allows all of the members of the committee to raise any national security concerns that they have, to have those properly addressed on the basis of the intelligence information they received, information from the companies, and if there is need for either further information or further assurances, that could be done. But when, on January 17, the committee was asked to make its judgment on this proposed acquisition, by consensus, they said that there was not a national security concern,

in their mind, that would require either blocking the deal or sending it to investigation.

Senator KENNEDY. Well, my question is, were there any individual members that raised that and voted in “no” on that. Was this a unanimous vote?

Secretary KIMMITT. It was a unanimous vote, and, as I said in response to the Byrd-amendment question, had it not been, then it would have to go into the 45-day review.

Senator KENNEDY. Now, in the definition of the language on what is considered on national security, the five different criteria, there are those who believe that those five criteria are not truly reflective of the kinds of real threats that al Qaeda or terrorist organizations might pose, that they are more technical, talking about defense production, defense products, various materials, technology, and other factors. I’m interested in what national security test was really applied at the time of the consideration. Was the test just the test that is included in these five, or were the issues of the kind of threat that al Qaeda is posing and the kind of threats that have been mentioned heretofore in the 9/11 Commission that Senator Levin had mentioned—were those considered, as well?

Secretary KIMMITT. Decidedly, the latter, Senator Kennedy. Those statutory provisions are the starting point, not the ending point, of the national security analysis. Remember, when the statute was last amended, we didn’t even have a Department of Homeland Security. We, at the Treasury Department, didn’t have an Under Secretary for Terrorism and Financial Intelligence. The world has changed.

I think it’s the question everyone on this side of the panel—and it’s, Mr. Chairman, very unusual to be up here—struggles with: What is national security? I think we have to recognize it can never be defined in the abstract. It’s a dynamic concept. I think the way this CFIUS process has been set up—it’s been running this way for 31 years, through multiple Democratic and Republican administrations—says that “national security” is defined by the definition brought to the table of the representative from each of those departments and agencies that is on the committee. These are highly dedicated, professional security officials. Many of them, Senator Levin, I might say, have been around well before September 11. I would imagine that they had direct contact with the 9/11 commissioners and others.

So, the way it works is, people can bring whatever concern they have to the table, and unless that concern is addressed, not only can we not approve it at the policy level, it has to go to a 45-day investigation.

So, I think the short answer is, if you listen just to the kinds of issues that have been brought to the table, they’re very different than when CFIUS was created in 1975. Exon-Florio was passed in 1988, amended in 1992. I would say that the definition that we might have of national security today, in 2006, I think will look a bit out of date even next year. So, those are a starting point, but not an ending point, and we trust the security professionals to come to the table with any concern that they have.

Senator KENNEDY. We have some outstanding individuals doing extraordinary jobs. But you're against a background where, as we understand, effectively 1,500 of these proposals have been approved, and only one has not been approved. We are trying to get a sense of what the standard is going to be used and whether the standard, in terms of national security, is sufficiently high that it's going to clearly override a narrower interest, and that is a commercial interest. That, I think, is a key issue in this whole debate and discussion.

Secretary KIMMITT. Senator, if I could just respond to that?

Senator KENNEDY. Please.

Secretary KIMMITT. Again, an excellent point. That's exactly the balance. Remember, the CFIUS process and the Exon-Florio amendment aren't an end unto themselves, they're part of a process on how we evaluate these acquisitions. There are many other aspects to it. No department or agency gives up its fundamental responsibilities for laws related to the national security.

You're right that since 1988 there have been roughly 1,500 cases notified. Only one has been disapproved by the President. But there have been many that have withdrawn because they weren't going to be approved. In 1989, just as an example, there were 204 notifications. In 2005, there were 65. What's happened is people have begun to understand that certain cases just are not going to get through. So, they don't even come to us. There's a self-selection process. There's actually a CFIUS bar—I don't know if they would, these days, admit to that—who basically advise companies. So, some of these things are just not going to happen.

So I think when we look at the statistics, you look at the fact that, again, this is generated in the private sector, these people generally come in early, and very often they find it's just not going to happen, or they're told, "If you're going to have an issue, it's going to be with the Department of Homeland Security or Justice or Defense. Go work it out with them." If it can't be worked out, it's not going to go forward. It doesn't have to go to presidential decision for the deal not to go forward.

Senator KENNEDY. Well, just finally, because my time is up—and I appreciate your response—I think the concern that you have on issues of national security is, each individual is bringing their own definition. We don't have a clear standard for oversight so that others could really tell whether they are meeting that responsibility and that obligation. That is at least a concern of this Senator.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you, Senator Kennedy.

Secretary KIMMITT. If I could, Mr. Chairman, just respond. They bring, of course, that view of national security based on the responsibilities of their departments and agencies set by legislation passed by Congress. There are many committees of jurisdictions, we're finding out, who have an interest not only in this process, but in the national security process.

Again, though, I think it's going to remain a dynamic concept. I think the statute is a starting point, but not an ending point.

Chairman WARNER. Thank you.

Senator CLINTON.

Senator CLINTON. Thank you, Mr. Chairman.

I just want to see, Secretary Kimmitt, if we can nail this down. As I read the Treasury Web site, section 837(a), known as the Byrd amendment, requires—requires—an investigation in cases where the acquiror is controlled by, or acting on behalf of, a foreign government. Do you agree that DP World is controlled by, or acting on behalf of, a foreign government?

Secretary KIMMITT. It certainly is owned by a foreign government. I don't have the full text of what the Web site says. With all due respect to our Web site, I look to the law—

Senator CLINTON. Well, this is quoting the law.

Secretary KIMMITT.—and the interpretation that's been given by our general counsel, which I reconfirmed this morning.

Senator CLINTON. Well, that's fine, but I'm reading the language of the law, and the law requires an investigation where the acquiror is controlled by, or acting on behalf of a foreign government—and I think we can agree that DP World is controlled by, it's owned by a foreign government—and the acquisition, “could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.”

As I understand your testimony, you're saying that that second provision is not met, because no one in the CFIUS process, in the administration, thought that this transaction could affect—a very low standard; we're not talking about damage, we're talking about affect—the national security. Is that basically the testimony?

Secretary KIMMITT. My testimony, Senator, is that the way the process has run for 14 years through three administrations has been that an agency has to register a national security concern before it can go into the investigation. I would say, for a State-owned case, it is a lower threshold of concern than it would be for a non-State-owned company making an acquisition. But we do not see it as mandatory. As the chairman said, we have, and administrations have, consistently seen that to be discretionary.

I would also say, because you made the point about the GAO, the GAO has done terrific work in this area. They're as knowledgeable as anybody in the city about the CFIUS process. They have more continuity on this than anyone. This has been a subject of review on their part four times. They've never endorsed it, but they've never taken exception to our view.

I think it is just an interpretation difference. But I would also say companies are looking for ways to get as much information as they can to us prior to making their application.

Senator CLINTON. Well, Secretary Kimmitt, I understand the point that you have made. You've made it very persistently. But the bottom line is that what is discretionary is the definition, that this very low standard could affect the national security of the United States, in your view, and in the view of everyone who participated in this CFIUS process, was not met. That is the discretionary element. Because if there was a trigger that it could affect the national security, then it was mandatory, because you had a government-owned entity and the effect on national security. So, clearly the bottom line is that, in this CFIUS review, no one from any part of the administration raised any issue, including the issues that Senator Levin just raised with you, that in any way

raised a concern about an effect on national security. That is the conclusion.

Secretary KIMMITT. No, Senator, if I may respectfully disagree. All of those concerns were raised. All of those concerns were addressed. Because they were addressed to the satisfaction of individuals who had to make an individual, as well as an institutional, judgment that the national security interest of the United States was not adversely affected—

Senator CLINTON. It doesn't say "adversely affected." It says "affect." It's not even the requirement of "adverse effect." It's just "affect."

Secretary KIMMITT.—that based on the interpretation that has been consistent since 1992, the members of the CFIUS reached the conclusion that they did.

Senator CLINTON. But how many requests for approval have come from country-owned entities that were called both a problem and an ally, that had a track record that raises serious questions about America's national security? There haven't been any. I find this kind of a circular argument. The bottom line to me is that you looked at all of this, or failed to look at all of it, and concluded that it did not affect the national security.

But let me move on. Secretary Jackson, I want to ask you to respond to a couple of the public comments that have been made by former officials of the Department of Homeland Security.

Joseph King, who headed the Customs Agency's antiterrorism efforts under the Treasury Department and the new Department of Homeland Security, said, "national securities are well grounded." He said, "A company the size of Dubai Ports World would be able to get hundreds of visas to relocate managers and other employees to the United States. Using appeals to Muslim solidarity or threats of violence, al Qaeda operatives could force low-level managers to provide some of those visas to al Qaeda sympathizers," said King, who for years tracked similar efforts by organized crime to infiltrate ports of New York and New Jersey. "Those sympathizers could obtain legitimate driver's licenses, work permits, and mortgages that could then be used by terrorist operatives."

Do you agree or disagree with Mr. King's assessment?

Secretary JACKSON. I disagree with Mr. King's assessment.

Senator CLINTON. Why do you disagree?

Secretary JACKSON. Because we have a multiple set of layers here. First of all, I believe that there will be substantial continuity, and any change in the management that the firm would be sending here would be something that we'd have a chance to explore in detail and to do very detailed assessments and reviews of.

Second, the process for awarding visas would include appropriate reviews that would allow us to explore possible linkages to terrorism. That's very much a part of what we do. The State Department might care to join in that conversation, as well.

But I believe that we have a set of tools available for us to have a great deal of visibility into the personnel associated here, and to make sure that you are a lawful permanent resident or a U.S. citizen for access to these jobs.

Senator CLINTON. Well, let me ask you this, Secretary Jackson. Clark Kent Irvin, who served as the Inspector General of the

Homeland Security Department from 2003 to 2004, has written, in an op-ed published today, “It is true that at the ports run by the Dubai company, Customs officers would continue to do any inspection of cargo containers and the Coast Guard would remain in charge of port security. But, again, very few cargo inspections are conducted, and the Coast Guard merely sets standards that ports are to follow, and reviews their security plans. Meeting those standards each day is the job of the port operators. They are responsible for hiring security officers, guarding the cargo, and overseeing its unloading.”

Secretary JACKSON, this is your former Inspector General. Do you agree or disagree with what he said?

Secretary JACKSON. I agree, in part, with what he said. I disagree with other parts. Let me just unpack that a little bit.

I believe that we have much more substantial inspection and screening than is suggested by the comments that you read to us.

Senator CLINTON. Well, he was your Inspector General. These aren’t my comments. This is the man who was the Inspector General of your Department for 2 years.

Secretary JACKSON. He’s writing an op-ed, and he didn’t have opportunity, or didn’t choose to take the opportunity, to explain fully the layered security system that both I have talked about and that my colleague from CBP has talked about. So, the idea that we are passively allowing containers to flood through the country without some substantial amount of scrutiny is just simply wrongheaded.

Could we do more? Absolutely. Are we trying to improve and deepen and strengthen our tools? Every single day. Secretary Chertoff made a commitment, after he finished his initial review of the Department’s programs in summer of last year, to strengthen and deepen, through a program called Secure Freight, our review and our analysis of that.

But I would tell you that quote does disservice to the work that the CBP is doing to evaluate inbound cargo.

Senator CLINTON. Finally, if I could ask, Mr. Chairman, was the White House coordinator—

Chairman WARNER. We’ll have a second round.

Senator CLINTON. Okay.

Chairman WARNER. Could you reserve the question until then?

Senator CLINTON. Okay.

Chairman WARNER. Because I am quite anxious. We, I think, had an excellent briefing, thus far. We’ll have another round of several minutes for each Senator to ask questions, at which time you’ll be accorded that opportunity. I must say that I am impressed with your question on the law. I have sent for the statute. I’d like to read it myself, because there is clearly that phrase “the acquisition results in control of a person engaged in interstate commerce in the United States that could”—I repeat, “could affect the national security.”

In that context, Secretary Kimmitt—I think we’ve been over it, but it’s so critical—are there some minutes that were taken, or kept, of the various CFIUS meetings, at which time presumably these questions were raised and there was a colloquy between the members on the issues?

Secretary KIMMITT. Mr. Chairman, I'd be glad to locate those records and respond to that question.

[The information referred to follows:]

Exon-Florio prohibits public disclosure of documents and other information filed with CFIUS and such information remains subject to this statutory prohibition on public disclosure even after the CFIUS process is concluded in a particular manner. While the statute does not prevent our disclosure of information in response to the committee's oversight request, it does prohibit any disclosure of the information to the public. These confidentiality provisions are, of course, intended to assure companies that their proprietary business information will not be publicly disclosed, thereby encouraging them to make full disclosure to CFIUS of their proposed transactions and other relevant facts. This full disclosure is important in order that CFIUS be able to evaluate properly any potential national security issues raised by a proposed transaction.

While CFIUS does not produce a report of its findings or a report following the 30-day period, we have enclosed copies of unclassified documents that we believe will be helpful in informing you about CFIUS actions in this case. They were provided by the Office of International Investment, Department of the Treasury, from the CFIUS case files for the notices submitted by DP World on December 15, 2005, and March 3, 2006. They include the DP World filings with CFIUS; press releases and articles; electronic mail; informational briefs provided by the companies and related correspondence.

We have substantial confidentiality interests in the deliberative-process information and law-enforcement-sensitive materials that have not been produced or have been redacted from these documents. We also have withheld or redacted information that did not relate to the DP World transaction as unresponsive to your request, as well as information that would identify agency employees below the senior level.

No classified information is being provided with this paper. The intelligence assessments before CFIUS during its consideration of the December 15, 2005, filing were: (1) the December 5, 2005, Intelligence Community Acquisition Risk Center (CARC) assessment; and (2) the December 28, 2005, Defense Intelligence Agency assessment. The National Intelligence Council led an Intelligence community collaborative effort to produce an all-source, all-threat National Security Threat Assessment for the March 3, 2006, filing. I understand that these reports were previously provided to Congressional Intelligence Committees.

Chairman WARNER. I think it would be helpful for this committee, to the extent that it doesn't involve the executive privilege.

Secretary KIMMITT. All right.

Chairman WARNER. Does your colleague wish to add anything?

Secretary KIMMITT. No.

Chairman WARNER. All right.

You've explained, certainly, in the discussions I've had with you and with the Defense Department—although the Secretaries of State, Treasury, Defense, Homeland—the Secretaries themselves compose the CFIUS board where the final decision resides. This decision starts with a group of, I presume, thoroughly seasoned and experienced civil servants. Is that correct?

Secretary KIMMITT. Yes, sir.

Chairman WARNER. I'm trying to look at all of the steps that are taken.

Secretary KIMMITT. Sure.

Chairman WARNER. When you say "if anyone raised a question," it would have triggered this investigation, under your interpretation—so, that's the civil servant level—if someone had triggered it, then it goes to an Assistant Secretary level? Is that correct?

Secretary KIMMITT. That's correct.

Chairman WARNER. Then either through the Deputy Secretaries or Under Secretaries through—to the Secretary, if they feel it is necessary—

Secretary KIMMITT. That is correct.

Chairman WARNER. So any one of those series of individuals, in fulfilling their review process, could have triggered the need for this investigation.

Secretary KIMMITT. Any one of those institutions, yes, Mr. Chairman.

Chairman WARNER. Now, would you go into the technical status of the contract today? Does that contract terms and the situation permit someone, at this point in time, saying, "Upon reflection, and given the very conscientious concern of Congress and many citizens across the United States, we should take a look at that 45 days"?

Secretary KIMMITT. Mr. Chairman, as I said in response to your earlier question, I do not have that information. As a general matter, the CFIUS review is a national security review. Other agencies of the Government get involved, as necessary, on antitrust and other matters. We may have that answer ourselves. If not, I think we could obtain it. But I just don't have it available to me right now.

Chairman WARNER. We have your assurances, at the earliest opportunity you will transmit your opinion on that question, and response to it, to this committee.

Secretary KIMMITT. Yes, Mr. Chairman.

[The information referred to follows:]

All CFIUS decisions are made by consensus of the entire committee. The review process allows for any agency that sees a potential threat to the national security, as is its obligation, to raise those concerns within the review process. In such a case, an extended 45-day investigation period would commence.

The Exon-Florio amendment prohibits disclosure to the public of any documents or information about a transaction that is provided to CFIUS or the President pursuant to Exon-Florio. Federal employees could be subject to criminal and other sanctions for making an unauthorized disclosure of such information.

Chairman WARNER. All right. I thank you.

In reading—and I've studied this question intensively for the last 72 hours, certainly—so much of the press refers to phrases like this. I'm not trying to fault the press, and that's one of the reasons I want to get these facts out, because these professionals in the press want to be accurate. But there are headlines like, "Port Security Operations Sold to the UAE at Six Ports," others I've seen where the public has the perception that the UAE is buying these facilities, acquiring them, in title.

Let us be exactly explicit as to what this contract provides and what it is that they get and what they do not get.

Secretary JACKSON. Mr. Chairman, DP World's contract allows it to acquire the assets of P&O Ports. Those assets—let me divide into a couple of categories. First, what they are not. They are not buying a port. Ports are publicly owned facilities, typically by the State or local—

Chairman WARNER. States or municipalities or others.

Secretary JACKSON. Exactly. So, they are not buying a port. They are not buying a portion of the port. Typically, the relationship is a long-term lease from a port authority to a terminal operator. So, what is principally at stake here, first, is long-term leases for operating a particular terminal that are granted by a public institution at the State or local level.

Second, there are some services provided for other terminal operators or other ocean carriers responsible for terminal operations.

These are stevedoring services, for example, and sometime warehousing service that are associated with the movement of cargo globally.

So, essentially, they're buying the authorities, the leased landhold authorities, some infrastructure that is associated with managing of terminal operations, including equipment necessary to operate these facilities.

Chairman WARNER. Now, by virtue of those acquisitions, does this company, or others involved elsewhere, get a better insight into how we go about the security relationships? I have to believe that they're part of this agreement, which requires inspection at the point of origin of a container, and many containers are point of origin in UAE, that they have a very good idea of what the security requirements are as that container moves from a port of embarkation to the United States, and, therefore, by virtue of this contract, they don't get any better understanding or more insight or more control over the security. Is that correct?

Secretary JACKSON. Yes, sir. I think it's generally correct. Let me try to elaborate on some components of that.

First, there are certain things that they do as a terminal operator which involve the definition of security plans under Coast Guard-approved rules. The Coast Guard would then go in and inspect compliance with those rules. The same thing applies with the Customs and Border Protection. They establish procedures, rules, guidelines, and security requirements. Again, the terminal operator complies. We inspect, we audit, we oversee.

There is a series of things that are at the heart of our security processes that are not exposed to the terminal operator. I would tell you, one very important one, for example, is the calculus that goes in, in our targeting center with CBP, to decide which specific containers are going to be audited, examined, studied, opened, and further scrutinized. So, that would be an example of something that a terminal authority would have no visibility into. They simply are told, "We're taking that one, and we're doing this with it."

So, there is a substantial amount that is behind a veil that's not seen by the terminal operator. It's a partnership every day out there on the terminal working the other security issues.

Chairman WARNER. The United States, the business interests in our country, haven't expressed a great deal of interest in trying to do this management. I think that's one of the reasons that foreign operators are involved in so many of our ports. Is that correct?

Secretary JACKSON. There are a large number of foreign-owned firms that are operating in the United States in terminal operating agreements. There are many foreign-owned ocean carriers that, themselves, have subsidiaries that do termination operations in the United States and globally. So, this is not an industry dominated by U.S. assets.

Chairman WARNER. Fine.

To Secretary England, in my consultations with you and Secretary Rumsfeld, the Chairman of the Joint Chiefs was present. We look upon the Joint Chiefs as an independent entity that has, first and foremost, in their hearts and minds every day every hour of the day—our security. Did they participate in this decision and, likewise, concur in the issue that they would not be a security risk?

Secretary ENGLAND. Pardon me, Mr. Chairman. I'm not sure of the extent that they're a formal part of the process, but, of course, the military services report directly to the chairman, and all the military services were, indeed, part of this process.

I do know the chairman concurs in the findings of the Department. Again, I would stress that this question about what level of security—I mean, we don't go just to an arbitrary level. Literally anyone who has any issue on any subject dealing with the security of these transactions is free to raise them, and they do. So, this is about as broadbased and an open process as you could possibly have. Literally anyone can comment in this regard.

Chairman WARNER. There was no negative comment, to the best of your knowledge, coming from the Joint Chiefs.

Secretary ENGLAND. No, that's correct. There were no negative comments in the entire Department.

Chairman WARNER. Fine. Thank you.

Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

First, on the issue which Senator Clinton has raised, I don't see how you can interpret the statute two ways. It is not a discretionary statute. The statute says that the President, or the President's designee, "shall make an investigation." Now, the word "shall" is not discretionary. The word "shall," I think you'd agree, Secretary Kimmitt, is a mandatory word. Would you agree with that, so far?

Secretary KIMMITT. I would agree with that, Senator.

Senator LEVIN. Okay.

Secretary KIMMITT. So far.

Senator LEVIN. Good. Well, now we are going to get to the rest of the sentence, "where the takeover could affect—could affect—the national security of the United States." Are you saying that there is not one department that looked at this that thought that the takeover of these facilities could affect the national security? You may have reached a conclusion that with all of the added protections, that it doesn't impact the national security. But I'm asking this question. Is it, there is not one agency in this Government that believes that this takeover could affect the national security of the United States? Is that what you are telling us?

Secretary KIMMITT. Senator, what I'm saying is that there's been a consistent interpretation in the executive branch of that law since 1992. Our feeling is that the law, going back to 1988, when it was first passed, brings before us any case that affects the national security. Our view has been to give meaning to that phrase. I accept what you said with regard to "shall," but as to the "could," which isn't "shall," we have basically taken the position, as have previous Democratic and Republican administrations, that that is only triggered if concerns about potential harm to the national security have not been resolved. This is really not a political point, because I don't think we do the country a justice when we politicize national security. I'm not saying that you're intending to. But, in the last 5 years of the previous Democratic administration, there were 21 foreign government-owned cases. One went to investigation.

Senator LEVIN. Well, maybe they decided that, in none of those cases, it could affect national security.

I'm asking you whether—

Secretary KIMMITT. But, Senator, you said “mandatory.” In other words, it's—

Senator LEVIN. If—no, no. What's mandatory is if it could affect national security, then it has to go to that investigation.

Secretary KIMMITT. Sure.

Senator LEVIN. That's what the law says.

Secretary KIMMITT. In this administration, in the first term, from 2001 to 2005, there were 43 such cases, 4 of which went to investigation. The determination was different here, because no one raised a concern.

Senator LEVIN. And—

Secretary KIMMITT. All concerns—

Senator LEVIN. No, I'm—

Secretary KIMMITT. Could I rephrase that? This is really important. Concerns are raised. They're raised from the start. I mean, it was really exceptional here that we had the Intelligence Community, weeks before anything was filed, do their assessment of many of the factors that you've brought up. By the way, the Intelligence Community is not just the Central Intelligence Agency (CIA). We all have intelligence elements in our departments, and we looked particularly closely at some of the terrorist financing points that you made.

But the consistent interpretation of administrations has been if those concerns could not be resolved, we go to investigation; if they have been resolved, the deal is cleared.

Senator LEVIN. I can't go back and argue whether a statute has been interpreted one way or another, because the question is whether or not it is interpreted correctly in the matter before us. This isn't a court. We write laws. If agencies ignore the law, even though they have been ignored before, apparently, or misinterpreted before, or—

Secretary KIMMITT. No, I don't—

Senator LEVIN. Well—

Secretary KIMMITT.—I don't—

Senator LEVIN.—Secretary Kimmitt—

Secretary KIMMITT.—I don't think—

Senator LEVIN.—let me finish now.

Secretary KIMMITT. Yes, sir.

Senator LEVIN. An ambiguity has been found in a statute which is unambiguous. The statute says—and I'm just going to read the words again and go on to another issue—that “an investigation shall be made”—that's mandatory—if the acquisition, “could affect the national security of the United States.” It is saying—it seems to me it is obvious, it is clear, even by your own actions, the fact that additional requirements were imposed here, that this acquisition “could affect” the security of the United States.

If you want the law changed—I don't care which administration you represent—if any administration wants the law changed, this or a previous one, come to Congress and change it, but do not ignore it.

Secretary KIMMITT. Sure.

Senator LEVIN. I'm going to leave it at that, because I have to go on to other—you have given us your position on it. That's—

Secretary KIMMITT. But, respectfully, if I could respond briefly. We didn't ignore the law. We might interpret it differently. But the fundamental fact here, concerns were raised, they were resolved. If they hadn't been resolved, then the national security could have been affected.

Senator LEVIN. If the national security could be affected, then this law requires an investigation, period. Not just what you call "resolution of concerns." It requires that 45-day investigation. That's what the law says. If you don't like it, you—and I'm looking at you as representative of either this administration or any other administration—if the executive branch doesn't like it, come to Congress and change it. Don't interpret it away. That's my plea to any executive branch.

I want to finish my questions.

Chairman WARNER. I'll give you the time. Let me make a suggestion here. I think that the Senators raise a very important issue. I note that the Attorney General of the United States is a member of the CFIUS. Is that correct?

Secretary KIMMITT. That's correct, Mr. Chairman.

Chairman WARNER. Then I would suggest—and I will join with my colleagues, but, through you, let's start it—to have him prepare a memorandum as to the interpretation of the law by this administration and other administrations and how the CFIUS process has been conducted consistent with those interpretations. So, in that way, this committee and other Members of Congress and others interested will have some clarity to what has been done. But, I must say, as a lawyer myself, reading this, on the face, my colleagues raise a legitimate question.

[The information referred to follows:]

Deputy Secretary Kimmitt's March 31, 2006, letter to Chairman Warner responds to this matter.



THE DEPUTY SECRETARY OF THE TREASURY
WASHINGTON

March 31, 2006

The Honorable John Warner
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for your letter in which you requested that the Attorney General provide an opinion concerning the legal interpretation of the Byrd Amendment, section 721(b) of the Defense Production Act, 50 U.S.C. App. § 2170(b).

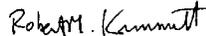
We consulted with the Department of Justice regarding your request. As you know, the State of New Jersey recently filed a lawsuit (*Corzine v. Snow*) challenging CFIUS's conclusion that the Byrd Amendment did not require a formal "investigation" of the DP World acquisition. On February 27, 2006, the Department of Justice filed a responsive brief in the lawsuit. I am enclosing that response for your review and want to draw your attention to pages 19-24, which set forth the Justice Department's interpretation of the Byrd Amendment.

The Justice Department at page 23 concluded that "(1) the Byrd Amendment requires an investigation only when the transaction at issue is determined to be one that 'could affect the national security of the United States,' and (2) the determination of whether a particular transaction 'could affect the national security of the United States' is a determination that is anything but ministerial and non-discretionary – requiring as it does the collection and analysis of facts regarding both the proposed transaction and the nation's security." The Department of Justice further noted at page 22 that this reading of the Byrd Amendment has been followed by the Executive Branch since the provision was enacted in 1992.

As a point of reference, between 1992 and 2005, inclusive, a total of 96 acquisitions involving foreign government-controlled entities came before CFIUS. Of those, only five cases went to investigation. As I mentioned during the February 23, 2006 briefing before your Committee, four of those investigations occurred between 2001 and 2005.

I hope this information is helpful as you continue to consider ways, including legislative proposals, to address this important matter.

Sincerely,


Robert M. Kimmitt

Enclosure

The enclosure referred to was received and has been retained in committee files.

Senator LEVIN. I don't want to sound skeptical of the Attorney General's opinion, which will be forthcoming, but I would also suggest we ask the Senate legal counsel to give us an opinion.

Chairman WARNER. I concur in that. We'll do that.

Secretary KIMMITT. Let me say this. I think it is a valid question. I said that when it was first raised by Senator Clinton. It's been one of the tough questions. That's why I have a Q&A in front of you. Senator, our faithful staffs tried to anticipate what the tough questions are. This is a tough one. It's a close call. I think that we have applied it consistently. We may have a difference on it. But I will say, again, I think the most important thing is, it doesn't suggest that security concerns were not raised. They were raised, they were resolved, we moved on.

Senator LEVIN. A quick few questions if I can.

Chairman WARNER. Yes, go ahead.

Senator LEVIN. Is it true that the UAE was one of a handful of countries that recognize the Taliban? That statement was made, I think, either in the 9/11 Commission report or somewhere else. Is that accurate?

Chairman WARNER. That goes to the State—

Senator LEVIN. State Department?

Mr. WAYNE. Yes, Senator, that is accurate. They made a strategic decision after September 11 not only to cut those ties, but to deepen and strengthen their relationship with the United States, and to join us in fighting the war on terror. But, yes, they did have relations with Taliban before. They've cut those off. The presence of our troops there, and our facilities, underscores that. They have progressively worked with us on counterterrorism, on cutting off the financing of terrorism, on cutting off the flow of weapons of mass destruction.

Senator LEVIN. When did our troops first visit those ports? What year, approximately? How long have we been using their facilities?

Secretary ENGLAND. Senator, I don't know. I can go back—

Senator LEVIN. All right, just give us that, if you would, for the record.

Secretary ENGLAND. Okay.

[The information referred to follows:]

The U.S. Navy has made periodic port calls to the UAE since the 1970s. Regular use of the UAE ports began during the preparation phase for the first Gulf War in 1991.

Secretary ENGLAND. I can answer they were using it when I was Secretary of the Navy in my first term, so at least the last 4 or 5 years.

Senator LEVIN. But the fact that they allowed us to use their ports doesn't satisfactorily answer why they were one of a handful of countries that were recognizing the Taliban even at the same time they were using our ports. That sort of symbolizes the duality here, where we have an ally most of the time, or recently. But not too many years ago, even while they were giving us access to their ports, they were also doing something that very few other countries in the world did, which was to recognize a terrorist regime that was hosting a terrorist organization.

My final question. The Clinton administration, and I believe I read this, attempted to get the UAE to strengthen its money-laundering laws prior to September 11. Now, I don't know where I read it, but was that accurate? I think I read that they were frustrated by the lack of a positive response at that time. Now, this is pre-September 11. Can someone tell me if that's accurate or not?

Mr. WAYNE. Senator, I don't know if, pre-September 11, we tried to get them to strengthen those laws. Post-September 11, we did try to get them to strengthen those laws. They have now, several times strengthened those laws.

Senator LEVIN. Right.

Mr. WAYNE. They've also cooperated with us in freezing the funds of a number of terrorist groups, including a group called the al Barakat group that was operating out of Dubai. That group has been shut down. Since 2000, they've frozen \$1.3 million of funds in 17 different accounts based on the U.N. sanctions.

Senator LEVIN. Thank you.

Mr. WAYNE. We've had a very close relationship in working on terrorist finance with them. In the region, they've actually been a leader in setting up new standards for controlling the Hawala or the informal money-exchange system.

Senator LEVIN. It is very welcome, and there is no doubt about that. The question I was asking is, pre-September 11, because we need constancy and longstanding commitments, it seems to me, and that's one of the factors that we ought to be looking at when we look at the question of port security and reliability of a government that takes over any of our facilities. But I'll leave it at that.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you very much, Senator.

We'll turn to you, Senator Clinton. I might like to, once again, say that, at the conclusion of Senator Clinton's 5 minutes, we will engage in a press availability, at which time those desiring to propound questions to anyone here on the dais, please go to the microphone, identify yourself, and ask a question.

Senator Clinton.

Senator CLINTON. Thank you, Mr. Chairman.

I want to just get additional information about how CFIUS actually operates. How many times did CFIUS meet to consider this transaction?

Mr. LOWERY. Senator, the CFIUS met once, and then it reviewed documents, both in early November, early December, mid-December, and in mid-January. But there was one official meeting that I know of.

Senator CLINTON. So, there was one official meeting. Are there quorum and proxy rules for conducting business for CFIUS?

Mr. LOWERY. No. I think the way that CFIUS operates, an invitation goes out to all the agencies to come to the meetings, and they're usually attended by all the agencies, unless there's an outstanding exception or something. The agencies work through the processes together in that particular meeting. Then they go back and they individually, because it is a committee, do their own analysis on the transactions.

Senator CLINTON. I understand the chairman has already asked for minutes of the meeting. I assume it's that one meeting that CFIUS held that the chairman asked for minutes from?

Chairman WARNER. Senator, it seems to me that we should be given the record of all levels of deliberation and such minutes as recorded at all levels of that deliberation.

[The information referred to follows:]

See response on page 31.

Senator CLINTON. Was the White House Coordinator for Homeland Security, Frances Townsend, apprised of the CFIUS review?

Mr. LOWERY. My understanding is that when the transaction was initiated, or review was initiated, there was an e-mail that went out to the White House and including, I believe, to the Homeland Security Council. That is my understanding.

Senator CLINTON. Now, by executive order, the assistant to the President for National Security Affairs sits on CFIUS. Was the National Security Advisor, Steven Hadley, apprised of the review? Was he at the meeting that was held?

Mr. LOWERY. The National Security Council was certainly apprised of the meeting. I don't know exactly who would have been at that meeting.

Senator CLINTON. Was the Secretary of Homeland Security, Michael Chertoff, both apprised of the review and at the meeting where the decision was made?

Secretary JACKSON. The Secretary was not at the meeting. The Department was aware of the transaction, obviously, and deeply engaged in it.

Senator CLINTON. Now, one of the concerns that we have in the New York/New Jersey area—Senator Menendez and I have been working, along with my colleague Senator Schumer, Congressman King, Congressman Fossella; it's a completely bipartisan, bicameral concern—is that—there is no requirement that the Federal Government consult with, or take into account, the views of State and local officials. Do you think that we should look at providing some kind of requirement, especially when we get to the area that we're most concerned about, a government-owned entity, a potential effect on national security, that there ought to be consultation with State and local officials?

Secretary KIMMITT. Senator, that's a question I hadn't considered. A very good question. I would have thought that the companies would have done that. Because one company, of course, is already a resident of the State, another is wanting to come in to conduct operations there. With the press reports that showed up in the New York Times, Wall Street Journal, Miami Herald, Baltimore Sun, and elsewhere, I guess I would have thought that that would have begun, I think, the question of whether the Federal Government has a responsibility in an acquisition like this to reach out, is one I'd like to consider and come back to you on.

[The information referred to follows:]

Certain CFIUS agencies and subcomponents historically have worked very closely with State and local officials. While laws relating to information and document privileges generally preclude the provision of case-specific information to these officials, CFIUS believes that cooperation with State and local officials can be and is achieved through existing working relationships.

CFIUS has worked to improve communication with Members of Congress so that it can perform its oversight responsibilities more effectively. However, it is the position of the administration that any information provided to Congress must not compromise proprietary corporate information provided to CFIUS by the companies.

Senator CLINTON. Thank you.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you. Thank you, Senator Clinton, Senator Levin, and all who participated in this.

We will now proceed to a press availability. Those desiring, please approach a microphone.

I'd like to also, respectfully, ask that the questions be germane to the subject at hand. These witnesses are here for that purpose.

Tony, we'll start on the right.

Mr. CAPPACIO. Tony Cappacio of Bloomberg News. To Senator Clinton and to Senator Warner, and Secretary Joseph and Secretary England might be able to elaborate a little bit too, but, Senator Clinton, after the hearing today, do you anticipate legislation next week, bipartisan legislation, to block the consummation of the business deal by March 2?

For Secretary Joseph and Secretary England, if such legislation is introduced, debated, and passed, what impact might that have on our relations in the Arab world as we're trying to develop allies for the long war?

Chairman WARNER. Let me first address the question. I think, at this point in time, the President has stated very clearly his concerns about this situation as it relates to a broad range of our foreign policy decisions and the like. Now, I respect those Members of Congress—indeed, of my own party, as you might imagine—who have come forward with these various ideas. I think it is unwise, speaking for myself, to try and speculate what's going to take place in the coming days and weeks. I do think it's important that the administration cooperate fully with those hearings the committees of the Senate and the House schedule. As a consequence of those hearings, I'm sure that there will be further cooperation between the administration and Congress. I am, in my own heart, confident that this matter can be reconciled.

So, that is my view, but I yield to my distinguished colleague from New York. You have a very major port, and I think you have—

Senator CLINTON. We do.

Chairman WARNER.—stepped up to this issue very quickly.

Senator CLINTON. Thank you, Mr. Chairman.

Tony, there will be legislation introduced. There will be probably several pieces of legislation, most of it bipartisan. There will certainly be legislation to require the 45-day investigation. It seems, to many of us, that, on the face of the statute and given the circumstances of this transaction, that should have been undertaken, but, in the absence of it, it should now be ordered.

That may be the first step in trying to resolve this matter, to understand more fully exactly what all of the factors were and to guarantee that the questions that many of us have, those that we've raised here and those that have been raised by colleagues on both sides of the aisle, are fully taken into account.

Mr. CAPPACIO. Secretary England and Secretary Joseph, what impact might that kind of legislation have on our relations over there?

Chairman WARNER. Again, they don't know how exactly the legislation would read. With all due respect to the bill that's been introduced, as we all know, in my 28 years here, the bills are modified substantially as they proceed on the individual chamber floors, then go to conference, where often further modifications take place.

So, I'm not going to interfere with the asking of the question, but I make that observation.

Secretary JOSEPH. Let me just say that the UAE today is a good friend, and it's a good ally. As my colleague said, after the events on September 11, the government of the UAE made a strategic decision to be on the right side of the issues and has cooperated with us very extensively on the war on terror, as well as on combating weapons of mass destruction.

I think what we need to do is, we need to treat the UAE fairly, as we would any other friend or ally. I would not want to speculate on the consequences of legislation that has not yet been proposed.

Mr. CAPPACIO. Thank you.

Chairman WARNER. On the left.

Mr. ROSEN. Yeah, thanks.

Chairman WARNER. Yes.

Mr. ROSEN. Ira Rosen, with CBS. This is for Commissioner Ahern. I think everybody would agree that the threat of weapons of mass destruction is really the paramount threat going right now, yet only one of the six ports that are under question—only one of them is equipped with a working radiation detection system. Why is that?

Mr. AHERN. What has happened at this point is our deployment footprint—we've been moving them out incrementally based on the site surveys that are done by us and by our contractor who does the installation of the radiation portal monitors (RPM). One of the first stages of implementation that we actually took was on the Northern Border, where we didn't have as much information in advance of container or truck crossings coming into the country. As we take a look at the maritime model, we've had a lot of different opportunities to put layers of defense out in front of the arrival of the ports. So, we made some of those determinations initially, knowing that we had confidence with the information coming in, knowing we had the ability to screen and vet that information for security concerns, and as also as far as with the forward deployment of our CSI teams overseas in 42 ports.

So, we looked at seaports as a phase-3 implementation, and we're in that process of implementation at this point in time. As I stated, 181 RPMs at this point in time, 37 percent of the container traffic, and we'll continue to deploy as we go forward.

Mr. ROSEN. But you don't have the machines that could really screen the devices that people are most concerned about. Shouldn't that be priority one?

Mr. AHERN. I think priority one was pushing our defense in depth as forward as we possibly could in the process and not wait for them to arrive in the ports in the United States. This is an additional layer in our security that adds to the ones we have already placed.

Chairman WARNER. The chair notes—and I think it's a very significant and important thing—there a number of press that are going to ask questions. So, I would hope that you would just have the one question; then, if absolutely essential, a quick follow-up.

Thank you.

This is to accommodate your colleagues who are standing in line patiently.

Ms. CORNWELL. Thank you. I'm Susan Cornwell, with Reuters. I have a question for the administration officials here.

We know what your decision was, but I'm wondering if, given perhaps what you've heard today and also the political fallout, whether you, any of you, now think that a 45-day investigation might be a good idea. Then I do have a quick follow-up.

Chairman WARNER. I think, in my question to that, the Secretary Kimmitt has said you will get me the information as to the flexibility under the law. But go ahead with the question.

Secretary KIMMITT. I think what you had indicated, Mr. Chairman, was a request for flexibility under the contract.

Chairman WARNER. That's right, yes.

Secretary KIMMITT. I'll have to find that for you.

[The information referred to follows:]

See response on page 32.

Chairman WARNER. Correct. I stand corrected. But do you wish to further amplify my observation?

Secretary KIMMITT. I think essentially it goes to the point that Secretary Joseph said. Because it involves pending legislation, I'm not in a position to comment on it. The administration would have to comment on that in a statement of administration position.

Ms. CORNWELL. But the legislation hasn't been introduced yet.

Secretary KIMMITT. No, but, as Senator Clinton says—and I think she, Senator Menendez and other members had pretty clearly indicated that it was coming—I just think that the administration will provide its views at the appropriate time.

Ms. CORNWELL. Okay. The follow up is, In all the history of CFIUS, how many of these 45-day investigations have there been? Any details of them would be appreciated, too.

Secretary KIMMITT. I have only the number since 1988, when the law came into place. There were 25 cases that had gone into investigation in the period 1988 through 2005.

Chairman WARNER. Thank you.

On the left.

Mr. RUGABER. Chris Rugaber, at BNA publications. Some critics of CFIUS have said that there may be a reluctance to open a 45-day investigation, out of concern over chilling foreign investment in the United States and whether it would send a bad signal to foreign investors. Was that issue discussed? How was that issue discussed in the CFIUS meetings? I was also wondering if the Senators shared that concern that perhaps security was not given as much a priority, and that perhaps worries over foreign investment were given too much of a priority.

Chairman WARNER. Well, stating, myself, having intensively looked at this whole situation, and I wanted to carefully await the facts. I think the administration is to be commended for the manner in which we were so forthcoming—I don't find that, at this point in time, there was a breach of the procedure that would have in any way resulted in a lessening of our security considerations. That's my opinion.

Now, as to your first question, you directed it to which member of the panel here, the first part of your question?

Mr. RUGABER. Well, Secretary Kimmitt or anyone—

Secretary KIMMITT. I'd be glad to answer.
 Senator Clinton, did you want to respond?
 Senator CLINTON. Please go ahead.

Secretary KIMMITT. Okay. The U.S. has pursued an open investment policy since the beginning of the CFIUS days in 1975. We believe that the world economy works best on the basis of free and fair trade, flexible exchange rates, and free flow of capital across borders, which means an open investment policy.

Foreign investment in the United States supports between 5 million and 6 million jobs. It's 20 percent of our exports, \$30 billion a year in research and development (R&D) investment. It's a very powerful part of the American economy. Of course, we're the key part of the world economy.

At the same time, our first priority as government officials, whether political appointees or career, is to protect the national security. So, although we operate in the context of an open investment policy, the process of CFIUS, in spite of what you've read by many people, is driven by one thing: Does anyone in the committee have a national security concern? If so, the case is not going to go forward.

Chairman WARNER. Thank you very much.
 Gentlemen?

Mr. KULISCH. Hello. Eric Kulisch, American Shipper Magazine. I have a question. Will Dubai Ports World set up or operate as a North American incorporated subsidiary, have a U.S. board, be subject to U.S. laws, like U.S. companies? That often takes place when foreign companies invest here, and related to that—

Chairman WARNER. Let's take this question, in seriatim.

Go ahead. Secretary Kimmitt, do you want to take it, or Secretary Jackson?

Secretary KIMMITT. I think I'm going to defer to Stewart Baker, the Assistant Secretary of Homeland Security, who had been most directly in touch with the company on that.

Mr. BAKER. Yes, my understanding is that the company will be taking over P&O North America, which is a U.S. company. They do not have plans to change corporate structure at this time.

Chairman WARNER. Thank you very much.

On the left? Yes.

Ms. HESS. Pam Hess, with United Press International. Could you tell me how many non-U.S. entities control port terminals? I think you mentioned that there are 877 in the country. Could you tell me if there are any correlative arrangements at airports? Are there any foreign companies in charge of port terminals? Or in the airport terminals?

Secretary JACKSON. The number that we mentioned was in these 7 cities, 829 facilities.

Ms. HESS. Okay.

Secretary JACKSON. That is not data that I have right here. We might be able to try to get that for you, that shows you, all across the country, how many terminals there are and how many have foreign ownership and how many domestic. We do not have that information, ourselves, completed. I believe we're trying to get some better data on that.

[The information referred to follows:]

Secretary Jackson did not respond in time for printing. When received, answer will be retained in committee files.

Mr. HESS. The arrangements at airports, are they any different?
Secretary JACKSON. Yes, they are. This is a fundamentally different process at U.S. airports. There are a whole different set of rules, and you're basically operating under the authority of an airport authority with different air carriers and freight forwarders having access to very delimited portions of the airport.

Mr. HESS. Right, and is there—

Chairman WARNER. Thank you. No, we have so many people waiting. I appreciate that.

This gentleman?

Mr. MEEK. Good afternoon, Mr. Chairman. Thank you for the opportunity to ask a question. I'm James Meek, from the New York Daily News.

I have a question for each of the Deputy Secretaries—and I'd appreciate all of them answering; it's a yes-or-no question, unless the answer is yes—and for Under Secretary Joseph. Can any of you think of any occasions since the 2001 September 11 attacks where the United States has requested the United Arab Emirates authorities to cooperate on a counterterrorism investigation or have requested information which they have subsequently refused or gave an unsatisfactory response to or delayed a response to? Any occasion since September 11.

Secretary KIMMITT. I'm not aware of any.

Secretary ENGLAND. I am not aware of any.

Chairman WARNER. Secretary Joseph, please address the microphone. Thank you.

Secretary JOSEPH. I'm not aware of any either.

Secretary JACKSON. Neither am I.

Chairman WARNER. Thank you very much.

Mr. MEEK. Thank you very much, gentlemen.

Chairman WARNER. Question?

Ms. TURNER. Thank you, Mr. Chairman. Trish Turner, with FOX News.

Secretary Kimmitt, of the 45-day investigations, you said there were 25, I believe, between 1988 and 2005. Can you give us some idea, or give us an example, preferably, of what would send this to a 45-day investigation that would set it apart from what we're talking about here?

Mr. Chairman, I have a question for you.

Secretary KIMMITT. The view of any member of CFIUS that the national security interest could be adversely affected.

Ms. TURNER. But can you give us some kind of example of one particular case that was sent to this kind of review?

Secretary KIMMITT. I don't have that immediately available to me, but if you get in touch with us after this, we'll be glad to take you through that with what we can. Again, you might want to take a look at the statute, the way that it is written. What you want is companies to provide business, proprietary, and other confidential information to you so you can assess these very carefully. We do have limits on what we can discuss publicly. We have more flexibility, as I said, in what we can share with Congress.

Senator CLINTON. But, Mr. Chairman, I think it would be useful for the committee to get those examples, because if this definition of “national security” is kind of a moving target, we need some idea of what the field looks like.

[The information referred to follows:]

We endeavor to protect information about the companies from public disclosure, including for proprietary business reasons, but we would be pleased to provide the chairman and committee members a briefing on the transactions that went to investigation.

Chairman WARNER. Assuming that the reason for the investigation was prompted by national security. It could have been others, could it not?

Secretary KIMMITT. Well, it could have been other reasons. Essentially, though, this is an interagency process.

Chairman WARNER. Right.

Secretary KIMMITT. You operate by consensus. So, in each one of those cases, at least one member was not prepared to recommend that the transaction proceed after the 30-day period.

Chairman WARNER. We’re looking at the triggering mechanism of those investigations.

Secretary KIMMITT. I understand the very important question that Senator——

Chairman WARNER. There are——

Secretary KIMMITT.—Clinton has raised.

Chairman WARNER.—25 instances, and the triggering mechanism——

Secretary KIMMITT. Right, and what we’ve done—again, the tradition has been that we do, on a quarterly basis, a briefing. I have to say it hasn’t included this committee. We’d be welcome to include this committee—it’s generally Banking and Financial Services on the Senate and House sides, respectively—of cases completed during that quarter. We could bring up these different cases and either look at all of them or whatever subsection is important for you.

Chairman WARNER. We’ll work it out.

Secretary KIMMITT. When it comes to completed cases, we have a lot more flexibility.

Secretary JACKSON. Mr. Chairman, if I could just add to what Bob said. I think it’s also very important to focus on what he earlier spoke about, in terms of cases withdrawn from consideration. There are a not-insignificant number of cases that go through the 30-day process, and it becomes clear they are not going to get over the finish line. So, I think that the full complexity of cases includes those that got a significant amount of scrutiny and were subsequently withdrawn.

Chairman WARNER. So the 25, in reality, is much larger.

Secretary JACKSON. Yes, sir.

Secretary KIMMITT. It could be larger. I didn’t mention those, Michael, in part because it’s a little bit tougher for us to talk about those.

Chairman WARNER. All right.

Secretary KIMMITT. I mean, if a company’s done the right thing and said, “This isn’t going to work,” we don’t want to penalize them, and then have to go into great detail why.

Chairman WARNER. Understood.

Secretary KIMMITT. I think you'd rather have the system come to the conclusion this isn't going to work, they walk away from the deal. But it is larger.

Chairman WARNER. Right.

Ms. TURNER. Mr. Chairman, may I just ask you—I don't think you've said—

Chairman WARNER. Can you speak up a little louder?

Ms. TURNER. I don't believe I've heard you say if a hold isn't placed on this particular transaction before Congress has had a chance to work its will, if you will, are you willing to support legislation that would place a hold on this transaction?

Chairman WARNER. I'm not going to speculate on that. I'm really confident that these matters now being brought to the attention—now, the public having had a full disclosure of the facts that are available, I think it's going to work itself out. So, I'm not going to participate in trying to speculate.

Ms. TURNER. Thank you.

Chairman WARNER. But we will get the information that Secretary Kimmitt promised. Thank you very much.

Mr. STRAW. Thank you, Chairman. My name is Joseph Straw. I'm from the New Haven Register, and my question is for the Treasury Department officials.

Per current statute, does the President have the authority to stay the ruling, or is the only option either to void it or let it stand? Parallel to that is the issue of a 45-day investigation. Was that only applicable prior to the CFIUS vote, or can the President enact that himself now?

Secretary KIMMITT. If I understood your question correctly, now that approval has been given, the process can be reopened only if it is discovered that the parties provided false, misleading, or incorrect information.

Ms. ATKINSON. Hello. Sheryl Atkinson, from CBS. Did anybody on the committee discuss, anticipate, or have any conversations about the idea that this deal might not be well received by the public, that there would be sensitivities to it and/or (b) anticipate any political issues with the deal?

Secretary KIMMITT. I haven't asked that question. I will give you the best answer I can give. Before I came back into the Government last summer, there was quite a bit of attention on the CNOOC deal, when the Chinese National Overseas Oil Corporation was looking to acquire Unocal, in competition with Chevron. That case was never formally notified to the Treasury Department. The 30-day process was never begun. Yet, there was considerable press attention and hearings on the Hill. In this particular case, the people that I have talked to who conducted the review, I think once they saw the stories start appearing in mainstream newspapers and also some of the specialty press as early as October, some of which had headlines that says, "Arab Company to Acquire Port," to the best of my knowledge we didn't get a single question from either the press or Congress.

So, I think, to some degree, because so many of the people involved in the process had lived through the CNOOC process, they

might have made the judgment that this didn't have quite the press or political sensitivity.

I think the White House has said that it would have been good for us to have engaged Congress earlier. I certainly support that. I've indicated some of the problems that we have under the law. In being as forthcoming as we might like to be, I'd like to continue that discussion. But I can't really figure out why a case like this, that did show up in these major papers in New York, in Baltimore, in Miami, and national papers, as well as ones overseas, wouldn't have occasioned some question. It doesn't solve the issue. We're up here now dealing with the security concerns that have been raised. But I think that might have had an effect on the people doing the review.

Ms. ATKINSON. Just a quick follow-on, if I may. Do you understand the public sensitivities that some people are addressing, just on a professional level, or do you think this is way off base?

Secretary KIMMITT. I certainly understand and accept them. Every question that has been raised, either by the public or their elected representatives, is absolutely legitimate. As I said earlier, I think we've looked at these questions. We're in the process of trying to explain the way that we looked at them and how we resolved them. But they're certainly legitimate. We work for the American people.

Ms. ATKINSON. Thank you.

Chairman WARNER. Thank you. I must advise everyone that we've been having a 2½-hour hearing, and it's important to try and continue to give the facts as asked by the press. But I'm going to have to cut it down to two more questions from either side. Thank you very much for your very good cooperation in making—

Secretary KIMMITT. Mr. Chairman, if I might add—

Chairman WARNER. Yes.

Secretary KIMMITT.—they are welcome to follow up with us in the Departments.

Chairman WARNER. Surely.

Secretary KIMMITT. We've had a major outreach. In fact, I think one of the reasons I have to leave is, I have two scheduled press availabilities, as do other colleagues. So, please don't take this as the end of it. We need to answer these questions. We understand it. They've been raised legitimately, they need to be responded to professionally.

Chairman WARNER. I thank you for that.

On this side?

Mr. LIANG. Thank you, Mr. Chairman. John Liang, with Inside Defense. A question for Secretary England.

Mr. Secretary, during your testimony, you mentioned more than one DOD agency and office that had looked at this particular case. One of the offices you did not mention, however, was the Office of the Under Secretary of Defense for Industrial Policy. Could you characterize—which is currently being run by a career civil servant in an acting capacity—could you characterize for us what that office's comments were concerning this case? How close are you to forwarding a name to the President and Congress as to who's going to be the next appointee for that role?

Secretary ENGLAND. I'm not quite sure where the nominee is for that office, although we have, indeed, interviewed several people. So, that is in the process of being filled.

We sent this out to 17 agencies. I do not believe that's one of the ones in DOD, because that's really not a national security issue. They are part of our Acquisition, Technology, and Logistics (AT&L) organization. So, we go to AT&L; they distribute it within that department. So, I'm not sure where all they go within that total component. Industrial policy is part of AT&L and has the CFIUS lead within that component and we do get a definitive answer from them.

It doesn't go out to them as a separate, independent organization within DOD. They answer as part of AT&L.

Mr. LIANG. Thank you very much.

Ms. CALDWELL. Good morning. Leanne Caldwell, Pacific Radio. To the administration officials, I think it would be really helpful if you could be specific about the amount of foreign companies, or foreign companies run by foreign governments, who do have a—some sort of stake in our ports. Since you have generally said that there are these situations, to the Senators, do you think it's a double-standard that this is an Arab-based company that we are questioning?

Chairman WARNER. All right. You make that request for information. I'm not sure we have all the facts here, at the moment. Do we?

Secretary JACKSON. Mr. Chairman, we've committed to try to get additional facts—

Chairman WARNER. Just provide it for the record.

Secretary JACKSON. We'll provide it to the committee.

[The information referred to follows:]

Secretary Jackson did not respond in time for printing. When received, answer will be retained in committee files.

Chairman WARNER. I thank you very much.

Senator CLINTON. May I respond to that for a minute, Mr. Chairman?

Chairman WARNER. Yes.

Senator CLINTON. We hear, on a fairly regular basis, that we live in a post-September 11 world. Sometimes that's used as a declarative statement, and sometimes it's used as a political attack. But the fact is, we do live in a post-September 11 world, and I think it's important that, whatever the interpretations of the statute was in the past, that there is now a necessity for a heightened scrutiny. I don't think this has to do with the nationality of the company so much as the track record that Senator Levin and others have laid out, and the fact that it is a foreign government-controlled and -owned entity. Senator Menendez and I will be introducing legislation to prohibit government-owned entities from controlling, owning, and managing our ports. We don't let them do it to our airports. There's a very different standard. Yet, the potential for danger and damage to our country is as high, or higher.

This is not in any way directed at any particular country, but, as a matter of national security in the post-September 11 world, I think we have to take a hard look at this.

Secretary KIMMITT. Mr. Chairman, could I—

Chairman WARNER. If I may, I'm confident that Congress will perform that oversight. There are means by which to, first, clarify any ambiguity in this law—that's number one—and, second, to emphasize the importance of the ports as a part of our security system.

Secretary KIMMITT. Mr. Chairman, if I could.

Chairman WARNER. Yes.

Secretary KIMMITT. I would just say, as Senator Clinton did, let's put the law aside. We'll take a look at that, and maybe agree to disagree, and maybe we'll find common ground. I agree with everything else you've said in your statement. We have to adapt our national security review to the circumstances at hand. It's a post-September 11 world, it's also a post-July 7 world. Who would have thought Britain would have been hit the way that we were? We look at things very differently.

This Community Acquisition Risk Center is a very important development, the Intelligence Community getting involved in this. We'd like to see that operation expanded a bit from a resource-and-personnel perspective to take a particularly close look. We know they did a good job here. There was no rush. The company came in, in advance. They took 33 days to look it over. I think that's where you start your really deep look on foreign-owned and -controlled companies, whether they be from the Mid-East or elsewhere.

Chairman WARNER. We'll take a last question from this side.

Mr. STARKS. Chairman Warner, Tim Starks, from Congressional Quarterly. Is it your view that the best way to diffuse this situation is for the administration to voluntarily conduct a 45-day review, if it's possible, without legislation? Do you have any concerns, or do any of the administration officials here have any concerns, about whether, legally speaking, Congress can legislatively halt this process or order a new review before March 2?

Chairman WARNER. I would just generally say I think Congress, being a coequal branch of the Government, could enact such legislation—hopefully it wouldn't come to that, but I think it would probably have the authority—certainly, at that point in time, the administration would recognize the very strong sentiment in Congress. On the other hand, the President has made explicit in his statement with regard to the veto—but, again, I do believe this thing—it's my own opinion—can be worked out satisfactorily so that there's a reconciliation of the views of Congress and the executive branch that's in the best interest of our national security.

I thank you for that question. I thank all who have been present. I think we've made a contribution that's very important at this time. This briefing is adjourned.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR SAXBY CHAMBLISS

REVIEW PROCESS

1. Senator CHAMBLISS. Secretary Kimmitt, to block a foreign acquisition of a U.S. corporation, the President must find that: (1) there is credible evidence that a foreign entity exercising control might take action that threatens national security; and (2) provisions of law do not provide adequate and appropriate authority to protect national security. Is the Committee on Foreign Investment in the United States (CFIUS) process of a 30-day review sufficient to assess issues of this complexity?

Secretary KIMMITT. The Exon-Florio amendment provides the President or his designee with sufficient time to consider the national security implications of a foreign acquisition of a U.S. company. The filing of notice with CFIUS (or the committee) begins an intensive 30-day investigative period that provides the committee with sufficient time to investigate most transactions fully. In many cases, the committee has more than 30 days to conduct its examination because many companies approach the committee in advance of a formal filing. This informal pre-filing notification allows CFIUS members and the Intelligence Community to prepare for formal consideration of a transaction. If any CFIUS agency determines that national security concerns remain after the conclusion of the 30-day investigative period, that agency is and should be empowered to require an extended investigation. This ensures that all members of the committee have the time necessary to consider the full range of a transaction's national security implications.

During the 30-day investigative period, CFIUS agencies are able to consider information from multiple sources, including the filing, follow-up discussions with the companies, and unclassified and classified data sources. In addition, mitigation agreements between the parties to a transaction and the Departments of Defense, Justice, and Homeland Security or other agencies are frequently negotiated before the parties file a notice with CFIUS. This is particularly common for telecommunications cases that go through the FCC regulatory licensing process. If any CFIUS agency determines that national security concerns remain after the conclusion of the 30-day period, such agency can request an extended 45-day investigation. Finally, it is important to note that the vast majority of cases that are notified to CFIUS do not raise national security issues and are easily reviewed within the 30-day investigative period.

2. Senator CHAMBLISS. Secretary Kimmitt, the CFIUS process requires the evaluation to consider the record of the acquiring foreign entity as to compliance with U.S. laws and regulations and the shareholders (and others) with influence over the foreign entity including foreign governments. In this case, what was the assessment of the U.S. Government over influence of a company owned by a foreign government?

Secretary KIMMITT. The committee's assessment of DP World's record of compliance with U.S. laws and regulations, which included consideration of the records of its principal shareholder, was informed by several sources. In the first review of the DP World transaction, CFIUS requested and received an assessment of the transaction from the Director of National Intelligence's (DNI) Intelligence Community Acquisition Risk Center (CARC). The CARC conducted a thorough assessment of the proposed transaction, which CFIUS member agencies reviewed carefully before making a determination on whether or not to proceed to a further 45-day investigation. CFIUS also requested and received an assessment of the transaction from the Defense Intelligence Agency, as well as extensive analytical input from the National Counterterrorism Center. After DP World filed a second notice (under the Exon-Florio amendment), an all-source assessment was conducted by the National Intelligence Council of any potential threats arising from the proposed transaction.

Among other things, CFIUS considered the degree and type of influence of the ruler of Dubai over DP World and the relationship of Dubai and the United Arab Emirates (UAE) to the United States. The committee's deliberations included consideration of potential threats emanating from the UAE. It also included consideration of the UAE's cooperation with U.S. authorities through the Container Security Initiative, MegaPorts, various terrorist financing initiatives, and the conflicts in Iraq and Afghanistan.

DECISIONMAKING PROCESS

3. Senator CHAMBLISS. Secretary Kimmitt, who made the decision to approve this transaction given the delegation was to the Secretary/Cabinet level?

Secretary KIMMITT. The Exon-Florio amendment provides authority to the President alone to suspend or prohibit a foreign acquisition where the foreign acquirer might threaten to impair the national security. It does not confer authority to approve or disapprove of transactions. On behalf of the President, the committee reviews proposed foreign acquisitions of U.S. companies, and if national security concerns remain at the end of the 30-day investigative period, any agency may recommend a further 45-day investigation. At the end of such investigation, CFIUS provides the President with a recommendation. Under the Exon-Florio amendment, the President may suspend or prohibit a merger or acquisition or take no action, allowing the acquisition to proceed.

In the DP World transaction, because the companies informed the U.S. Government of the proposed acquisition well before filing, CFIUS agencies had approximately 90 days to review the transaction. After carefully reviewing the transaction, CFIUS agencies agreed that an extended 45-day investigation was not necessary. CFIUS consists of six Departments and six White House agencies. The Departments of Energy and Transportation were also invited to participate in the DP World case and, given their relevant expertise, were involved in the investigative process. After carefully considering all available facts, CFIUS determined by consensus that the proposed acquisition by DP World did not present a threat to national security.

4. Senator CHAMBLISS. Secretary Kimmitt, why were the President and other senior leadership not informed of this decision?

Secretary KIMMITT. CFIUS agencies agreed that there were no national security issues to warrant a further 45-day investigation, and thus the case was concluded. The Administration supports a high level of political accountability for CFIUS decisions and is committed to ensuring that senior, Senate confirmed officials play an integral role in examining every transaction notified to the committee. The Treasury Department and other CFIUS agencies have recently put in place mechanisms to ensure that senior CFIUS officials are better apprised of CFIUS reviews and investigations and their disposition, even when the cases raise no national security issues. In addition, we have put in place an internal process to keep senior officials, including the Secretary, better apprised of CFIUS activities generally.

5. Senator CHAMBLISS. Secretary Kimmitt, what consideration was given to the political and national security implications?

Secretary KIMMITT. The Exon-Florio amendment provides for a national security review of foreign acquisitions of U.S.-based businesses engaged in U.S. interstate commerce. In the DP World case, as in all cases, CFIUS gave the national security implications of the transaction top consideration. The committee considered the full range of national security issues in assessing the proposed DP World acquisition of Peninsular and Oriental Steamship Navigation Company.

AUTHORITIES ON ACQUISITION

6. Senator CHAMBLISS. Secretary Kimmitt, the CFIUS process involves evaluation of foreign companies' interest in acquiring U.S. companies. What are the authorities of the provision related to transactions from one foreign company to another?

Secretary KIMMITT. The authorities of the Exon-Florio amendment cover potentially any transaction in which a foreign person acquires control of a U.S.-based business engaged in U.S. interstate commerce. Therefore, the sale of any controlling interest in a U.S.-based business by one foreign owner to another, including the sale of only a partial interest in that business, would be subject to Exon-Florio.

CONCURRENCE ON AGREEMENT

7. Senator CHAMBLISS. Secretary Kimmitt, CFIUS seeks unanimous agreement among CFIUS agencies on the recommendation to the President. Did any CFIUS members non-concur with the final decision? Did any member concur but with issues? If so, what issues were raised and how were they addressed or resolved?

Secretary KIMMITT. After thorough examination of the issues, at the conclusion of the 30-day investigative period of the proposed DP World acquisition of the Peninsular & Oriental Steamship Navigation Company, CFIUS determined by consensus that a further 45-day investigation was not warranted. I would note that because the companies informed the U.S. Government of the proposed acquisition well before filing, CFIUS agencies had approximately 90 days to review the transaction. Further, the Department of Homeland Security (DHS) negotiated an unprecedented assurance letter with DP World with respect to law enforcement, public safety, and national security.

REPORT SUMMARY

8. Senator CHAMBLISS. Secretary Kimmitt, if an investigation is conducted, a report and recommendation are sent to the President. Is there a summary or report of this decision? If so, please provide a copy.

Secretary KIMMITT. Regarding the DP World investigation, due to the fact that CFIUS completed its work at the end of the 30-day investigative period and did not

go into a further 45-day investigation, CFIUS did not prepare a report and recommendation to the President.

NOTIFICATION PROCESS

9. Senator CHAMBLISS. Secretary Kimmitt, the CFIUS process requires a review and determination to be complete within 30 days unless an investigation is pursued. According to press information, the CFIUS process was set into motion in December 2005. Describe the timeline to assess the filing—was any of this over the holiday?

Secretary KIMMITT. The attorneys involved in the transaction brought the proposed transaction to the attention of CFIUS on October 17. By early November, the companies had provided to CFIUS comprehensive information about the transaction and CFIUS had requested an Intelligence Community Threat Assessment. On November 29, the companies publicly confirmed the transaction. The Intelligence Assessment was circulated to CFIUS in early December. The companies met with CFIUS on December 6 to discuss the transaction. The companies filed with CFIUS on December 16. CFIUS began its formal review on December 17, 2005, and concluded on January 17, 2006. Thus, the CFIUS evaluation of the transaction lasted substantially more than 30 days.

Section 800.404 of the Exon-Florio regulations stipulates that the review days are calendar days. However, pursuant to CFIUS regulations, if a review ends on a holiday or weekend, it is moved forward to the next business day.

10. Senator CHAMBLISS. Secretary Kimmitt, what process of notification did you employ within the review process?

Secretary KIMMITT. During the CFIUS review process, Treasury, as the CFIUS chair, routinely communicates with other CFIUS agencies, the filing companies, and their legal counsel to notify them of relevant developments. This communication takes the form of unclassified and classified e-mail, faxes, phone calls, and meetings.

MAKE-UP OF CFIUS

11. Senator CHAMBLISS. Secretary Kimmitt, the CFIUS membership is comprised of 12 executive branch agencies. What role did the Intelligence Community have in assessing the national security (threats, warning) implications?

Secretary KIMMITT. CFIUS consists of six Departments and six White House agencies. In addition, CFIUS invites other Federal agencies to participate in investigations on a case-by-case basis when they have expertise relevant for a particular case. For example, the Departments of Transportation and Energy have participated in CFIUS reviews. The Intelligence Community (IC)—primarily the Intelligence CARC and the Defense Intelligence Agency (DIA)—has played a long-standing and important role in the CFIUS process, not as a voting member, but as providers of intelligence assessments of the foreign acquirer and the transaction. The Office of the DNI—via the National Intelligence Council—is now providing an all-source assessment of any potential threats arising from proposed transactions.

12. Senator CHAMBLISS. Secretary Kimmitt, what is the experience level of the CFIUS and how are they selected for membership?

Secretary KIMMITT. Each CFIUS agency staffs its own CFIUS activities and chooses its own staff. Depending on the nature of the transaction and the business of the U.S. target company, an agency may include staff from several offices in its agency to review and analyze the national security implications from its agency's perspective.

SECURITY COMMITMENTS

13. Senator CHAMBLISS. Secretary Kimmitt, the Dubai Ports World signed a letter of assurances making commitments to meet and maintain security standards for the port terminals. What are those security standards?

Secretary KIMMITT. The companies committed to maintain no less than their current level of membership in, cooperation with, and support for the Customs-Trade Partnership Against Terrorism, the Business Anti-Smuggling Coalition, and the Container Security Initiative (CSI). They also committed to their current level of membership in, cooperation with, and support for the March 2005 Memorandum of Understanding with the U.S. Department of Energy to support CSI by cooperating and restricting the trafficking in nuclear and radioactive materials. The companies committed to provide advance written notice to the DHS before making any mate-

rial change with respect to its cooperation/membership/support, and to meet with any DHS designated U.S. Government officials prior to implementation. In fact, the DHS agreement with DP World provides assurances with respect to law enforcement, public safety, and national security that DHS does not have from other terminal operators.

14. Senator CHAMBLISS. Secretary Kimmitt, what government agency is responsible for overseeing these commitments?

Secretary KIMMITT. The DHS signed the assurance letter with DP World and has the responsibility for overseeing the commitments.

15. Senator CHAMBLISS. Secretary Kimmitt, what is the enforcement mechanism if the commitments are not maintained?

Secretary KIMMITT. DP World's assurance letter to DHS includes two enforcement mechanisms. For a material breach of any representation or commitment in the letter, DHS may seek any remedy available at law or equity in a U.S. court of law. For any materially false or misleading representation or commitment or omission of material information in the assurance letter, in addition to other remedies available at law or equity, DHS may request that CFIUS initiate a review to determine the impact on national security and the appropriate response to protect national security.

QUESTIONS SUBMITTED BY SENATOR BILL NELSON

INTERCOUNTRY DIALOGUE

16. Senator BILL NELSON. To the panel, given that the Dubai Ports World buyout of Peninsular and Oriental (P&O) Steamship Navigation Company is a global buyout, has the administration contacted or worked with any other countries faced with this situation about their mutual concerns and level of comfort with having their port operation taken over?

Secretary ENGLAND. The Defense Department did not contact or work with foreign countries faced with this situation about their mutual concerns and level of comfort with a take over of port operations by a foreign acquirer. At the interagency level, we understand that there was some informal discussion with several countries where the acquisition of P&O Steamship Navigation by Dubai Ports World would result in DPW assuming responsibility for the off- and on-loading of cargo at terminals in their ports.

Secretary JOSEPH. It is true that Dubai Ports World is assuming operations of some container terminal and other facilities in a number of countries. Based on press reports and information from our embassies, the transaction appears to have generated much less public interest or concern in those other countries than it has in the United States. The U.S. Government did not reach out specifically to foreign governments regarding this transaction, but our intelligence review necessarily included information derived from numerous foreign countries. In addition, the CFIUS did draw on the judgment of its member agencies and their extensive experience in cargo and port security in reaching the conclusion that the risk management provisions in current law and regulations, in numerous bilateral and multilateral cooperative efforts, and in the DHS assurances letter provided by the companies was sufficient for purposes of clearing this transaction in the original CFIUS review.

The U.S. Government is working with other countries every day to enhance vessel, cargo, and port security. For example, the DHS is working in the CSI led by U.S. Customs and Border Protection with numerous other countries, including the U.K. and Dubai, to screen cargo before it ever reaches U.S. shores. DHS is also working in the multilateral World Customs Organization to promote the adoption worldwide of standards for cargo security best practices. Through the U.S. Coast Guard, DHS is working to enforce global facility and vessel security standards in the International Ship and Port Facility Security Code. We are working with foreign governments on a daily basis to enhance vessel, cargo, and port security as well. The Justice Department, including the Federal Bureau of Investigation and DHS's Immigration and Customs Enforcement, is working on a bilateral and multilateral level investigating and bringing terrorists that may harm U.S. ports to justice worldwide.

Secretary KIMMITT. Our assistant secretary communicated with his counterparts in a few countries in which DP World is now operating. They explained that they had reviewed the transaction—in most cases from a national security perspective—and did not have any concerns.

Secretary JACKSON. The DP World transaction did not involve the “take over” of any U.S. ports. Through its acquisition of P&O, DP World sought to acquire the leases at 24 terminals in the U.S. That’s a relatively small part of the operations in the six ports where they would operate terminals, including New Orleans, Houston, Miami, Newark, Baltimore, and Philadelphia. The company’s CFIUS filing indicated that DP World would also assume responsibility for P&O equities at other ports, but those equities consisted of stevedoring and labor operations where P&O was not the designated terminal operator.

Terminal operators do not run ports and do not provide or oversee security for the entire port complex. That is the responsibility of the government and the local port authority, which is usually a government agency.

Terminal operators ordinarily sign a long-term lease for waterfront property in the port. They build a pier for ships, cranes to unload the ship, a parking lot to store the containers they unload, and perhaps a small management office. They make their money lifting containers out of ships and holding them for shippers. The business is very competitive.

Terminal operators, such as DP World, conduct business throughout the world. The administration has not had specific discussions with other countries about how comfortable these countries are with the conduct of terminal operations in their countries. DHS addressed all of its national security concerns during the CFIUS review of the transaction.

RESPONSIVENESS TO INQUIRIES

17. Senator BILL NELSON. To the panel, how responsive was Dubai Ports World and the UAE Government to inquiries? What documents did you request and did you feel that you received full cooperation?

Secretary ENGLAND. For the Defense Department, we thought Dubai Ports World and the UAE Government were responsive to inquiries. The DOD did not request additional documents; however, at the interagency level we noted that where other member agencies requested documents, the companies and the UAE Government were responsive.

Secretary JOSEPH. The State Department defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary KIMMITT. DP World was extremely cooperative. They came to CFIUS well before the transaction was publicly announced. They met with CFIUS, including the Department of Transportation, on December 6 to discuss the transaction. They promptly provided all information requested. They worked closely with CFIUS throughout the U.S. Government’s consideration of the transaction, which lasted approximately 90 days.

Secretary JACKSON. Most requests for information and documents made before and during the CFIUS review were made through the Department of the Treasury, the interagency Chair for CFIUS, so Treasury is in a better position to respond to the portion of the question addressing any specific document requests. Both DP World and P&O responded promptly to all inquiries that were made directly by DHS and DHS feels that it received full cooperation before and during the CFIUS review.

FOREIGN POLICY TOOLS

18. Senator BILL NELSON. Secretary Joseph, what assurances can you offer that under this deal the UAE Government will not view its management of strategic American ports as one of its foreign policy tools in its relations with the United States?

Secretary JOSEPH. Dubai Ports World (DPW) is owned not by the UAE Government but by the Emirate of Dubai, the second richest of the seven emirates (essentially states) of the UAE federation, which has existed since 1971. Dubai does not have a foreign policy per se, since foreign relations for all seven emirates are handled by the UAE Federal Government. Dubai as an emirate is primarily interested in developing and expanding its trade and business as a means of survival in the post-oil economy.

In practice, DPW functions on business principles like any competitive multinational maritime services provider, with a diverse international managerial cadre recruited for its commercial skills. In our judgment DPW does not operate in any practical sense as a tool of the foreign policy of the Emirate of Dubai, or of the UAE Government, which is headquartered in the Emirate of Abu Dhabi.

DEFENSE IMPLICATIONS

19. Senator BILL NELSON. Secretary England, please describe the process that the Department of Defense (DOD) followed in granting its approval within the CFIUS process. Does the DOD look at the deal solely in regards to the potential threat, or does it look at it in the context of the overall relationship with UAE? Please respond specifically to the concern that the DOD may have agreed to approve the deal as a “trade” in exchange for our existing military relationships with UAE.

Secretary ENGLAND. The DOD did not agree to approve the deal as a “trade” in exchange for our existing military relationships with the UAE. The DOD conducted an in-depth and comprehensive review of the proposed transaction. This transaction was staffed and reviewed within the DOD by 17 of our agencies or major organizations which examined the filing for impact on U.S. national security interests, critical technologies, the presence of any classified operations existing with the company being purchased and any other concerns this transaction posed. Given the issues related to port security in this case, we took the added measure of including U.S. Transportation Command among the reviewing agencies and organizations. In summary, DOD conducted a comprehensive and indepth review of this transaction, and no issues were raised by any of the reviewing agencies or organizations within the DOD.

20. Senator BILL NELSON. Secretary England, it is my understanding that some of the ports implicated by the Dubai Ports World deal are centers for shipment of military materiel. Did the DOD consider the strategic implications of this deal in light of which specific ports are involved and how they are used in military operations?

Secretary ENGLAND. The DOD considered the strategic implications of this deal in light of the specific ports involved and how they are used in military operations. In particular, consideration was given to the critical infrastructure aspects of this case because some of the port facilities also handle U.S. military traffic. Defense analyzed the Dubai Ports World case thoroughly and determined that it posed no risk to national security, including to the shipment of military cargo. The U.S. Transportation Command (USTRANSCOM) is the Department’s designated single port manager for military cargo. Port operations are overseen by military and career government civilians. Other ports utilized for military cargo have no connection with the Peninsular & Oriental Steamship Navigation Company.

 QUESTIONS SUBMITTED BY SENATOR EVAN BAYH

CONSIDERATION OF COUNTRIES

21. Senator BAYH. To the panel, was any consideration given to the country in which the acquiring entity is located?

Secretary ENGLAND. The DOD took into account a number of factors relating to the UAE. For example, Dubai was the first Middle Eastern entity to join the CSI—a multinational program to protect global trade from terrorism. It was also the first Middle Eastern entity to join the Department of Energy’s Megaports Initiative, a program aimed at stopping illicit shipments of nuclear and other radioactive material. In reviewing CFIUS filings, foreign government control and influence over an acquiring company is an important consideration. But the actual possibility of direct control and influence varies with the nature of the transaction, including the types of companies being acquired and how the business is ultimately managed. It may also depend on whether the acquiring company is in a country of concern. If the DOD identified threats to national security that could not be resolved adequately during the 30-day review period, we would have asked for the transaction to go to investigation. In this case, the DOD did not have concerns with the foreign government involved, the acquiring company, or the nature and structure of the actual business operations. The ports will remain under the ownership and control of U.S. State and local authorities, not DP World.

Secretary JOSEPH. The State Department defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary KIMMITT. CFIUS regularly considers the country in which an acquiring entity is located as part of its broad and comprehensive security review and gives extra scrutiny to transactions involving foreign governments. CFIUS agencies are guided by the criteria in the Exon-Florio amendment and consider whether the foreign acquirer, acting through the U.S. target company, might take action to threaten the national security and, if a threat is identified, whether existing laws are adequate and appropriate to deal with it.

In establishing whether the foreign acquirer may be a threat to national security, CFIUS examines the intelligence reporting and any reports of the foreign acquirer violating U.S. laws and regulations, such as not complying with the export control laws. In addition, it is important to examine the home government of the foreign company with respect to a number of issues, including whether it maintains an acceptable export control regime that protects against unlawful U.S. technology diversion.

Secretary JACKSON. As part of its comprehensive examination of the potential national security effects of every CFIUS transaction, DHS always considers the identity of the acquiring entity and its connection to the government.

22. Senator BAYH. To the panel, should the law be amended to require such consideration?

Secretary ENGLAND. The DOD defers to the Treasury Department, the Chair of the CFIUS on this question.

Secretary JOSEPH. The State Department defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary KIMMITT. The law need not be amended to require such consideration because, as described above, CFIUS already considers an acquirer's country of origin in every case.

Secretary JACKSON. The country in which an acquiring entity is located is already considered as part of the national security analysis, so there is no need to amend the law to require such a consideration.

LINKS TO TERRORISTS

23. Senator BAYH. To the panel, was there any consideration and/or investigation into the UAE's links to terrorist groups? Should there have been?

Secretary ENGLAND. There was consideration and investigation into any reports of the UAE's links to terrorist groups. The UAE has been a key partner in the war on terror, working closely with the United States to shut down terror finance networks. The UAE has worked with us to stop terrorist financing and money laundering, by freezing accounts, enacting aggressive anti-money laundering and counterterrorist financing laws and regulations, and exchanging information on people and entities suspected of being involved in those actions.

Secretary JOSEPH. The State Department defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary KIMMITT. Yes, consideration was given to the UAE's position on terrorism. The UAE has addressed terrorist financing issues since September 11 and has worked with the United States in shutting down terrorist finance networks. The UAE has strengthened its banking laws and regulations to prevent the misuse of its financial institutions by money launderers and terrorist financiers. The UAE has taken steps to curb and block financial flows to terrorists. We continue to encourage the UAE government to take further steps to strengthen its financial defenses and to vigorously enforce its existing anti-money laundering/counterterrorist financing laws and regulations.

In its thorough review of the proposed DP World transaction, CFIUS did not uncover any evidence that any DP World executive contributed funds to terrorist organizations. As in all of its cases, CFIUS carefully considered the possibility that the proposed transaction could contribute to a heightened risk of terrorism.

In the first review of the DP World transaction, CFIUS requested and received an assessment of the transaction from the DNI's Intelligence CARC as well as extensive analytical input from the National Counterterrorism Center (NCTC). The CARC conducted a thorough assessment of the proposed transaction, which CFIUS member agencies reviewed carefully before making a determination on whether or not to proceed to an extended 45-day investigation. CFIUS also requested and received an assessment of the transaction from the DIA as well as extensive analytical input from the National Counterterrorism Center.

During the second review, an all-source, all-threat assessment was produced by the National Intelligence Council, which incorporated judgments based on terrorist-related name traces of senior DP World personnel conducted by the Federal Bureau of Investigation and the Intelligence Community Acquisition Risk Center. The Treasury Department, DHS, and Department of Justice also directed other appropriate authorities to investigate whether any DP World executive was implicated in terrorism, money laundering, or any other criminal activity. A thorough interagency search did not produce evidence of any such activity.

Secretary JACKSON. A detailed answer to this question would involve the discussion of classified material. The unclassified answer is that all relevant information, including any alleged links to terrorist groups, was considered.

ASSESSMENT OF INFRASTRUCTURE

24. Senator BAYH. To the panel, what consideration was given to the nature of the asset? Specifically, was there a closer examination because the acquisition involved critical infrastructure?

Secretary ENGLAND. For the DOD, consideration was given to critical infrastructure because some of the port facilities also handle U.S. military cargo. Defense analyzed the Dubai Ports World case thoroughly and determined that it posed no risk to national security, including to the shipment of military cargo. The U.S. Transportation Command (USTRANSCOM), the DOD's designated single port manager for military cargo, took part in the review. Port operations are overseen by military and career government civilians. Other ports utilized for military cargo have no connection with Peninsular & Oriental Navigation Company.

Secretary JOSEPH. The State Department defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary KIMMITT. As part of CFIUS' broad consideration of national security issues, CFIUS always considers the nature of the assets being acquired and whether such assets represent critical infrastructure for the United States, broadly defined. With respect to the DP World transaction, CFIUS member agencies carefully considered the fact that P&O North America carries out operations at ports across the Eastern and Gulf Coasts. The Committee looked at both threats and vulnerabilities to the United States when assessing the implications of the DP World deal. CFIUS agencies do not ask companies to enter into security agreements for every transaction CFIUS reviews; the fact that this acquisition involved critical infrastructure played a role in DHS's decision to seek assurances. In fact, DHS signed an assurances letter with DP World with respect to law enforcement, public safety, and national security.

Secretary JACKSON. DHS gave very close consideration to this transaction because of the nature of the asset and its role within our critical infrastructure. Given our special responsibilities for critical infrastructure pursuant to Homeland Presidential Security Directive (HSPD)-7, DHS takes a particularly active role in transactions like DP World that involve an asset under the regulatory supervision of DHS and/or where the asset is part of the Nation's critical infrastructure.

25. Senator BAYH. To the panel, should the law be amended to require such consideration?

Secretary ENGLAND. The DOD defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary JOSEPH. The State Department defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary KIMMITT. CFIUS already considers a broad range of factors in considering whether a proposed acquisition could pose a threat to national security, including whether the assets to be acquired constitute critical infrastructure. Consequently, we do not believe it is necessary to amend the law to require consideration of such factors.

Secretary JACKSON. No amendment to the law is necessary since DHS already gives close scrutiny to any transaction involving a critical infrastructure asset.

CONGRESSIONAL NOTIFICATION

26. Senator BAYH. To the panel, was there any thought to notifying Congress in advance of this pending transaction?

Secretary ENGLAND. The DOD defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary JOSEPH. The State Department defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary KIMMITT. Over the past 17 years, CFIUS has not notified Congress before a review and investigation is complete. To keep Congress informed adequately and regularly about the CFIUS process, I have offered that Treasury, on behalf of CFIUS, orally briefs our oversight committees, the Senate Banking and House Financial Services Committees, generally every quarter on completed reviews. On a case-by-case basis, CFIUS may suggest that its oversight committees invite other potentially interested members and committees with jurisdiction over areas affected

by decisions under Exon-Florio to attend these briefings. For instance, Treasury officials were scheduled to brief Senate Banking Committee staff on CFIUS matters on February 16, but the briefing concentrated on the DP World case, which had arisen the preceding weekend. I am open to other suggestions on ways to improve our reporting on the process so that Congress can fulfill its oversight responsibilities.

Secretary JACKSON. Traditionally, Congress has not been notified of pending CFIUS cases. At the time this transaction was under review, the Department of the Treasury, as interagency chair, had the lead role in providing information to Congress on transactions that had been reviewed.

27. Senator BAYH. To the panel, should the law require that congressional notification be made?

Secretary ENGLAND. The DOD defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary JOSEPH. The State Department defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary KIMMITT. The administration is committed to improved communication with Congress in connection with the CFIUS process. Since the DP World matter arose, we have promptly notified Congress of all reviews upon completion. As noted above, we are also briefing Congress on a quarterly basis.

Secretary JACKSON. The administration and the CFIUS agencies are examining how to expand notifications of decisions to Congress so that it can fulfill its important oversight responsibilities. Since those discussions are still ongoing, it would be premature for DHS to express a firm opinion at this time.

DIRECTOR OF NATIONAL INTELLIGENCE

28. Senator BAYH. To the panel, did the CFIUS ask for the views of the DNI?

Secretary ENGLAND. The DOD defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary JOSEPH. The State Department defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary KIMMITT. In the first review of the DP World transaction, CFIUS requested and received an assessment of the transaction from the DNI's Intelligence CARC. The CARC conducted a thorough assessment of the proposed transaction, which CFIUS member agencies reviewed carefully before making a determination on whether or not to proceed to a further 45-day investigation. CFIUS also requested and received an assessment of the transaction from the DIA as well as extensive analytical input from the National Counterterrorism Center.

After DP World filed a second notice under the Exon-Florio amendment, an all-source assessment was conducted by the National Intelligence Council of any potential threats arising from the proposed transaction. As part of some procedural changes CFIUS has made to improve its reviews, the DNI's National Intelligence Council is now providing consolidated all-source Intelligence Community assessments of any potential threats arising from a proposed transaction for all CFIUS cases.

Secretary JACKSON. The views of the intelligence community are considered in every CFIUS case since the Director of National Intelligence's CARC provides classified reports to all CFIUS members. The CARC provided a classified threat assessment to all CFIUS members regarding the proposed DP World transaction.

29. Senator BAYH. To the panel, should the DNI play a substantive role in CFIUS?

Secretary ENGLAND. The DOD defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary JOSEPH. The State Department defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary KIMMITT. Senior representatives from the Office of the DNI now participate in all CFIUS meetings. The DNI does not and should not vote on CFIUS matters because the role of the DNI is to provide intelligence in support of the President and not to issue policy judgments based upon that intelligence. However, the DNI examines every transaction and provides CFIUS with broad and comprehensive intelligence assessments.

Secretary JACKSON. DHS is not certain what is meant by playing "a substantive role." The intelligence community provides relevant reporting in each CFIUS case. The DNI is asked to assess the threat to U.S. national security posed by each proposed transaction, not to render a judgment about whether the transaction should

be approved. DHS believes that these policy judgments must continue to be made by each of the CFIUS members. CFIUS continues to work with the DNI to integrate appropriately the DNI into the CFIUS process.

PUBLIC PARTICIPATION AND NOTIFICATION

30. Senator BAYH. To the panel, has any consideration been given to convening unclassified public hearings?

Secretary ENGLAND. The DOD defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary JOSEPH. The State Department defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary KIMMITT. Since implementation of the Exon-Florio amendment involves national security, there is a limit on the extent to which the process can be public. For example, sometimes the impetus for an investigation is based on information contained in a classified report. In such cases, it may not be possible to reveal the reasons for an investigation without compromising classified information. Similar considerations may pertain to the reasons for the final determination by the President. In addition, companies filing with CFIUS provide proprietary information to enable CFIUS to conduct its reviews. Under the Exon-Florio amendment, this information—and the fact of the filing itself—cannot be made public by the government.

Secretary JACKSON. The public has a role to play in the CFIUS process by alerting government officials, to national security concerns they perceive from transactions that have been reported on in the press. DHS does not believe, however, that there should be a formal mechanism in the CFIUS process for the general public to express satisfaction or dissatisfaction with proposed or pending mergers, acquisitions, and takeovers by or with foreign persons.

Moreover, under Exon-Florio and its implementing regulations, no information provided to CFIUS in connection with a CFIUS review may be made public. Therefore, any detailed discussion in an unclassified public hearing of a transaction reviewed by CFIUS would be problematic.

31. Senator BAYH. To the panel, should the law be amended to allow some public participation?

Secretary ENGLAND. The DOD defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary JOSEPH. The State Department defers this question to the Treasury Department, the Chair of the CFIUS.

Secretary KIMMITT. Direct public participation in the CFIUS process would be problematic given the commercial sensitivity of much of the information provided and discussed in connection with the CFIUS process. The administration believes that the most appropriate way to bring about public participation is through effective communication with Congress.

Secretary JACKSON. For the reasons already given, the law should not be amended.

[Whereupon, at 1:35 p.m., the briefing adjourned.]

