S. HRG. 109–996

EXAMINATION OF THE EXON-FLORIO AMENDMENT: FOCUS ON DUBAI PORTS WORLD'S ACQUISITION OF P&O

HEARING

BEFORE THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

IMPLEMENTATION OF THE EXON-FLORIO AMENDMENT, FOCUSING ON DUBAI PORTS WORLD ACQUISITION OF PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY, THE ROLE OF TERMINAL OPERATORS, AND U.S. COAST GUARD ACTIONS UNDER THE MARITIME TRANSPORTATION SECURITY ACT OF 2002

MARCH 2, 2006

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C O N T E N T S

THURSDAY, MARCH 2, 2006

WITNESSES

EXAMINATION OF THE EXON-FLORIO AMENDMENT: FOCUS ON DUBAI PORTS WORLD'S ACQUISITION OF P&O

THURSDAY, MARCH 2, 2006

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
Washington, DC.

The Committee met at 10:04 a.m., in room SDG–50, Dirksen Senate Office Building, Senator Richard C. Shelby (Chairman of the Committee) presiding.

OPENING STATEMENT OF CHAIRMAN RICHARD C. SHELBY

Chairman SHELBY. The hearing will come to order.

The Committee has been concerned with the adequacy of the CFIUS process for some time. We have long held concerns that the process favors open investment policy over legitimate national security interests.

While I strongly support our open investment policy and recognize that it is vital to our national economic interest, I do not believe it should stand at any cost. Everything in this country cannot be for sale. This makes the credibility and integrity of the CFIUS process vital if we are to balance these interests.

We all recall the uproar this past summer when the state-owned Chinese oil company made an offer to buy the American firm Unocal. Today, it is Dubai. Tomorrow, it will be another investment deal. Again, this reinforces our need to improve this process as soon as possible to ensure that national security interests are adequately considered and protected and that the process is viewed as credible by the Congress and the American people.

I believe that a crucial starting point in this analysis should be the requirements of the Byrd Amendment to Exon-Florio. This provision ostensibly requires a thorough 45-day investigation of acquisitions or mergers involving foreign state-owned or controlled entities. However, the recent DP World case has raised some basic questions as to the applicability of this requirement. In fact, during last week's briefing of the Armed Services Committee, Deputy Secretary of the Treasury Kimmitt responded to Senator Byrd regarding Byrd's amendment. Kimmitt said, "we have a difference of opinion on the interpretation of it."

That there is no certainty on as fundamental an issue as to whether a full 45-day investigation should be triggered by certain transactions underscores the serious nature of the shortcomings of

the CFIUS process as it is presently constituted. Beyond questions with respect to the process undertaken during a CFIUS review, I also have significant concerns regarding the range of the national security considerations that are covered.

To this end, I believe that there must be greater clarity in the law regarding the requirement to consider transactions for their impact on such things as critical infrastructure protection and nonproliferation issues, among others. Where internal administrative efforts may take such matters into account, I believe we must provide clarity to ensure that such issues are formally examined as part of any routine review.

Shifting focus from general consideration of the CFIUS process to the particular consideration as to how it was applied in the Dubai Ports transaction only further heightens my concerns. I believe that there is a strong consensus that from the perspective of Homeland Security, our single greatest vulnerability is our ports of entry, especially our maritime ports of entry. Thus, when anyone from any foreign country seeks to purchase any part of our port operations, careful scrutiny should be given to the national security implications associated with the transaction.

While Dubai is an important ally in the war on terror, it is nevertheless a country in the Persian Gulf, a region where support for al Qaeda is very strong and through which funding for terrorist activities, including the attacks of September 11, flowed. It is also the location where the most dangerous nuclear weapon black market smuggling operation in history operated.

Given the considerable number of questions related to national security associated with this deal, that is, the control of critical infrastructure such as our ports and the involvement of a firm from the world's most dangerous region, I do not believe it was reviewed in a manner commensurate with such risks. Perhaps most troubling, such approval occurred notwithstanding the fact that in its review of the transaction, the Coast Guard Intelligence Coordination Center stated that, "there are many intelligence gaps concerning the potential for DPW or P&O assets to support terrorist operations that preclude an overall threat assessment of the potential DPW and P&O merger. A process that could produce such a result is simply no longer acceptable."

Finally, I believe this deal reveals that there are significant gaps in the existing process regarding transparency and Congressional oversight. In what can only be deemed a highly ironic twist, it is now known that just 3 days prior to this Committee's October 2005 hearing on the CFIUS process, the Department of Homeland Security was approached by Dubai Ports World with very advanced notification of its intention to purchase P&O. Next, the Treasury Department asked the Director of National Intelligence to provide an intelligence assessment on Dubai Ports World on November 2.

Finally, on December 16, the companies involved officially requested that their pending transaction be reviewed by CFIUS. This Committee was not notified, as I believe it should have been, upon the formal commencement of a review of the proposed transaction.

Perhaps most troubling, some have claimed that because news stories about the transaction appeared as early as October 31 in the *London Financial Times,* Congress should have been aware of

the pending transaction. I am sure that when Deputy Secretary Kimmitt stated on the record here at the Banking Committee hearing on October 20 that we can certainly have a much better line of communication with Congress on the CFIUS process that he had something different in mind than the U.S. Congress having to rely on the U.S. or foreign press to learn of impending deals.

Flatly stated, the system for Congressional notification is fundamentally broken. Both Exon-Florio and the later Byrd Amendment were passed in particular contexts in which it was very clear that the Legislative Branch of the U.S. Government was deeply concerned about the manner in which foreign acquisitions of U.S. companies were examined or not examined for national security implications.

The manner in which the Dubai Ports transaction was handled only reinforces this Committee's earlier findings that the system is seriously flawed and that corrective, legislative measures are required. We will hear this morning again from Deputy Secretary Robert Kimmitt, the Chairman of the Committee on Foreign Investments in the United States and who I might add personally assured us would remain on top of the security review process last year.

We will also hear from Mr. Eric Edelman, Under Secretary for Policy, Department of Defense; Mr. Stewart Baker, Assistant Secretary, Department of Homeland Security; Mr. Robert Joseph, he is here, Under Secretary of State for Nonproliferation.

Senator Sarbanes.

STATEMENT OF SENATOR PAUL S. SARBANES

Senator SARBANES. Thank you very much, Mr. Chairman.

Under your leadership, this Committee has been concerned for some time about the way foreign purchases of U.S. asset with national security implications are evaluated under the Exon-Florio Amendment to the Defense Production Act. In fact, 2 years ago, Senator Bayh and I joined with you in asking for a GAO report on this subject. GAO delivered that report last September, and this Committee held two hearings on the report and its implications in October, well before the present controversy about Dubai Ports World arose.

At the time, I thought we were receiving assurances from the Administration that the review process through which Exon-Florio was implemented would be substantially improved. Regrettably, that appears not to have happened. The Exon-Florio Amendment was enacted in 1988. It authorizes the President to review and investigate and ultimately, if necessary, to suspend or bar the acquisition by a non-U.S. person of a company doing business in the United States if the acquisition could threaten U.S. national security.

Now, Exon-Florio was amended in 1992, most importantly to mandate a 45-day investigation if a foreign government-owned company acquired a company in the United States whose operations relate to the national security. The 1992 Amendment also required a report to Congress by the President after the conclusion of any Exon-Florio investigation.

In that report to the Congress, the President was charged by the statute to provide a detailed explanation of why it either permitted or rejected the acquisition in question. Whichever way he decided, he was required to submit an explanation to the Congress, and the rationale for that was that you could not begin to understand the criteria that were being used unless you got an explanation when it was permitted, as well as when it was rejected.

The President's Exon-Florio authority to investigate acquisitions has been delegated by the President to the Committee on Foreign Investments in the United States, or CFIUS. CFIUS is chaired by the Department of the Treasury. It includes the Departments of Commerce, Defense, Homeland Security, Justice, State, the National Security Council, and five other components of the Executive Office of the President: The OMB, the CEA, the National Economic Council, the Trade Adviser, and the Adviser on Science and Technology.

This highly critical report by the GAO delivered to this Committee last year concluded that the way CFIUS administers Exon-Florio may limit the statute's effectiveness. The GAO cited several specific concerns: First, that Treasury very narrowly defines what constitutes national security; two, that CFIUS is reluctant to start 45-day formal investigations because they perceive a negative impact on foreign investment and a conflict with U.S. open investment policy; third, that the resulting limitation of the CFIUS process to a 30-day preliminary review period makes careful analysis very difficult at best; and fourth, that failure to proceed to an investigation means that few Presidential decisions will ever be required, thereby eliminating reporting to the Congress and making effective Congressional oversight impossible. In fact, it contributes markedly to making the whole process more opaque, less transparent.

Now, the purchase by Dubai Ports World, DPW, of Peninsular and Oriental Steam Navigation Company, P&O, has focused the questions with which we were concerned last year in deeply troubling ways. Let me just say, Exon-Florio states that the President or the President's designee shall make an investigation as described in Subsection A in any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which 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.

How could one reasonably question the fact that the Government of Dubai's control of the corporation that is operating major terminals in some of the largest ports in the United States could affect national security? Port security is a major component of our defenses against terrorism. Our ports are critical to the national economy and to our conduct of international trade, and our ports employ tens of thousands of our citizens.

Still, despite ownership of DPW by the Government of Dubai, no 45-day investigation occurred. I co-sponsored the 1992 Amendment to Exon-Florio that provided for the 45-day investigation. Senator Robert Byrd, the sponsor of the amendment, said on the floor when the amendment was being considered, "it requires that any acquisition that involves a company controlled by a foreign government,

as was the attempt with Thompson's attempt to buy LTV Corporation's missile division, must automatically receive the more detailed 45-day investigation."

It is not surprising that U.S. citizens throughout the country are worried about the Dubai Ports World transaction. The transaction would transfer control of substantial terminal functions at a number of major East and Gulf Coast ports including New York, Newark, Philadelphia, Baltimore, Miami, and New Orleans would be transferred to DPW. DPW would acquire lesser but still significant functions at ports including Portland, Maine; Boston; Davisville, Rhode Island; Norfolk; Galveston; Houston; and Corpus Christi.

And I go back to the point I made earlier. No one has denied that port security is a critical component of our national security. In fact, that point is constantly being made to us. My concern is with the deeply flawed process that permits this transaction to go forward before it is analyzed sufficiently. The problems identified by the GAO, especially the fear of moving to a 45-day investigation, are evident.

In addition, I am not aware of any effort to discuss this transaction with the Chairmen and Ranking Members of relevant Congressional committees. And there is little evidence that this transaction, in fact, received high level attention within the executive branch before CFIUS acted. In fact, Mr. Chairman, one of the answers I would like to receive from this panel today is who from each of the 12 departments and offices, including those in the Executive Office of the President, were involved in the decision not to move forward with a 45-day full investigation. Who were the decision makers? What level were they at? And what did they tell their principles.

Secretary Kimmitt, as Chairman of CFIUS, I was seeking to learn from you when you learned of the transaction and what your direct involvement in it was.

Mr. Chairman, I believe that fundamental reforms in the Exon-Florio process are in order, and I look forward to working with you to ensure that the problems we are reviewing today do not happen again. Thank you very much.

Chairman SHELBY. Thank you.

Senator Allard.

STATEMENT OF SENATOR WAYNE ALLARD

Senator ALLARD. Thank you, Mr. Chairman.

I would personally like to thank you for your ongoing oversight on the CFIUS process. Like many of my colleagues, I have been extremely concerned with what I have been hearing regarding the decision to transfer port operations to a company owned by a foreign government. I appreciate this opportunity to more closely examine not only the ports decision but also to use this as a poster child of the shortcomings of the underlying CFIUS process.

I oppose the decision to permit a company owned by the Government of Dubai to take over operations of six major U.S. ports without additional information and review. My primary concern about this plan is national security. While I am a strong advocate for economic growth and business opportunities, they must not come at the expense of national security.

Having served on the Armed Services Committee and on the Intelligence Committee also at that time under the able leadership of Chairman Shelby, I am keenly aware of the primacy of national security. The only room for error in the arena of national security is to err on the side of caution. We cannot be casual about the safety and security of our country.

The Administration has urged, as they no doubt will today, that Dubai Ports World will only conduct terminal operations and that the company will have no involvement in port or terminal security. In my view, they could not be more wrong. Security is an integral part of operations. To draw a parallel, ground maintenance crews and crews that clean and prepare planes are not directly responsible for airplane security. However, it is not difficult to imagine ways in which they could have a deleterious effect on our air security. Similarly, with terminal operations, operators might not have primary responsibility for security; their actions directly affect the ability of Customs and the Coast Guard to perform their security functions.

I am pleased that the Administration has finally agreed to conduct a review of this matter. However, I am disappointed that it took a massive public outcry. Congressional pressure and a request from the Dubai Ports World company itself for the administration to agree to conduct what unquestionably should have been done in the first place.

I would strongly advise that they consult closely with Congress in this process, as we have a critical role to play in national security decisions. I would also admonish the Administration to ensure that they conduct a thorough, vigorous investigation during this 45-day period.

Key Administration officials have already made comments that could lead one to believe that this will be little more than a perfunctory investigation or one designed to support a predetermined outcome. This is absolutely unacceptable. Congress and the American people expect a legitimate, objective, substantive investigation, and I continue demanding nothing less.

Only when a thorough, objective investigation has been completed, and Congress has had an opportunity to review the findings will I even consider allowing this takeover to proceed.

While much of the public attention has been focused specifically on the matter of port operations, this one situation simply underscores the much broader concern of how we even got to this point, and the answer lies in a flawed CFIUS process. Again, the ports deal only typifies the lack of transparency and Congressional notification in the current process. The fact that the Administration fails to acknowledge any weakness in this system only makes me more concerned.

For some time now, Chairman Shelby has indicated his concern with the CFIUS process, and I appreciate his leadership. I intend to work closely with him and other Committee Members to continue examining what forms may be necessary for the underlying CFIUS process.

Without reforms for the flawed structure that supported the decision to allow a foreign government to take control without even

conducting an investigation, we will continue to face potential risks to other sectors vital to our national security.

Thank you, Mr. Chairman.

Chairman SHELBY. Senator Reed.

STATEMENT OF SENATOR JACK REED

Senator REED. Thank you very much, Mr. Chairman, and thank you for holding this hearing.

At the heart of most of what we do is trying to strike a balance, and in this case, it is a balance between an open investment policy in a world economy and the national security of the United States. And the conclusion emerging at this point is that balance has not been properly struck as of yet. Certainly, that is what I am hearing from my constituents throughout Rhode Island, and I think my colleagues are hearing the same thing throughout the country.

Since 1988, the Exon-Florio Amendment has required the Administration to conduct these reviews, and in 1992, the Byrd Amendment put in place a 45-day investigative process, which would lead ultimately to a Presidential decision and to Congressional review, at a minimum.

The process that was taken with respect to Dubai's potential acquisition of our ports, or at least potential management, I should say, of our ports to be precise, avoids this investigation process and, in effect, cuts Congress out and the American people for a careful review of this transaction, and that has caused great concern not only here but also more importantly throughout the country.

I think we have to go forward, as now is the case with this 45-day review. I think Congress has to be an active participant in this process. We have to look very closely at all of the parameters of national security. It is troubling to be revealed in the last few days that the Coast Guard essentially did not think they had sufficient information to cover all the different aspects of national security.

And as Senator Sarbanes pointed out, the Government Accountability Office has also indicated that there appears in the process of CFIUS review a narrowing of the terms of national security to avoid the type of investigation and ultimately the type of transparency that is essential, I believe, not only for appropriate decisions but also communicating to the public that we are taking care to protect the national security of the United States.

And so, I think it is important that we have this hearing today. It is important for this investigation. And I would hope that this is not simply a perfunctory analysis with the conclusion predetermined, but it is a searching and careful review of every aspect of national security that could be implicated in the transfer of the management of these ports to any other entity.

Thank you, Mr. Chairman.

Chairman SHELBY. Senator Hagel.

STATEMENT OF SENATOR CHUCK HAGEL

Senator HAGEL. Mr. Chairman, thank you, and I, too, welcome our witnesses.

As has been noted this morning, for any nation, no interest is more important than its national security interests. We are dealing

here with two specific issues: One, this particular case, the P&O acquisition case, and two and maybe more importantly, future acquisitions and the process that leads us to those future acquisitions. It may well require that we amend current law.

I would also note, Mr. Chairman, that these kinds of issues and decisions that are made have consequences and implications that always go far beyond national security interests. As also noted here this morning, they would include investment issues, trade issues, diplomatic, geopolitical, strategic interests of our country, which are particularly important at a time when we live in a global community underpinned by a global economy. Many complicated issues.

I am particularly pleased, Mr. Chairman, that you have brought forward these witnesses, because as we sort through this, let us deal with the facts. Let us not deal with the politics or the passion or the emotion. It is facts that we will require, and through this process of questions, we will get the facts in this particular case as well as any adjustments that need to be made to the process.

One last point, the world is obviously dynamic. We appreciate that. Laws and regulations constitute the reality of the world at the time we pass the law, not unlike what we were dealing with in the NSA surveillance case, the 1978 law. Technology has bypassed, I believe, that law. We are going to have to change that law.

And here, too, is a living, breathing 21st century example of how and why we may have to change this law. But it should be very clear to the world and to the people of America that first, our security is paramount, but our security does include many other dynamics of our future. And that is our economic, geopolitical, our relationships, our diplomatic and all that secure our economy, our future, and our competitive position in the world. I look forward to hearing our witnesses and opportunity to ask questions.

Thank you, Mr. Chairman.

Chairman SHELBY. Thank you.

Senator Stabenow.

STATEMENT OF SENATOR DEBBIE STABENOW

Senator STABENOW. Thank you, Mr. Chairman, for this very important hearing. Thank you for our witnesses being here today. There is no question that the issue of homeland security is something on the minds of all of us and the people we represent, and we are here today really to say that this should not be negotiated, sidestepped, or ignored in any of the processes that have been developed.

Everyone, port managers, front line workers, former administrators, all agree that safety should be our primary concern. A former commander in the U.S. Coast Guard and expert on maritime security I think put it this way. The September 11, 2001 attacks on New York and subsequent attacks on Madrid and London show that transport systems have become favored targets for terrorist organizations, and it is only a matter of time before terrorist breach the superficial security measures in place to protect the ports, ships, and millions of intermodal containers that link global pro-

ducers to consumers. So that is the backdrop that we are having this discussion.

Given this type of statement, I simply cannot understand how the importance of port security was ignored in this process. In my opinion, it is just common sense, frankly, that American companies accountable to American people should run ports, regardless of the country.

A company that manages a port is responsible for providing the day-to-day physical security of that facility, and when you think about it, they control access to the port with fencing, security cameras, security guards, and screening the truck drivers that come and go. They ensure the employees meet Federal and State employment laws and ultimately facilitate the transport of goods through the port and coordinate between Federal and State law enforcement agencies as well as commercial interests at the port. Again, given that, I believe that our policy in a post-September 11 world specifically should be that we should have this done by American companies.

The port manager has a tremendous amount of power and influence over the operations of the port. In my opinion, as I said, it does not matter if we are talking about a British company or United Arab Emirates. I believe American companies accountable to the American people should manage the operations of these vital national security interests.

Mr. Chairman, we have dealt with this issue before. You mentioned the Chinese oil company. We also had a situation back in the late 1990's with the Port of Long Beach, when they reached an agreement to lease a former Navy container terminal to a Chinese company, China Ocean Shipping Company. At that time, Congress passed legislation that followed 1998, I was in the House at the time and supported that, to prohibit the Navy from conveying the closed naval station to the Chinese company.

I think what is even more concerning about the process involved in all of this is that people at the highest levels of government do not appear to have been involved or aware of what was happening as it happened. The entire approach has been casual. It appears that the President as well as the Secretary of the Treasury, who chairs the Committee on Foreign Investments 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 we did, through the television and other media reports.

And what we have learned since then is even more concerning, I think, that according to an internal document, the Coast Guard, which is in charge of reviewing security at ports operated by the Dubai Maritime Company, warned the Administration it could not rule out that the company's assets would not be used for terrorist operations.

On Tuesday, we also found that the Deputy Homeland Security Director, Michael Jackson, admitted that he was not aware of the Coast Guard memo before he approved the deal. That is a great concern to me.

But finally, Mr. Chairman, I would simply say I believe there is a broader issue here as well as this process, and that is what we are doing about port security. Only one in 20 shipping containers

entering the United States is physically inspected. When we look at the fact that the September 11 Commission report gave us a D on port security. To me, the broader issue is not just what happens through this process, although it is critical.

But as a Member of the Budget Committee, I am extremely concerned that we have not seen the action we need to address port security. The Coast Guard estimated after September 11 that it would cost nearly $5.4 billion to provide the needed upgrades at our ports, $5.4 billion. Since then, the Administration has requested $46 million, and in this year's budget that we are going to be taking up in a few weeks, the Administration has proposed eliminating the Port Security Grant Program for the second year in a row. I do not understand this.

Fortunately, we in Congress have at least begun to fund this at $700 million to date, but frankly, most of our Nation's ports are left without the resources that they need, and I hope we are going to address this on a bipartisan basis, because this is not, of course, a partisan issue. This is an American issue.

And I would finally just say, as an example, our ports in Detroit were told they were not even eligible for the Port Security Grants because they were not a high risk port, despite the fact that the City of Detroit is the eighth largest metropolitan area in the country, and 42 percent of all the American-Canadian trade goes through those ports in Southeastern Michigan.

So, Mr. Chairman, people in my State are perplexed about what is going on, both the decisionmaking processes, what the decisions were, and frankly, the larger question of how are we going to up our grade. The D that was given by the September 11 Commission to me is the broader issue at play, and I hope this year we are going to do something about that.

Thank you, Mr. Chairman.

Chairman SHELBY. Senator Bunning.

STATEMENT OF SENATOR JIM BUNNING

Senator BUNNING. Thank you, Mr. Chairman, and thank you for holding this very timely and important hearing.

I think it is very important to note that this Committee has been active on the issues surrounding the Committee on Foreign Investment for a lot longer than just the port deal that is the focus of this hearing. Now more than ever, it is clear that we need to take a hard look at the Committee on Foreign Investment to see what changes need to be made for the future.

But the task at hand today is to take a closer look at the Dubai Ports World's acquisition of P&O and its U.S. operations. We need to go slow with this process. We should have had the 45-day review, because it is a foreign government's investment, and, to our witnesses, I do not know how we did not get the 45-day review to start with.

This decision should be based on facts, not on emotion or partisan political calculation. The single most important question we need answered is will this deal make the United States less safe? If the answer is yes, the deal needs to be stopped. If the answer is no, it should probably go through but with a lot more thorough investigation of the consequences.

A business deal like this is a matter of free trade and economic efficiency. There are clear economic benefits from the transaction, and the UAE is an important trading partner. In fact, we have a large trade surplus with them, one of the few countries that we do. The UAE is also a partner in the war on terror. They have provided critical assistance to our military forces, including port facilities for the Navy. They are actively participating in our efforts to bring democracy and freedom to the Middle East, both in Iraq and Afghanistan. They even donated $100 million to help those affected by Hurricane Katrina.

But there are troubling questions that we need to resolve. For example, the UAE was one of the three countries to recognize the Taliban in Afghanistan prior to September 11. There are reports of censorship by their government, and the parent company of Dubai Ports World may participate in the Arab boycott of Israel. How do we know if the UAE's friendship with the United States is sincere or if it is just good for business?

I am glad that the company asked for more detailed review of the transaction so that both the Committee on Foreign Investment and Congress have time to look into it thoroughly. We should stop this deal if there are any real security threats. To stop it purely for political reasons would send, I believe, the wrong message to peaceful Muslim countries and to our allies and trading partners around the world.

Mr. Chairman, thank you again. I hope this hearing gives us a better understanding of the facts of this deal and helps us understand what changes we need to make to make the Committee on Foreign Investment a better committee.

Chairman SHELBY. Thank you, Senator Bunning.

Senator Menendez.

STATEMENT OF SENATOR ROBERT MENENDEZ

Senator MENENDEZ. Thank you, Mr. Chairman.

I want to thank you for holding this hearing at a critical moment, and I want to associate and thank you for your very strong statement at the opening, which I associate myself with as well as the Ranking Member's.

You know, I have for 13 years prior to coming to the U.S. Senate in the House of Representatives represented the third largest port on the East Coast, the megaport on the East Coast, the Port of Elizabeth and Newark, which is part of the Port of New York and New Jersey. And I must say that anyone who suggests that a terminal operator has nothing to do with part of the security equation at a port is living in la-la land. That is just simply not a fact.

And it alarms me that I hear time after time, especially that originally the Administration take that view. It just simply is not a fact. Now, today is Thursday, March 2, and as of today, DP World owns P&O, and as of today, a company controlled by a foreign government owns operations at major U.S. ports. And while they have made promises not to exercise that control, I question whether the way that we have proceeded legally blocks them from doing so.

Now, I certainly support the 45-day investigation, which I believe should have been carried out automatically, as required by U.S.

law. But there is a question that the 45-day review does not change the previous decision by the Administration to allow this deal to go forward.

DP World did not withdraw its previous application, nor has the Administration declared its decision to clear this deal on January 17 to be null and void pending the 45-day investigation. In fact, the document signed by the President of P&O Ports and the CEO of DP World says, "DP World and POP&A will abide by the outcome of the review, but nothing herein shall constitute a waiver of any rights of DP World or of POP&A that have arisen from the original notification, which is the statement of nonobjection dated January 17."

Translated from lawyerspeak, it seems to me that this means DP World will agree to the results of the new review as long as the previous approval still stands. So as far as I can tell, the company has made it clear that they believe that the previous CFIUS decision still stands. And I hope the testimony will address that right off the bat, because it is a critical issue, today being March 2.

I am also deeply concerned that given these circumstances, that the President will not have the authority to stop the deal even if the new investigation gives him information that he wants to. And that is why I believe that the legislation that has been offered in a bipartisan way to give Congress a legal right to stop the deal if they do not agree with the ultimate rights of the investigation moves forward.

That right simply does not exist right now, and I hope that we would acquire the right prior to the end of the 45-day investigation. Now, I know that I have heard some of our colleagues talk about politics, but I am concerned when I hear that, in essence, the statements that this is a predetermined outcome, because I have not heard the President say, well, let me see what happens after the 45-day review. He continues to say very clearly that he has made his decision; promised to veto any legislation that deals with the question of this deal, and stated just this Tuesday my position has not changed.

Now, it seems to me shocking that every day, where there are new revelations about potential security risks that we have a verdict before the trial has been concluded. In the short time that the Congress, the media, and the American people have scrutinized this deal, it has been revealed that amongst other things, my former colleague in the House of Representatives, the Chairman of the Homeland Security Committee, Peter King, said that members of CFIUS told him weeks ago that the intelligence review was not thorough.

The Coast Guard did have questions about national security issues that they raised during the 30-day review. I know they said it was satisfied, but I do not know how you go from large intelligence gaps to suddenly so quickly filling those gaps within that time period. And of course, DP World's holding company and the Government of Dubai actively enforcing the boycott of Israel that is contrary to United States law. These are just a few of the items that have come out post the 30-day review.

So, I seriously hope that we will look at legislation that improves this process that also deals with the question particularly on port

security. I think it is a vital national asset that has a huge security risk to it that simply cannot be in the hands of a foreign government. I think Americans instinctively understand; common sense, as we like to say in New Jersey, that we cannot simply turn over a critical national security infrastructure like terminal operations at our ports to a foreign government.

Foreign governments act very differently than foreign companies. Foreign governments act in their own national interest and in their own national security interests. Privately held companies are controlled by stockholders and answers to the needs of the market, not the needs of a government, and if we have any doubt of that, just look at what Hugo Chavez is doing manipulating the Venezuelan oil company Citgo here in the United States promoting his own foreign policy views here in the United States. And so, I just simply hope, Mr. Chairman, that we will exercise our rights and acquire a right to have an ultimate say on this deal.

And finally, you know, the September 11 Commission amongst other things told us think outside the box. A simple envelope that we send for commerce or that we do to send a note to a loved one became a deadly weapon when anthrax was put inside of it. An airplane, which we used for leisure or for commerce and travel became a weapon of deadly destruction. To not think outside the box that a terminal operator is not part of the security equation of the ports of the United States is to live in a pre-September 11 mentality. That is a mentality we cannot risk.

Thank you, Mr. Chairman.

Chairman SHELBY. Senator Dole.

STATEMENT OF SENATOR ELIZABETH DOLE

Senator DOLE. Mr. Chairman, I want to thank you very much for holding this important hearing on an issue about which many Americans, including many of us in Congress, have concerns, and I would like to thank the distinguished panelists for joining us here today to discuss this topic.

Protecting our ports is a daunting task. As a former Secretary of Transportation who then oversaw the Coast Guard, I know first hand the important role that effective port security plays in protecting the United States. The U.S. Maritime System consists of 300 sea and river ports with over 3,700 cargo and passenger terminals. It is estimated that more than 9 million marine containers enter U.S. ports each year.

While the U.S. Coast Guard and the Bureau of Customs and Border Protection have the primary responsibility to control and administer port security, they cannot bear the sole burden of this duty. With the vast number of containers that come through our ports each and every day, it is critical that all entities that have contact with U.S. ports have our best interests in mind.

Last week, the Senate Armed Services Committee was briefed by Administration officials about the process that governs foreign acquisitions. As a result of that briefing, I believe that we have a better understanding of the events that led to the approval of this transaction. For instance, we learned that lawyers for the company first approached the Department of the Treasury about this transaction in October 2005. We also learned that key agencies respon-

sible for protecting our homeland were consulted during the process and did not object to the approval of this transaction.

Although these are encouraging signs, several concerns remain. For instance, like most Americans, I personally disagree with CFIUS' assessment that a more extensive investigation into this transaction was not warranted, so I am pleased that the Administration has now agreed to undertake a 45-day second look investigate of the Dubai Ports World transaction.

If this investigation is both thorough and transparent, the American people will have confidence in the soundness of whatever conclusions are reached about the transaction's impact on our national security. During this process, we should review Dubai Ports World's record of management in other ports and determine whether they have created an environment that helps or hinders port security, and we also need assurances about any changes that Dubai Ports World might undertake at our ports and how such changes may affect port security.

In addition, I hope that Congress and the Administration can open a dialogue about how to create a more transparent CFIUS process. In recent days, it has been suggested that the process may have significant deficiencies. Unfortunately, some have sought to politicize this issue. The goal is not to point fingers. The goal is to ensure that the correct result is reached in this case and that national security, as always, is our foremost priority.

I am confident, Mr. Chairman, that working with the Administration, we will be able to achieve this shared goal.

Thank you.

Chairman SHELBY. Senator Dodd.

STATEMENT OF SENATOR CHRISTOPHER J. DODD

Senator DODD. Mr. Chairman, thank you, and I am going to ask unanimous consent that an opening statement be included in the record.

Chairman SHELBY. Without objection.

Senator DODD. I want to thank you, Mr. Chairman, at the outset for having this hearing. People may wonder, obviously, why a Banking Committee has a jurisdiction over this, but the Defense Production Act, over which this Committee has jurisdiction, is, of course the Committee of responsibility in dealing with this organization that has given approval to this present contract.

I note this morning that yet there is another example of the Dorchester Company involving, I might point out, located in my home State of Connecticut operating some 9 U.S. locations in dealing with precision parts and defense contracts from Boeing, Honeywell, Pratt Whitney, and GE. So there are other matters, I know, coming before this Committee.

I want to commend you, Mr. Chairman, for having this hearing, my colleague from Maryland for his opening statement. I want to particularly commend my colleague from New Jersey, our newest Member of this Committee. A very direct and forthright statement. Your comments are very, very helpful.

I am just going to take Senator Hagel's point and I think Senator Menendez and others' point. We can obviously deal with this port issue in front of us. But for this Committee's purpose here, this

system is broken, I think all of us agree. And again, I think you can point to various reasons why that has happened over the years. The world has changed.

And I was just going to ask you, I know you have your statements, and I have looked at your statements, but I want you to as well consider just a couple of things. Some of us here are considering some legislation here that would do four or five different things, and I would like you just to make note of them quickly for you, and then, if you would comment on them at some point here during your presentations.

First, I am curious why, in fact, we do not add the Director of National Intelligence and the Director of the CIA to the CFIUS panel. Seems to me you have a provision in there that talks about national security. To not have anybody on the panel who is directly involved in that responsibility just screams out for an answer.

Second, the creation of a CFIUS subcommittee on intelligence, whose matters would represent all 15 intelligence agencies of the U.S. Government, which would be chaired by the Director of National Intelligence, this would review and provide comments on all matters that come to CFIUS, including the 30-day review and 45-day investigations.

Third, to create two vice chairs, filled by the Secretaries of Defense and Homeland Security so that economic and intelligence security matters have appropriate weight.

Fourth, mandate that only the CFIUS Chair, with the concurrence of the two vice-chairs or the President acting on his own authority, can sign off on a 30-day review which concludes that a potential deal poses no security threat. In addition, it would require that this determination be made in writing with appropriate signatures and mandate that the CFIUS Chair and Vice Chair who make such a determination be at the level of Secretary.

And fifth, informing the Congress as well, so that there is some participation here by the appropriate Committees, with a possibility of adding a fast track opportunity for Congress to reverse with maybe supermajorities, so that you do not end up with these things being thrown out unnecessarily.

So, I would like you to comment on those points and just say I am just curious as to why, with this matter coming up, someone did not raise their hand in the room of the 12 members of this committee and say should we not call the boss on this one? I just am stunned, in a way, given the nature, the times we live in, all of the events out there that someone did not say in this process should we not call the President of the United States and ask him whether or not something like this should go forward?

So for the last week or so since this has all become public, I have been anxious to hear an answer to that question, and maybe someone can tell me why that did not happen.

Thank you.

Chairman SHELBY. Senator Crapo.

STATEMENT OF SENATOR MIKE CRAPO

Senator CRAPO. Thank you very much, Mr. Chairman. I appreciate the attention that you have given to this issue both before and now during the current issue that has come up before us.

Frankly, it is hard to understand why the 45-day review and the more thorough process was not initiated with regard to this transaction from the outset. And then, it is hard to understand why, when the issue became one of public concern, there was so much resistance to a 45-day review and to taking the time to have the extra-thorough scrubbing of this issue that the public, my constituents and I think the vast majority of the American public are asking for.

There is no question that port security in this country is one of the most critical aspects of our homeland security. We have all been discussing that here today, but the fact is that regardless of who is in charge of the specific security activities at a port, those who actually operate the port and are in charge of the movement of the containers and the other activities at the port are going to have a critical opportunity for either securing the port or making it less secure, and it would seem that it is one of the most important things we can review, to make sure that those who are operating our ports are doing so in a manner that strengthens and improves the United States' security.

It seems to me that we are facing two issues here in the Committee today. The first is whether this specific transaction was properly reviewed and was properly approved and whether it should be allowed to go forward. And I agree with my colleagues who have said that if the security of the United States is compromised by this transaction, the transaction should be stopped.

But there is also another much larger issue that this Committee is facing, and that is how we are going to deal with the transactions of this type that we face relating to our security in the future, the question of process. I for one believe it is very evident that the process needs to be fixed.

I have just been jotting down a couple of notes as I have been listening to my colleagues talk here. A couple of questions about our process that I think this Committee, Mr. Chairman, needs to address: One, because the CFIUS system permits public disclosure only when there has been a rejected recommendation, how do we restore public confidence in the fact that the accepted recommendations are all properly and thoroughly vetted? What changes need to be made to the system to permit more public awareness without compromising security concerns while, at the same time, not threatening legitimate foreign investment in the United States?

And with regard to the management and the makeup of the Committee itself, why do we not have the Director of the CIA on the Committee, or now that we have created the position, the Director of National Intelligence? Why do we not recognize that these decisions require the input of our intelligence community and require the involvement of all those at the various levels of Government who are tasked with protecting this Nation's security?

I think there are a tremendous number of process questions that we need to ask and a tremendous number of specific questions about this transaction that need to be answered.

And once again, Mr. Chairman, I look forward to the information that we will receive today in the Committee and in working with you and my colleagues in the future to make sure that in the end, we in the Congress and the American people can have the con-

fidence in the process that we have created to address these issues and specifically in the outcome of this specific transaction.

Thank you, Mr. Chairman.

Chairman SHELBY. Senator Schumer.

STATEMENT OF SENATOR CHARLES E. SCHUMER

Senator SCHUMER. Thank you, Mr. Chairman, and I want to thank both you and Senator Sarbanes for holding this hearing and for your interest in this issue. It is no secret that you, Senator Sarbanes, and this Committee have been interested in this issue long before Dubai Ports World came onto the scene.

Now, I believe, Mr. Chairman, that the Dubai Ports World takeover has exposed serious problems with the CFIUS process, and I am grateful to the efforts of this Committee to look into reforming this critical function of Government. I believe that CFIUS dropped the ball on this investigation, and by skirting around Congressional requirements and loosely interpreting the law, the Committee could have left some of our most vital assets open to infiltration and attack.

The agreement by the Bush Administration and DP World was good news, but there are still some critical questions that need to be answered, and they go to the heart of this deal. The investigation must be impartial and thorough. The American people and the Congress need to see a report of the investigation, and Congress should have a right of disapproval.

A bipartisan group of legislators, including Members of this Committee, have introduced such legislation, and we will move such legislation if there is no other way of achieving these three goals. And it was good to hear from many of my colleagues on the other side of the aisle that if there are security concerns, we should block the deal. That is very important to know, because the President has already said that he is for the deal even before the 45-day investigation is completed and we get a report on it.

Now, today, as Senator Dodd mentioned, the *Washington Post* reported that Dubai International Capital is seeking to take over London-based Doncasters Group, which manufactures military aircraft and tank engine parts in nine locations throughout the United States. In this case, CFIUS decided on Monday to do the full 45-day investigation, the very same investigation that the Committee decided to skip in DP World's case.

The new proposed acquisition shows that a thorough review of foreign takeovers of U.S. security functions hardly stops at Dubai Ports World. And the more we learn about the CFIUS process in this investigation, the more questions are raised. Why did they do a 45-day review for tank engines in a box but not for possible nuclear weapons in a ship's container?

It has become clear that Dubai Ports World is not a single incident. We not only need a thorough review of this new proposed takeover, but we also need an examination of the role foreign countries, particularly those that have had a past nexus with terrorism, play in areas with vital national security interests.

And as we have discussed in this Committee before, the CFIUS process is in dire need of reform, and the issues raised in the course of this investigation are symptoms of a broken system.

There are several issues I think we need to address as we consider changes to the process. As has been mentioned before, we need to examine who is on the committee. I believe that either an intelligence or homeland security agency should serve as co-chair of CFIUS. The Treasury Department is reportedly reluctant to initiate investigations, fearing such investigations would discourage foreign investment and that the United States would look protectionist. But this is the wrong approach, particularly in a post-September 11 world. Homeland security must come first, not trumped by economic or diplomatic considerations.

Finally, we need to beef up Congressional oversight and bring more transparency to this process. To assure Congress is fully informed, the President must be required to provide a report on all applications that go through the investigation phase. CFIUS should then provide an annual report on all transactions that occur during the preceding year.

CFIUS has failed to provide reports required by law every 4 years which evaluate whether or not a foreign country or company is trying to gobble up U.S. companies or critical technologies. We have not received a report, this quadrennial report, since 1993. If Dubai, China, or any other country is trying to acquire strategic technology or assets behind our backs, we need to know about it. We need answers to these questions, and we need to know them now.

So, I would like, Mr. Chairman, to respectfully request copies of the last three required reports, and if none have been completed, I ask Treasury to immediately commence a review of foreign investments over the last 14 years and do the quadrennial reports that are required by law. CFIUS should give this report to Congress and be required to testify before this Committee on whether countries or companies are coordinating strategies while our eyes are closed.

Mr. Chairman, I look forward to working with you and Ranking Member Sarbanes on these critical issues and pledge my full support in the effort to improve the CFIUS process. Overall, I believe that the DP World affair has been a sorry one and one that could have been avoided if CFIUS had done its job and followed the law. Neither Congress nor the American people will tolerate such a lackadaisical approach to our security in the future.

Thank you.

Chairman SHELBY. Senator Martinez.

STATEMENT OF SENATOR MEL MARTINEZ

Senator MARTINEZ. Mr. Chairman, thank you very much. I thank you and the Ranking Member for holding this very timely hearing today on an important issue before the American public. It is of great concern to us in Florida that Miami is one of the ports that is up for the takeover, and I have a fuller statement which I would seek——

Chairman SHELBY. It will be made part of the record.

Senator MARTINEZ. Thank you.

Chairman SHELBY. Without objection.

Senator MARTINEZ. Having the benefit of hearing from my colleagues, I just find interesting what great consensus seems to be

developing here as to some of the things that need to be reviewed. Obviously, the CFIUS process is one that I think there is consensus here, and I know the Chair has been concerned about this for some time, but it should be reviewed. We need to know a little bit more about it. We need to know the composition of this commission as to whether it is appropriate or not.

I also look forward to some clarity on the 45-day investigation and what, in fact, the prior investigation yielded or to what extent there was an investigation or why there was not thought to be a need for an investigation. I also believe, and I have said from the very beginning of hearing about this matter, that we should ask the question whether the function that is being done here by DP World is of such critical nature and so sensitive to national security as to whether or not it should be in foreign hands or not.

I am not prepared to answer that question until I know the facts, and I think that is one of the things that I hope this hearing will get to is some of the facts so that we can make better judgments about this. Because I think there are competing interests here. What is the impact on commerce that we might have with a very stringent process? And I also wonder what the role of the Congress should be, whether in fact it should be a continuing role, or it should be a reporting role.

And so, all of these things, Mr. Chairman, I think need to be also done in the context of our need for diplomacy, our need for foreign relations. Obviously, I would agree with the Senator from New York that national security is paramount to all of this, but we cannot ignore the very important relationship that we have with the United Arab Emirates and how, and the assistance that they provide to us as we seek access to the only seaport that is available to us in the Middle East.

And I think that the context of all of this should be done with our national interest in mind, which includes the Homeland Security interests of our Nation, but it also includes our broader national security interests. All of this can be accomplished if we get to the facts, if we find out the sensitivity of the work that is being done; if we are not driven by emotion. And frankly, I hope that we can continue to function on this as we put the paramount interests of our Nation first as opposed to any edge that we might pick up here on a partisan basis.

I think it is important here that we provide for the safety and security of our ports. The Port of Miami, Mr. Chairman, is downtown Miami. It could not be in any more critical or sensitive place. So the safety of this port is something that we have great concern about, and I hope as we discuss the CFIUS process, we will also talk about the broader issue of port security as we enlarge the debate on this very, very critical and important issue.

Thank you, Mr. Chairman.

Chairman SHELBY. Thank you.

Senator Bayh.

STATEMENT OF SENATOR EVAN BAYH

Senator BAYH. Thank you very much, Mr. Chairman.

Thank you, gentlemen, for your presence today. I am sure it is not easy, but I think as you can gather, there is deep bipartisan

concern about the efficacy of the process that you are charged with overseeing and a deep bipartisan commitment to correcting this process to better protect the homeland security interests of the United States.

Mr. Chairman, I think the whole controversy involving Dubai has revealed a process that has been deeply flawed now for some time, evincing in what is in a significant degree a pre-September 11 mindset. I think Senator Schumer put his finger on part of the problem, gentlemen, which is historically, the CFIUS process has defined the national security interests of the United States in much too narrow terms, terms which might have been adequate some years ago but no longer are, putting a preeminent emphasis upon our interests in trade, which are legitimate but cannot supersede national security concerns. We cannot put an interest in profit ahead of our national security.

But I am afraid that this process, in its ideological commitment to free trade, has too often done that in the past. I am going to mention one specific instance here in a moment. I think, Mr. Chairman, since this process, since its inception in 1988, one transaction has been declined because of national security concerns. That does not evince a very exacting standard, gentlemen.

We had a hearing in the Intelligence Committee yesterday which by definition I cannot get into. Let us just say, gentlemen, it is a good thing that we are having a 45-day additional review. It was my impression that there was relevant information sitting on desks in other parts of the Government that had not been included in this review process. Some of it was timing issues, but we need a process that is more comprehensive and better coordinated to ensure that all relevant information is made available to the decision maker, and as I said, a better balance is struck between national security concerns and our interest in free trade.

Finally, Mr. Chairman, this has been an issue that has been on my mind for some time, gentlemen, and frankly, I do not know whether you were around a couple of years ago. Colleagues, there was a company in Valparaiso, Indiana called Magnequench. They make 80 percent of the rare earth magnets that allow our smart bombs to function. That company was sold to a Chinese consortium. It has now been dismantled. The entire production capability has been moved to China.

It is not very smart to rely on China for a critical component of an important weapons system for our country, but that is what this process has allowed. That is what we now confront. And I think that is what all of us on this panel are determined that will no longer be allowed to happen.

And frankly, gentlemen, last thing, and this is not the pique of one U.S. Senator. We brought these concerns to the attention of the relevant authorities at the time, and we were just treated dismissively. It just did not seem to matter a whole lot. It was all about interests in trade, profits, rather than a meaningful balance with national security interests. That needs to change.

Thank you, Mr. Chairman.

Chairman SHELBY. Thank you. We will start with Secretary Kimmitt and move on.

Mr. Secretary, welcome to the Committee again.

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

Mr. KIMMITT. Thank you, Mr. Chairman. Chairman Shelby, Ranking Member Sarbanes, Members of the Committee, thank you for the opportunity to appear before you this morning to address both the Committee on Foreign Investments in the United States and its role in the review of DP World's acquisition of P&O.

As you noted, Mr. Chairman, my colleagues and I testified before the Committee last fall. At that time, the Committee was engaged in a broad examination of the CFIUS process. Before discussing the review of the DP World transaction, let me review that process.

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

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

This process has evolved over time to keep pace with changes to the concept of national security. Picking up, I think, on a point a number of Senators made, I think you first, Senator Dodd, but also, I heard this from Senator Bayh earlier, in 1998, the intelligence Community Acquisition Risk Center, acronym is CARC, was created. This office is now under the Director of National Intelligence and provides CFIUS with a threat assessment of the foreign acquirer.

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

CFIUS operates through a process in which Treasury, as Chair, receives notifications of transactions, circulates these and other materials, including the intelligence assessment, to the Members of the Committee and coordinates the interagency process. Upon receipt of a filing, CFIUS staff conducts a 30-day review during which each CFIUS member examines the national security implications of the transaction, including, again, the CARC threat assessment.

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

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

Let me turn now to the DP World transaction. At the outset, let me note that this transaction was not rushed through the review process in early February, nor was it casual and cursory. As you and others have noted, Mr. Chairman, on October 17, 2005, lawyers for DP World and P&O informally approached the Treasury Department staff to discuss the preliminary stage of the transaction. This type of informal contact enabled CFIUS staff to identify potential issues before the review process formally begins; in other words, before the 30-day clock begins to run.

In this case, Treasury staff identified port security as the primary issue and immediately directed the companies to the Department of Homeland Security. In October, DHS and Department of Justice staff met with the companies to review the transaction and security issues.

On November 2, as you noted, Mr. Chairman, Treasury staff requested an intelligence assessment from the Director of National Intelligence. Treasury received this assessment on December 5, and it was circulated to all staff members of CFIUS. On November 29, DP World issued a press release concerning this transaction.

On December 6, staff from the CFIUS agencies met with company officials to review the transaction and to request additional information. On December 16, then, after almost 2 months of informal interaction and 45 days after CFIUS requested the intelligence assessment, the companies officially filed their formal notice with the Treasury, thereby beginning the 30-day process. Treasury circulated the filing to all CFIUS departments and agencies but also added the Departments of Energy and Transportation because of their statutory responsibilities and their experience with DP World.

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

Last Sunday, as a number of you have noted, Mr. Chairman, DP World announced that it would make a new filing with CFIUS and requested a 45-day investigation. Upon receipt of DP World's new filing, CFIUS will promptly initiate the review process, including DP World's request for an investigation. The 45-day investigation will consider existing materials as well as new information anticipated from the company. Importantly, the investigation process will also very carefully consider concerns raised by Members of

Congress, State and local officials, and other interested parties. We welcome your input throughout this process, starting with the points you have raised at today's hearing.

Mr. Chairman, since my last appearance before this Committee, we have worked to address several of the flaws that you and the GAO had identified in the CFIUS review process. We have revised the interagency process to address the important concerns raised by you, Senator Sarbanes, and other Committee Members, specifically to ensure that all members, especially the security agencies, have the sufficient time and opportunity to review transactions, identify any security concerns, and fully address those concerns.

My takeaway from that earlier hearing, Mr. Chairman, was that that was the most important thing we were looking at, to make sure that nobody stopped a security agency from having the time to make its views known and either get them resolved or, if necessary, move further in the process. Nonetheless, it is clear that we agree that improvements are still required. In particular, we must improve the CFIUS process to help ensure that Congress can fulfill its important oversight responsibilities.

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

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

Chairman SHELBY. Secretary Edelman.

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

Mr. EDELMAN. Chairman Shelby, Senator Dodd, and other Members of the Committee, thank you for the opportunity to appear before you today to discuss the Department of Defense's role in the Committee on Foreign Investments in the United States and in our review of the Dubai Ports World and Peninsular and Oriental Steam Navigation Company transaction.

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

First and foremost, our primary objective in the process is to ensure that any proposed transaction does not pose risks to U.S. national security interests. And to do this, the Department of Defense reviews several aspects of each transaction, including the importance of the firm to the U.S. defense industrial base; that is, whether it is a sole source supplier and, if so, what security and financial costs would be incurred in finding and/or qualifying a new supplier if required; is the company involved in the proliferation of sensitive technology or weapons of mass destruction? Is the company to be acquired part of the critical infrastructure that the Department of Defense depends on to accomplish its mission? And can

any potential national security concerns that are posed by the transaction be eliminated by the application of risk mitigation measures either under the Department's own regulations or through negotiations with the parties.

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

On December 16, the Department of the Treasury received an official CFIUS filing. On that same day, Treasury circulated the filing to all CFIUS member agencies for review, DTSA staffed the filing to 16 other Department of Defense elements or agencies for review and comment. The review conducted by the Department of Defense on the transaction was neither cursory nor casual; rather, it was in depth, and it was comprehensive.

The transaction was staffed and reviewed within the DoD by 17 of our agencies or major organizations. In this case, DoD agencies reviewed the filing for impact on critical technologies, the presence of any classified operations existing with the company being purchased, military transportation and logistics as well as other concerns the transaction might raise.

During the review process, the Department of Defense did not uncover any national security concerns that warranted objection to the transaction or requiring a 45-day investigation. These positions were approved by staff that ranged from subject matter experts up to a Deputy Under Secretary of Defense as appropriate to the different offices undertaking the review, and all who were consulted arrived at the same position. Do not investigate further.

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

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

The Defense Technology Security Administration, which reviews, coordinates, and analyzes the recommendations from all the DoD components as well as assessing export control and sensitive technology issues, ultimately signed off on the transaction for the Department. Therefore, we had a comprehensive and in depth review

of the transaction, and no issues were raised along the way by any agency or department within the Department of Defense. We remain comfortable with the decision that was made in that review.

I would like to get back to Senator Dodd's opening questions. He raised a number of, I think, constructive questions about the process and also with regard to Chairman Shelby's opening statement. When I first came into my responsibilities last August, I was early on made aware by the Acting Director of DTSA of the GAO report and the concerns that had been raised about the security agencies having an adequate opportunity to express any concerns they might have about a pending transaction, particularly the difficulties of dealing with such transactions when there are complicated technological issues that have to be either worked through or analyzed by some of the respective components that I have mentioned or that might require detailed negotiations for mitigation measures with the companies involved.

Shortly thereafter, Secretary Kimmitt took the initiative to call me, asked me to come over and to visit with him at the Treasury and talk about what we might do to help fix the process, and as a result of those conversations and conversations he had with others, several steps were taken to use the prefiling notification period, for instance, to try and address some of these concerns, to make clearer who had the lead among agencies in looking toward risk mitigation issues. In this instance, I believe it was DHS, and Secretary Baker may address that, but also discussing withdrawals or refilings by companies to allow time for these kinds of security questions to be worked out.

No doubt, there were more things that could be done to improve the process, but there have been steps at least since I came into office in August to try to address many of the concerns that were raised by the Members in their opening statements.

I would also like to take the opportunity to provide a perspective from the Department of Defense point of view regarding our relationship with the United Arab Emirates and their support as a friend and ally in the global war on terrorism, and Senator Hagel and several others in their statements have also alluded to the importance of UAE in that regard.

In the war on terrorism, the United States needs friends and allies around the world and especially in the Middle East to help in this struggle. Simply put, we need a community of nations to win this long war. In our recently published quadrennial defense review, we highlight that in conducting the fight to preserve the security of the American people and our way of life, it is important that we strengthen the bonds of friendship and security with our friends and allies around the world.

We must have the authority and resources to build partnership capacity, achieve unity of effort, and adopt indirect approaches to act with and through others to defeat common enemies. The United Arab Emirates is an outstanding example of the kind of partner critical to winning the long war. Dubai was the first Middle Eastern entity to join the Container Security Initiative, a multinational program to protect global trade from terrorism. It was also the first Middle Eastern entity to join the Department of Energy's Megaports initiative, a program aimed at stopping illicit shipment

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

As you may know, the UAE provides the United States and our coalition forces with important access to their territory and facilities. General Pace has summed up our defense relationship by saying that, "in everything that we have asked and worked with them on, they have proven to be very, very solid partners." I would note as well that a couple of days ago in *The Wall Street Journal*, former Secretary of Defense Cohen and former Commandant of the Coast Guard Admiral Loy wrote that, "some critics have suggested that the UAE is a foe and not a friend. In fact, the UAE has been a staunch ally of the United States, which has been confident enough in that country to send its sensitive military equipment and technology."

U.S. Naval forces traditionally make more port calls in the UAE than anywhere else in the world. When peacekeepers went into Kosovo, the UAE provided personnel and equipment of great value to the NATO commanders. Specifically, the UAE provides excellent access to its seaports and airfields, like Al Dhafra air base as well as overflight through UAE air space and other logistical assistance.

We have more Navy port visits, as I just mentioned, in the UAE than any other port outside the United States. Last year, U.S. Naval warships and Military Sealift Command ships spent over 1,400 days in the ports of Dubai, Jebel Ali, Abu Dhabi, and Fujairah. And by the way, the port at Jebel Ali, which is the only carrier-based port in the Gulf, is managed by DPW.

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

We should note that our most important commodity, our military men and women, are frequent visitors to the UAE on liberty or leave while deployed to the region, so we rely on the Emirates for our security in their country, and I appreciate and thank the Government of the UAE for that. Our close military to military relationship with the UAE also includes the use of the UAE Air Warfare Center established in January 2004, where our pilots train with pilots from countries across the Middle East.

Finally, the United Arab Emirates have been very supportive of our efforts in Afghanistan and Iraq. They have provided military and operational support to Operation Enduring Freedom in Afghanistan and financial and humanitarian aid to Afghanistan and its people. The UAE has provided monetary and material support to the Iraqi Government, including a pledge of $215 million in economic and reconstruction assistance.

Chairman Shelby, that concludes my formal assessment. I would be happy to answer any further questions you or your colleagues have after my other colleagues had a chance to have their say.

Chairman SHELBY. Secretary Baker.

STATEMENT OF STEWART BAKER, ASSISTANT SECRETARY FOR POLICY, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. BAKER. Thank you, Chairman Shelby and Members of the Committee.

The Department of Homeland Security is the newest member of CFIUS, and I think it is fair to say that we have been one of the most aggressive in raising new kinds of national security issues because of the breadth of the kinds of national security concerns that we are responsible for in the wake of September 11. But we did not object to this transaction, and I think the question that the Committee has asked is why, so let me see if I can give you an explanation of how we arrived at that conclusion.

First, it is important to understand what a terminal operator is. If you had read the press, you would think that our ports were being taken over by a foreign company, that we had outsourced security to a foreign company. None of that is true. The acquisition at issue here is of terminals, terminal leases, typically, in several major ports.

A terminal operator has essentially three assets. They have a pier; they have a crane; and they have a parking lot to put the cargo in. And what they do is they use the crane to take cargo out or put cargo in a ship and then to store it in the parking lot next to the pier. The facilities that we are talking about here, the terminals, far from representing the whole of the ports that are at issue, I think there are in these ports about 800 regulated facilities. Twenty-four of them are being transferred in this transaction, so it is substantially less than 10 percent of the facilities in the ports that we have been talking about.

Nonetheless, to say that does not mean that there was no risk in this transaction. I would not say that. We had to ask ourselves three questions in evaluating that risk. First, what legal authority and programs do we have already in place that would allow us to address any risks? Second, what do we know about these companies that might affect our evaluation of the risk? And third, is there anything more that we want from the companies in order to minimize the risk?

To address that first question, what authority, what programs do we have. Since September 11, we have increased spending on port security by 700 percent. It is now on the order of $2 billion a year. What we have done with that money is it is principally spent by two components. The U.S. Coast Guard, which administers a law passed since September 11 which required that there be port security plans for all U.S. ports and that all facility owners within those ports have facility security plans. That means that each of the facilities that is being transferred in this transaction in the United States has a facility security plan. It is inspected by the U.S. Coast Guard.

The U.S. Coast Guard also has the authority to conduct inspections of overseas ports. We came to the realization, I think, quickly after September 11 that if someone were to use a container to send a weapon of mass destruction into the United States that it would be a Pyrrhic victory if we found it in Newark while we were conducting inspections in Newark. We should, if possible, worry about the security of foreign cargo, foreign ports so that weapons that

could cause us harm do not enter into ships bound for the United States and so that we are not doing our first inspection in the United States.

We also have substantial authority with respect to cargo. For the same reason that we inspect foreign parts, we now require that shippers sending cargo to the United States tell us what is in that container 24 hours before it goes on the ship, so that we can say I am sorry; we are not satisfied with the risk factors associated with this container. We are going to send it to radiation screening or some other form of inspection in the foreign port itself.

We do that in 42 ports today. We are expanding that to 50, which covers about 80 percent of the containers bound for the United States, and that program will continue to expand.

We also have started a program in which participants in the supply chain, everyone from the manufacturer of goods who uses the container all the way through to the terminal operator and the purchaser adopt best security practices so that we can be sure that it is very difficult to introduce some foreign weapon or other dangerous material into an ordinary commercial container shipment.

So we do have substantial security programs in place addressed at precisely the concerns that have been raised by this Committee. We did not stop there, of course; we also asked what do we know about these companies? It turned out, quite a bit. We knew quite a bit about DPW, even though they do not do business in the United States, because they had been instrumental in helping us to do some of the screening that we have moved out to foreign ports. They were an early and voluntary participant in a Department of Energy screening program in Dubai, and when we set up our own screening program in Dubai, they were instrumental in helping that get set up in about 3, 3½ months in contrast to what is often a 12-month process. They were very helpful, very professional, and very cooperative.

We also, of course, know the U.S. facilities quite well. They are currently run by P&O Ports North America. The Coast Guard had inspected them, and they had joined our voluntary program of best security practices, so that we knew what kinds of security practices they had signed up to willingly.

Even so, with that background, we decided that we were going to take a step that was unprecedented in this area. We often have negotiated assurances with respect to telecommunications companies and high-tech companies about how they will add additional protections to national security after a transaction has gone through. We had never done that in the context of a ports transaction before. We nonetheless decided that in order to add an element of security to this transaction, we would ask for assurances from the parties.

They gave us those assurances. The assurances are really twofold: One, they agreed that the programs that they had entered into voluntarily, the foreign port screening, the best security practices in the United States, would no longer be voluntary for those companies. They are now mandatory for those companies. And second, they agreed that they would open their books to us essentially and allow us to get access to any information about their U.S. operations that we wanted without a subpoena, without a warrant, sim-

ply walking in with a written request and getting that information. That will allow us, for example, to get current lists of employee, Social Security numbers, dates of birth so that we can run those names through watch lists, conduct our own background investigations, and the like.

It was only after we had gotten this unprecedented set of assurances that adding to the other safeguards that we saw in the transaction that we concluded that there was not a basis for going forward to a further review.

Thank you.

Chairman SHELBY. Secretary Joseph.

STATEMENT OF ROBERT JOSEPH
UNDER SECRETARY FOR NONPROLIFERATION
U.S. DEPARTMENT OF STATE

Mr. JOSEPH. Mr. Chairman, Senator Sarbanes, thank you very much for the opportunity to testify before this Committee and all of its distinguished Members.

Given what has been said, I think I can be very brief. I would just emphasize that as others have said, the UAE is a strong friend and ally of the United States. After September 11, the UAE leadership made the strategic decision to be with us on the war on terror and has been a key partner ever since that date. Others have spoken to the contribution that the UAE is making in this essential effort, providing the United States and coalition forces with unprecedented access, overflight clearances, and other critical and important logistical assistance, providing outstanding support for our air and Naval forces, extending vital military and political support to Operation Enduring Freedom in Afghanistan and substantial financial and humanitarian support to the Afghan people and also providing significant material support to the Iraqi Government.

The UAE has worked with us very closely to suppress terrorist financing and money laundering, including freezing accounts and acting very aggressively enforcing its money laundering regulations, exchanging information, and conducting investigations.

On the nonproliferation side, while the UAE record is not perfect, it has been a solid partner. It is one of a number of countries that has cooperated with us to deny Iran access to nuclear and missile technology. It has disrupted financial transactions, stopping WMD activities. It has closed down proliferation-related front companies and has taken very direct actions to counter the proliferation of WMD and missiles in other contexts.

There are gaps, but we are working very closely with the UAE to close those gaps. I visited the UAE last October to create the counterproliferation task force, which is intended to improve our mutual efforts to combat weapons of mass destruction. The UAE, I would also point out, has also been one of our best partners in unraveling and closing down the A.Q. Khan network, elements of that network having operated on its territory.

It has been very active in investigating those involved in the network and working effectively to prosecute those that committed the illicit actions involved. UAE authorities have been very helpful in pursuing individuals and companies who work to facilitate the network's activities. The UAE, for example, closed down SMB Com-

puters and other companies when it was discovered that they were acting as front companies for the Khan network.

In sum, the UAE is a moderate Arab state. It is a supporter of our efforts to achieve peace in the Middle East. It has reached out to the United States in a friendship, as someone noted, being one of the first nations to offer financial support to the United States after Hurricane Katrina.

The United States and the UAE are working together to create a stable economic, political, and security environment in this very key region, and our national security, quite frankly, benefits significantly from its support and its activities both in the war on terrorism as well as its efforts to stop the proliferation of weapons of mass destruction and missiles.

Thank you.

Chairman SHELBY. Thank you, Mr. Secretary.

Secretary Kimmitt, I among the many here are puzzled by the Administration's interpretation of what we call the Byrd Amendment, the requirement for a full investigation when state-owned or controlled entities are involved. The law states that the investigation is required if the transaction could affect the national security of the United States. I can read the statute and see how you arrived at your interpretation, as the review determined that there was no risk to national security. We will put aside for a moment the extraordinarily low bar placed in the law by the use of the word could. It is a stretch, but I will try to get there.

But I cannot get there if I apply an intellectually honest approach that takes into account the clear intent of the statute. Senator Byrd, in introducing his amendment on the floor of the Senate on September 18, 1992, stated, "that it requires that any acquisition that involves a company controlled by a foreign government must automatically receive the more detailed 45-day investigation." These are the words of the sponsor, Senator Byrd.

Given this disturbing gap between the clearly stated intent of the statute and the Treasury Department's interpretation of it, I would like to hear from you today how exactly the Department interprets the Byrd Amendment and whether, in its deliberations, it has had opportunity to review the amendment's legislative history. That is what we do.

If you familiarize yourself with the legislative history and believe the statute is unclear, would it be fair to say that you are putting the letter of the law over the spirit of the law? If the statute is unclear, what would you suggest would help to clarify it? It seems to me that Senator Byrd's words on the floor of the Senate, the intent of this is clear and unambiguous.

Mr. KIMMITT. Mr. Chairman, I sincerely regret that we have this difference, and I think it is important that we resolve it quickly. I think with regard to the DP World case, as soon as we receive the filing, we will begin the 45-day investigation. But as many of your colleagues have said, we are not talking just about the DP World case. As important as that is, we are talking about what goes beyond.

Clearly, we are strongest in protecting our national security when the parties and the branches are together. We should not let a legal interpretation separate us.

Chairman SHELBY. But that is what you are doing.

Mr. KIMMITT. But that is what, I will have to say, has been the consistent legal advice given to CFIUS going back to 1992, even in light of reading the legislative history. Your colleague, Chairman Warner, had asked, and there is being prepared by the Department of Justice, a memorandum outlining the Administration's view on this.

As a policymaker, I would rather not parse the legal interpretation, but I will say that it has been consistent across Administrations. Just for example, by coincidence, in the 8 years of the Clinton Administration, there were 46 instances of government-owned and controlled companies seeking to make acquisitions in the United States. One went to investigation.

In the Bush Administration through the end of 2005, coincidence, also 46 cases, four of which went into investigation, and I would note all after September 11. But the fact is I do not think this is a partisan issue. I think we have a difference, and I think we have to close the gap. I have spent more time talking about legal interpretations and less about protecting the national security. I know that is your first priority; it is ours.

But I will just tell you that the people who did the security review, many of them who have been involved in this process going back many years were getting that consistent legal advice from their counsel. It was not really a Treasury interpretation as much as it was an interagency, sir. I regret that we are at that point.

Chairman SHELBY. I do, too, because I think it is a loose interpretation of the intent of the statute and the words of the statute.

When briefing this Committee's staff on the Committee on Foreign Investment's conclusions with respect to the Dubai Ports acquisition, the phrase that was repeatedly used in explaining those conclusions was that the interagency process turned up, "no derogatory information on the foreign owned company in question." Could you explain for the Committee what it means to sign off on an acquisition on the basis of an absence of derogatory information on a foreign-owned company?

Did the pre-review and formal review include a thorough examination of the potential risks to critical infrastructure posed by any transaction involving a Middle Eastern country's management of U.S. terminal operations? Secretary Joseph, did the review include a thorough examination of the proliferation risk posed by an acquisition by a country that in very recent history, as you have referenced, was a major throughway for nuclear components as part of the A.Q. Khan black market of nuclear parts?

First, Secretary Kimmitt, do you want to——

Mr. KIMMITT. Mr. Chairman, the answer to your question was that the critical infrastructure question was looked at during the initial review. That is why we had as many agencies involved in the review. I think there were literally hundreds of security professionals involved in this process when you hear that the Defense Department, once they get the notice, sends it out to 17 component agencies, but that is also why we have—not only the Department of Homeland Security; reached out to the Transportation Department and others to make sure that those nontraditional indicia of national security, the post-September 11 indicia, were represented

by the people who have statutory responsibility day after day to carry those out. So those were taken into account.

With regard to your point, before I turn to Under Secretary Joseph, I did not, I do not think, participate in the briefing you referred to.

Chairman SHELBY. We are talking about a briefing for the staff.

Mr. KIMMITT. Right; no derogatory information. That actually is a standard that is implied—one of the standards applied and one of the conclusions that is reached in terms of the intelligence community assessment of this or any other transaction. The measure for a member of CFIUS at the end of the 30-day process is have you raised all your national security concerns? Have they been satisfactorily addressed? If not, we go into investigation.

So it is not just no derogatory information. The person has to be satisfied. When he or she signs on the bottom line their most sacred oath, this transaction will not adversely affect the national security interests of the United States, that is the only standard. The no derogatory information or whatever the result is from the intelligence community informs that decision, but remember, we are talking about human beings here who are discharging their most important function when they clear on those things.

And Senator Sarbanes has asked, and we will certainly provide the names of the people involved. But I will tell you, I think that the people at the professional security level who have been doing this for quite some time are motivated by one thing and one thing only, and I am sure you will agree. What was right for the country?

Chairman SHELBY. Secretary Joseph, do you want to comment on the proliferation stuff?

Mr. JOSEPH. Yes, sir.

Let me just say that the State Department does have a very rigorous review process for CFIUS transactions. All transactions are referred to a number of bureaus, with the Economic Bureau in the lead. But that also includes the Bureau for International Security and Nonproliferation and the Political Military Bureau, both of which report to me as well as other bureaus, including the bureau that deals directly with intelligence.

In terms of your specific question, Senator, yes, the proliferation record was taken into account. I would note that the activities of the A.Q. Khan network stretched over three continents, involved many countries in terms of where the illicit activities took place, including in Asia and in Africa as well as a good number of countries in Europe.

Chairman SHELBY. Secretary Kimmitt, you have, on a number of occasions, pointed out that you are restricted from sharing information by the statute. According to the relevant subsection, though, while the information is exempt from Freedom of Information requests as not to be made public, I will quote the statute, "nothing in this subsection shall be construed to prevent disclosure to either House of Congress or to any duly authorized Committee or Subcommittee of the Congress."

Clearly, there must be considerable attention given to drawing the line between appropriate levels of Congressional oversight and the legal requirement to protect proprietary information. We understand that. Can you provide this Committee some insight on

how you feel that balance can be better maintained? Should this Committee be briefed on pending cases such as this? I mean, this has caused a firestorm in this country, or only on closed cases?

You know, this is not the first time you have been before this Committee dealing with CFIUS.

Mr. KIMMITT. Right, Mr. Chairman, and as I said, when we were together last fall, I think that the most serious concern was that the security agencies needed to have time to do their reviews. I think we have made major progress on that front. The other, though, was Congressional transparency, giving you the ability to exercise your important oversight responsibilities.

I think we have made some progress, but your dissatisfaction makes clear that the process in its entirety did not work.

Chairman SHELBY. It is not just my dissatisfaction.

Mr. KIMMITT. Right, I understand.

Chairman SHELBY. You just need to go out and talk to the people at the coffee shop in Montana or Oregon or whatever you want to go. There is great concern.

Mr. KIMMITT. I would not mind being there right now, but I am before their elected representatives.

[Laughter.]

Chairman SHELBY. They might have a lot of questions for you.

Mr. KIMMITT. And we should be ready to answer those. Because at the end of the day, every one of us is here to ask the question, what can we do every day to protect the national security interests of the United States and advance the aspirations of its people? That is why you are in government; that is why I have come back into government.

Let me answer the question on the notification. You and I have had several conversations after the hearing. We had set up, although someone had proposed an annual briefing on closed cases; as you know, we have set up a system of quarterly briefings on closed cases. Indeed, we are scheduled to brief you on this case, DP World, even before the firestorm hit. But it was, you are right, a closed case.

I think the real question, as I mentioned in my opening remarks, was how do we interact on pending cases to allow you to discharges your responsibilities, us to discharge ours? What the law says, its strictest part is that there cannot be public disclosure of information provided to us during the course of a review. I think that you put that in there because you wanted to make sure that companies felt comfortable giving us that sensitive proprietary business information that we need to make the national security determination.

And I guess I would like to suggest that we work with you; I think that now that we have decided on a mechanism on closed cases on how we can interact on pending cases in a way that ensures that the security review is done on a professional basis, we continue to get good, objective intelligence but also the companies feel comfortable in sharing this proprietary information with us.

Senator Bayh mentioned one statistic. Everyone always says 1,500; it is actually almost 1,600 cases now and only one disapproved. What we probably need to give you more visibility into is how many cases do not even get into the process. I will give you an example. At its high point in 1990, 295 notifications came to the

Committee. Today, there are 65. What that means is people have begun to understand that they have to meet certain standards, particularly in the post-September 11 world, and those cases go away before we come in.

But I do not think we would want a company to fear reputational risk if they could not share with us that sensitive proprietary information. But I do think, as we get closer to a formal filing into that pending process, I am very open to discussing with you how we could provide you the information that you need consistent with those points.

Chairman SHELBY. Did it ever occur to you in the Committee on Foreign Investments that this would be a very sensitive case, sensitive and concern by the American people, that someone coming from an area that—in the Persian Gulf, no matter how they were doing now has had some history of questionable activities and you did not even let us know, me, Senator Sarbanes, the Members of this Committee after we had that hearing in October? Why did you not do that?

Mr. KIMMITT. Mr. Chairman, if I could, I think I will pick up a question that Senator Sarbanes asked and a comment that Senator Dodd made. I have no idea why none of the hundreds of people involved in that security review did not raise their hand and try to move it up in their organizations. To answer your question, Senator Sarbanes, I, too, learned about this after the fact.

In February, a staff member brought it to my attention. I got the facts quickly. I told my boss, and I said let us notify the Hill, and I called you very shortly thereafter, Mr. Chairman. If I had known about this earlier, you would have known about it earlier. That is the process that we have to improve.

Chairman SHELBY. You remember what I told you? You remember, I said this is a political firestorm, may be a debacle.

Mr. KIMMITT. Sir, that is why I called you as quickly as I had told my boss about the subject. We took a look at what had been done. I still believe that the professional security officials did the job that we wanted them to do. I think the interagency process worked right; always room for improvement; I am always open to suggestions from my colleagues.

What we have to get right is notification within the departments at higher levels. We have to involve a broader group in the departments, and we have to find a way much more quickly to come into contact with you.

Chairman SHELBY. Thank you.

Senator Sarbanes.

Senator SARBANES. Thank you very much, Mr. Chairman.

Gentlemen, I am going to try to go through some questions here rather quickly, because we have time limits. But I do first want to say to Secretary Kimmitt that a policy is not something distinct from what the law provides. I mean, you were making the statement, well, I just do policy, and someone else does the law.

The statute provides the framework within which you must do your policy. That is where your authorities come from. You do not have a blanket authority. You have an authority provided to you by law. And therefore, what the law provides is extremely impor-

tant. The Administration cannot run around and do whatever it wants willy nilly without regard to what the law provides.

Does anyone at the table think that taking over terminal operations in a port could not affect the national security? If I came to you and said this is going to happen, do you think it might have an impact on the national security? Presumably, you would say, well, it could, and we have to take a look at it, would you not? Would anyone not say that?

Mr. KIMMITT. Senator Sarbanes, I do not think so. And I do not think that is what happened in this case. I think those professional people who looked at this did have concerns that could affect the national security and through the 60-day prefiling process and the 30-day process were able to resolve those concerns.

Senator SARBANES. That is not what the law says. If you once concede to me that it could affect the national security—this is not buying a toy company somewhere to make some toys, where you say, well, we cannot imagine any effect on the national security; clearly, this implicates the national security.

The law says the President or the President's designee shall—not may—the first paragraph says may—says shall make an investigation. And I think you were required to do that, and you did not do it in this instance.

Now, we will go back and review the other cases to which you make reference. I do not know what activities they encompassed. But this was written in here. When you have a foreign government involved in the takeover, you move to, if it could affect the national security, you move to a 45-day investigation.

I mean, we may have to lengthen the time periods here. I know you do not want to do that, because you want to move these things along, but we may have to lengthen the time periods and make it very clear what requires an investigation.

It is the same thing as a case about providing information, the other question the Chairman asked along this same line. It said nothing in this subsection, the one that gives you the authority not to make the information public says nothing in this subsection shall be construed to prevent disclosure to either House of Congress or to any duly authorized Committee or Subcommittee of the Congress.

Now, I take it from what you just said, you did not know about any of this, is that right, until it happened?

Mr. KIMMITT. I learned about it after the fact, Senator.

Senator SARBANES. Now, who is the Chairman of the Committee on Foreign Investments in the United States?

Mr. KIMMITT. By executive order, confirmed by the statute, it is the Secretary of the Treasury.

Senator SARBANES. Secretary of the Treasury. Now, presumably, the Secretary of the Treasury did not know about this either?

Mr. KIMMITT. Not until I notified him, sir.

Senator SARBANES. All right; now, you are the Deputy Secretary of the Treasury.

Mr. KIMMITT. I am.

Senator SARBANES. So you did not know about it either.

Okay; who chaired this committee on this specific instance?

Mr. KIMMITT. The way this works, the Committee on Foreign Investment in the United States is an interagency committee. It operates as other interagency committees do in that there is a staff level; there is a policy level, deputies, and then, the full committee. In this case, it was the staff and policy levels; that is, up to an assistant secretary or, as Secretary Edelman said, a deputy under secretary, who were involved.

Senator SARBANES. Well, who was the—I am trying to get some accountability here.

Chairman SHELBY. Names, names.

Senator SARBANES. Who was the chair of the committee as they considered this particular issue?

Mr. KIMMITT. That would be at the staff level. We have a deputy assistant secretary and an office director who are responsible for it at the staff level and then an assistant secretary at the policy level.

Senator SARBANES. Who decides?

Mr. KIMMITT. At the end of the day, the staff receives the input from all of the departments and agencies in terms of their views as to whether there are concerns, have they been addressed, do they need more time? If it is by consensus, then, generally what happens is that either at the assistant secretary level, there is a meeting or a sign-off by people at the assistant secretary level.

Senator SARBANES. That happened in this instance?

Mr. KIMMITT. It did. I would have to get you the details in terms of who was involved elsewhere, but it is then cases in which there are still issues that remain or any controversy that would come up. If the consensus has been reached, a decision is usually made at that staff or policy level.

Senator SARBANES. And does someone sign off on it? Is there a piece of paper with people's signatures saying that this is okay, and it should go ahead?

Mr. KIMMITT. There is a record, Senator Sarbanes.

Senator SARBANES. Has that been furnished to the Committee?

Mr. KIMMITT. I do not think it has been furnished, but we would be glad to put that together, sir.

Chairman SHELBY. We would ask for it.

Senator SARBANES. Yes.

Chairman SHELBY. We would ask for it.

Mr. KIMMITT. All right, sir.

Senator SARBANES. Now, why should Treasury chair this group?

Mr. KIMMITT. I have asked myself that question many times in recent days. This has been a process that has wanted to make sure that that range of issues that we have discussed today is considered. Treasury, I think, was designated when it was first created years ago, but there were the national security agencies on there right from the start.

I think some of the suggestions that have been made today, including the notion of the DNI being a member of CFIUS—any time I have a meeting of the deputies, the DNI or his rep is always there. I think the idea of some vice-chairs is a very good idea, but I think the feeling was, going back to what the Chairman said, was that the United States has benefitted from an open investment policy.

There are today between 5 million and 6 million Americans employed by companies headquartered overseas; 20 percent of our exports; $30 billion a year in development; and, therefore, we need to operate within the context of an open investment policy. But our first priority, as I testified today and in the past, is to protect our national security. And so, there is no way that a transaction can go forward if any agency, particularly any security agency, refuses to agree with it going forward.

Senator SARBANES. The GAO, in their report, which I presume you have gone over carefully, says the manner in which the Committee on Foreign Investment in the United States implements Exon-Florio may limit its effectiveness. For example, Treasury, in its role as chair and some others narrowly define what constitutes a threat to national security. And they go on to say the Committee is reluctant to initiate investigations because of a perception that they would discourage foreign investment, a potential conflict with U.S. open investment policy.

Of course, the Treasury has the responsibility to finance our debt, correct?

Mr. KIMMITT. We do, sir.

Senator SARBANES. Yes, so the inflow of foreign capital in the current economic circumstances in which we find ourselves is an extremely important priority for the Treasury Department, is it not?

Mr. KIMMITT. It is, sir.

Senator SARBANES. Yes.

Then, they go on to say Treasury in its capacity as chair applies a strict standard in determining whether an acquisition should be investigated. The Chair has established as the criteria for initiating an investigation essentially the same criteria that the law provides as a basis for the President to suspend or prohibit the transaction or order a divestiture.

Defense and other agencies have argued that since the statute applies these criteria to Presidential decisions, these criteria should not be the standard for initiating an investigation. In other words, whether you go to an investigation should have a lower standard in terms of the danger to the security than the final judgment that would have to be made by the President at the end of the 45-day investigation period.

Mr. KIMMITT. Senator Sarbanes, the GAO has done very good work in this area. You and I had a conversation about a critical comment a Treasury official had made about the GAO report. I told you that that did not reflect my views.

After our hearing, I sat down at length with the GAO to get more understanding of their point of view, and I will have to say, on the point that you have raised here, I just have really not found any basis for the fact that Treasury was somehow narrowing the ability of agencies to put their national security concerns on the table.

I will tell you what the standard is for me. If any agency of the Government is not prepared to sign off on the deal, it goes to investigation. It is a consensus. It is an interagency process. It is the way the interagency process runs. If you cannot get agreement at one level, you keep moving it up until you get to the ultimate decision maker.

I think there had been in the past some arguments on legal interpretations, on thresholds, and all the rest, but to me, it is very straightforward. And in this instance, if any agency, going back to Senator Dodd's point, had raised a hand, said I need more time, I have a concern, I do not think the assurances are good enough, we would have gone to the 45-day investigation.

I really do not believe that the Treasury Department, as much as we do support an open investment policy as part of a strong national and world economy, is in a position to influence the most fundamental decision any government official has to make, and that is signing off that the national security is going to be protected. And so, some of the people who work on this in the Department are with me. I am sure some others are watching. That is the standard that applies for me. What is right for national security. And if these departments and the many others are not prepared to say that, we go forward to the investigation, or the deal goes away.

Senator SARBANES. Well, is the standard you are using the same standard that the President would use if you went to an investigation? Is the standard you use to go to an investigation the same standard that the President would use at the end of the investigation in order to make his determination whether to say yea or nay?

Mr. KIMMITT. I think at the end of the investigation, Senator, the President would look at the recommendations from all of his Cabinet members who have participated in that, and he would make a fundamental decision of what was right for the national security.

Senator SARBANES. Right, but you do not make that determination as to whether—that is not the determination as to whether to go to an investigation.

Mr. KIMMITT. No; exactly, well, it is a determination——

Senator SARBANES. On your part, on the part of CFIUS.

Mr. KIMMITT. Well, but it is; it would seem to me, the question that every official involved in the process has to ask. Are they going to put their name on a piece of paper that is going to be eventually provided to the Committee as having signed off from the perspective of DoD or DHS or anyone else if they thought the national security would be compromised? I do not think so.

So, I think that what pervades the decisionmaking from bottom to top is the same thing that is driving your interests in this. How do we protect the national security of the United States? And I think at each level, that is the question that is being asked.

Senator SARBANES. What you are doing—is 30 days enough to do a thorough investigation in a complex matter?

Mr. KIMMITT. As I testified last time and have subsequently talked with the Chairman and your colleagues in the House, it is very often not enough time if a company just comes in with a filing. If the first time that you hear from them is when they put in their paperwork, because take a look in this case. For the intelligence community to do its assessment required 33 days, and there was some concern expressed about the intelligence community having to rush their assessment, other agencies having not enough time.

That is why we have made clear both in your hearings and elsewhere that parties, particularly to transactions that are complex, and any government-owned or controlled company transaction is

complex, they need to come in to us as early as they can, even before the deal is done.

In this case, they came in 2 months before their formal filing. That allowed us to begin the review process, to get the intelligence assessment both requested and in. But my message to companies would be do not think you can just walk in, drop something on the table, and expect in every instance for it to go through this 30-day period.

Senator SARBANES. Is the material made available in that prefiling period, does that become part of the record?

Mr. KIMMITT. That is a good question, Senator, because it goes to the question of whether some of the protections that you have extended to materials that have been filed by the company; we are looking at that question right now. I would think, I mean, the bottom line is anything the Government has in its possession becomes part of the record, but the formal filing, as I said, is what triggers the 30-day.

Senator SARBANES. Thank you, Mr. Chairman. My time is up.

Chairman SHELBY. Senator Hagel.

Senator HAGEL. Thank you, Mr. Chairman.

Following along the lines of Senator Sarbanes' questions, and I am going to go back to a comment that you made, Secretary Kimmitt, about you have received consistent legal advice on interpretation of the Byrd Amendment. Take me back through some of the history. Does that mean all the way through since the Byrd Amendment was enacted into law, in 1992? Where do you get that advice? Give us a little history.

Mr. KIMMITT. I think it does go back to the beginning of the law, which was in 1992. In fact, responding to a question, perhaps, that Senator Sarbanes raised, those cases that I mentioned, the 46 during the Clinton years, the 46 during the first 4 years of the Bush Administration were all government-owned and controlled companies. So starting in 1992 and running through, I think that the advice that has been given, it would be within Treasury, the General Counsel's office, the same would exist elsewhere, has been, again, that you must go to investigation if there is any security concern that has not been resolved.

Again, I know we have a difference of interpretation on that. I would like to resolve this as quickly as possible. And again, the legal background and advice on this, Senator Hagel, is something that has been prepared by the Justice Department in response to a previously received request.

Senator HAGEL. So it goes back to the beginning of the Byrd Amendment as to when it was enacted into law, the legal—what you are saying the consistent legal advice is to the interpretation.

Mr. KIMMITT. That is certainly my understanding, but I would say in each of those cases, and I really think we have to focus on this, 92 cases in all, only 5 of which went to investigation, in those other 87, there was a unanimous arrangement among the CFIUS agencies that there was no national security concern that had not been addressed.

Senator HAGEL. Are there others who weigh in on the legal analysis of this? Is it all from the Justice Department, and that is the

legal advice you rely on? Are your attorneys at Treasury or any other agency involved in the CFIUS process involved?

Mr. KIMMITT. Generally, people in departments rely on advice from their general counsel's office for issues that come up under their authorizing legislation. If it is something that involves the Government more broadly, then, the Justice Department really speaks on behalf of the Government more broadly, and of course, Justice is a very important member of the CFIUS and were on the panel the last time we appeared.

When we, by the way, as you know, discussed this subject a bit, it did come up also in the GAO report, and the GAO report, I think, or the GAO has done about four studies on this. They have noted this difference of opinion, and frankly, I wish we had gotten to resolution on it quicker. Someone said how do you resolve it. I think you put a period after shall conduct an investigation.

Senator HAGEL. Do you believe that the current law that you are operating under needs to be changed?

Mr. KIMMITT. Well, as I said, the dissatisfaction expressed by this Committee and others makes clear that the process in its entirety did not work right. I think the career security professionals, hundreds of them who did that informal and formal review, performed their jobs admirably and well, and I know that no criticism of those of us here at the table today is meant to suggest that those people conducted their responsibilities other than in the best name of the Nation's security.

But as I said, Senator, we clearly have to do some things inside the departments, and we clearly have to do quite a bit in finding ways to provide you more promptly with the information you need, and I would hope, and I cannot imagine that it would be not part of our discussion that we can very quickly resolve this interpretive disagreement on the Byrd Amendment.

Senator HAGEL. Well, does that, again, I am going to ask the same question. Does that include changing or amending the law, in your opinion?

Mr. KIMMITT. Well, I think it is pretty clear that the Congress is going to come up with new CFIUS legislation. We want very much to participate with you in that process. I think some of the questions that have been raised but also the suggestions that have been put on the table by Senator Dodd and others this morning are ones that we need to look at very seriously.

Senator HAGEL. Thank you.

Secretary Baker, let me ask a couple of questions going back to your testimony on the definition, as you laid it out, of a terminal operator. Would you explain the relationship between that terminal operator and U.S. security officials, specifically Coast Guard, U.S. Customs Service? Where does the division of responsibility end? Is it integrated into the same system? What role does the terminal operator have in port security?

Mr. BAKER. They are subject to regulation by the Coast Guard. The Coast Guard prepares a port security plan, and then, it expects the owners of facilities within that port to have their own facilities security plans that fit into the overall port security plan.

Typically, that would mean for a terminal operator that they would have to have lighting, fences, control over who gains access

to the facility and the like, so that you expect of them what you would expect of a responsible property owner with valuable and sometimes risky material on their property.

They are subject, as I said, to inspections by the Coast Guard. They are also subject to regulation by the Customs and Border Protection Agency, which, particularly in this case, where they belong to our best security practices program, requires extensive background checks for employees, recordkeeping with respect to employees, ID's, and a variety of other security practices, and they, again, are subject to validation by the Customs and Border Protection Agency.

Senator HAGEL. Does that include inspection of containers?

Mr. BAKER. They are not expected to inspect the containers. They are expected to assist. If the Customs official wants to see inside of a particular container, and if it is urgent, we can meet the ship at sea. If it is somewhat less urgent, we can be at dockside and insist on having a particular container removed there.

More typically, Customs will say to the terminal operator these are the containers that we are going to check. Some of them are going to go to radiation screening; others are going to go to ordinary Customs inspection. The terminal operator knows which containers we are looking at. They do not know why. They often do not know what is inside them. They certainly do not know why we are concerned about those particular containers.

Senator HAGEL. So it goes back to your original definition, if I understood it right; the terminal operator has a pier, a crane, and a parking lot for the cargo.

Mr. BAKER. Yes.

Senator HAGEL. And that, within that, is their responsibility.

Mr. BAKER. That is right. They have responsibilities for maintaining security in that area.

Senator HAGEL. One last question, Mr. Chairman. How many ports in the United States are under the management of foreign-owned terminal operators?

Mr. BAKER. Well, as I said at the beginning, the ports are not managed by the terminal operators. The ports are typically managed by——

Senator HAGEL. The definition you used of terminal operators.

Mr. BAKER. The estimates that I have seen, and this turns out to be more difficult to estimate than one would think, are that it is in the neighborhood of 70 to 80 percent.

Senator HAGEL. Seventy to 80 percent? So most of the ports in the United States have terminal operators that are foreign owned.

Mr. BAKER. Yes.

Senator HAGEL. Is that correct?

Mr. BAKER. That is correct.

Senator HAGEL. So what we are talking about here is not anything particularly unusual as far as a foreign-owned operator.

Mr. BAKER. That is correct.

Senator HAGEL. Is that right?

Mr. BAKER. There are a very limited, but there are other foreign government-owned terminals.

Senator HAGEL. How many of those, would you say?

Mr. BAKER. I cannot give you an estimate. There are only one or two companies that have terminals in the United States.

Senator HAGEL. What country would be involved?

Mr. BAKER. I think Singapore is one. There may be a Taiwanese company as well. A Chinese company has stevedoring and other services that they provide on the West Coast.

Senator HAGEL. Mr. Chairman, I would ask for the record if Secretary Baker could provide that information.

Chairman SHELBY. Absolutely.

Senator HAGEL. Thank you very much, Mr. Chairman.

Thank you.

Chairman SHELBY. Senator Reed.

Senator REED. Thank you, Mr. Chairman, and thank you, gentlemen, for your testimony today. This is an issue, obviously, of great concern to so many Americans at the moment. Just a technical point or an informational point. As I understand it, Secretary Kimmitt, this process of CFIUS notification is voluntary; is that correct?

Mr. KIMMITT. That is correct, but there is a heavy penalty for any company that fails to file who should have, because the President has authority in the event of a company that has failed to file to unwind or modify the deal.

Senator REED. Do we have any ongoing effort to determine if people, companies, or entities, are avoiding this filing requirement, or is it just if it happens, we will take appropriate action?

Mr. KIMMITT. We watch very carefully deals that are closed. We also watch carefully even deals where approval has been received, but there have been letters of assurance, mitigation agreements to make sure that people live up to their obligations.

Senator REED. Thank you.

Like so many of my colleagues, I have been trying to understand this process and understand this particular decision. And I must say, my impression is that this is a rather amorphous and faceless operation. I mean, it is hard to tell who made the decision; hard to tell what was the definition of national security, was it consistent across every department that looked at this? And I think we have a lot of work to do.

Again, I have immense respect for the gentlemen here today and particularly Secretary Kimmitt, but the impression I have is that perhaps it is not national security that pervades this decisionmaking, but it is the notion of getting these deals done as expeditiously as possible, which means, effectively, do not invoke the 45-day investigative phase, because that raises it to a very high public level, involving Congress.

Ad perhaps I am wrong, but those types of groupthink to me might account for a situation today, we are looking back all of us, stunned, saying how could this happen? This seems so simplistic that at least you would want to ventilate this deal.

Now, Mr. Secretary, comments?

Mr. KIMMITT. I think that that suggestion that somehow there was a rush to judgment for economic reasons was what pervaded a lot of the report that GAO prepared at your request. That is where, in my early months back in government, I have really fo-

cused my attention, because again, at the end of the day, none of us has a higher responsibility than protecting the national security.

No national security official is going to ever be rushed in this process to reach other than the decision that is right for the country. And if more time is needed, more time will be taken. So, I think that impression has been out there, Senator. Respectfully, I think that is something that we worked on very hard, and I do not think there is anyone throughout this process who has suggested that he or she did not have the time to come to the judgment that they did at the staff and policy level.

I think it is very legitimate to discuss who else should have been involved in the departments and agencies. It is very legitimate to discuss how best to get this information to you quicker. But I really think that we have gotten out of the system whatever problems kept people from getting their views on the table, having them seriously considered, or you go deeper into an investigation or the deal does not go forward.

I think going back, just picking up on the other part of your comment, Senator Reed, when I had testified last fall, I had said that the definition of national security is something tough to pin down. We would have written one definition in 1988; one in 1992; we would have written one definition on September 10, 2001; a quite different one on September 12.

I think if we look at changing this law, which clearly, we are going to work with you on, I think we should get the very best definition that we can of national security; lay out every one of the concerns that each of you thinks is most important; but then make very clear that this is not an exclusive list, that we still want the individuals at whatever level involved in this process to take their range of national security responsibilities, many of which are embodied in other laws that you pass, measure them against the criteria in the statute but not to be hesitant to raise any other issue.

Senator REED. Thank you, Mr. Secretary.

I have one question.

Chairman SHELBY. Go ahead.

Senator REED. It is responsive, I think, to the comments that Secretary Kimmitt has made and might be handled by other members of the panel is that there have been some reports that Coast Guard analysts felt that they could not answer all the questions. I guess that raises a question, are those reports accurate? And second, does that cut against your presumption that when time was running out, and questions were still unresolved, the decision was not to say okay, stop, we got to do this, it was, okay, this train has left the station, and I guess those are not really major concerns.

Could you respond?

Mr. KIMMITT. I will make the general response. I might ask Secretary Baker to respond to the Coast Guard point. Again, we request as quickly as we can an intelligence community assessment. Your Chairman knows, and many of you know, how hard we have worked for the intelligence community to speak with one voice. Again, this is the Community Acquisition Risk Center.

That is passed to them, that request, through intelligence channels. They then go out to all the intelligence agencies in the departments and agencies throughout the Government. They draw from

those sources to come back with a community assessment to us. However, each department and agency also has, most of the members of CFIUS, have their own intelligence offices who, in addition to providing input to the community assessment, are also giving advice to their policy officials who have to make those national security judgments.

And going back to Senator Sarbanes' point, you know, maybe much later, I would really like to come up and talk about how transformed the Treasury Department is in the national security business. It is quite different than the Treasury Department that I was in 18 years ago, the most important part of which is we now have an Under Secretary for Terrorism and Financial Intelligence.

So we actually are now a member of the intelligence community. We have an Assistant Secretary for Intelligence and Analysis. We do our own internal work, feed both into the intelligence community. But also, I rely on those people to advise my Assistant and Under Secretaries and the Secretary and myself.

I think on the Coast Guard point, I would turn to Secretary Baker.

Mr. BAKER. Thank you; yes, the Coast Guard, like many components, does have its own intelligence capability. And when we asked them if they thought that further restrictions on the transaction were required, they concluded that restrictions were not required. They did their own intelligence analysis and used that to make their final decision with respect to the transaction in question, so in the course of reviewing the intelligence, a report was prepared, and the final conclusion was reached based on that intelligence.

The conclusion was that DP World's acquisition of P&O in and of itself does not pose a significant threat to U.S. assets in the United States, in Continental U.S. ports, so the final decision about what this intelligence told the Coast Guard was that there was not a significant threat to U.S. assets.

The report also does acknowledge that there are gaps, lack of information in some cases, that would have been helpful in making a further intelligence evaluation, but even taking those gaps into account, the intelligence report concluded that there was not a significant threat to U.S. assets.

Senator REED. Thank you.

Thank you, Mr. Chairman, for your patience.

Chairman SHELBY. Senator Allard.

Senator ALLARD. Thank you, Mr. Chairman.

I would like to address my question to Secretary Edelman and Secretary Baker. During public statements and in your testimony, you have referred to Dubai as one of our closest allies in the Middle East and indicated they are one of the most cooperative—well, actually, the country of the United Arab Emirates is one of our most cooperative Middle Eastern countries on a number of issues.

And you have made the comparison to the Middle East, and these are countries that have a fairly active, at the very least, fairly active population not in support of U.S. policies; in fact, many of them would like to, in my view, see the United States disappear from the face of the Earth, making those kinds of statements.

And you made these comparisons to that actually very narrow or small group. How would that country rate and that company rate when you take into consideration the whole world? See what I am saying? So, I would like to know what your valuations are in respect to the whole world as the United Arab Emirates would compare instead of just that narrow population that you selected.

Mr. EDELMAN. Well, Senator Allard, I think that what I was trying to say is that the concern that has been raised in this case is that because Dubai Ports World is a government-owned entity that that would in and of itself present some higher level of risk. So the point I was making is that the Government of the United Arab Emirates has been extremely supportive since September 11 of the United States and other coalition partners in the global war on terror. I have mentioned all the different things they have done for us, and there are others that I did not mention.

So it went to the issue of the government and government ownership. We do recognize that throughout the Middle East, we face populations that are in many ways hostile to some of the policies this Government has pursued, but my comments went to the issue of the government. On the issue of Dubai Ports World, I think really, that was more of a Coast Guard judgment to make in terms of how they function in terms of terminal management.

I believe my colleagues in Defense who were involved in this, to the degree they had actual experience with Dubai Ports World at Jebel Ali, for instance, found that they ran the port very effectively.

Senator ALLARD. I guess I am more concerned——

Mr. EDELMAN. World class, I think they were saying.

Senator ALLARD. Okay; so, your view is, if you rate them with the rest of the port operators throughout the world, they rate high in your mind?

Mr. EDELMAN. I would say those colleagues in the Department of Defense who were involved in the review and looked at it felt that they were a world class operator, as I understand it.

Senator ALLARD. Well, yes, you can be a world class operator, meaning that they operate throughout the world, but what—how do they rate among other businesses or other, you know, that provide this kind of service to other countries?

Mr. EDELMAN. I think the judgment was that they operated efficiently and as well had been involved in some of these other programs that DHS and other departments run and cooperatively.

Senator ALLARD. Well, I am thinking in terms of security. How do they rate in terms of security compared to other companies throughout the world?

Mr. EDELMAN. That is why I referred to the Container Security Initiative. I think that again, it is really more an issue for my colleague from DHS, but I think our judgment was that they have performed well.

There were concerns that DHS was addressing in the process that were addressed through the letter of assurances, and I think my colleagues in Defense who were involved in the process looked closely at the letter and waited for it to come in before making their final determination.

Senator ALLARD. Did you want to respond, Secretary Baker?

Mr. BAKER. I would be glad to. We do not compare companies directly against each other. We ask whether they meet the highest standards that we can set, whether we are inspecting foreign ports, and we have inspected a number of foreign ports where DPW operates or measuring performance in our customs trade partnership against terrorism or cooperation on screening.

Senator ALLARD. So when you let out this contract, it is not competitively bid?

Mr. BAKER. No, this is not our contract.

Senator ALLARD. Well, how do you select that if you do not do it competitively?

Mr. BAKER. This was a purchase of a company. We do not regulate directly who may or may not operate a terminal. The port authority may have such regulations.

Senator ALLARD. Is that competitively bid?

Mr. BAKER. They do charge for the terminals, but in this case——

Senator ALLARD. No, I mean competitively bid. Do you ask for several companies to submit proposals as to what their cost would be to run the port maintenance and operation?

Mr. BAKER. That is not a role that we have ever played in port operations.

Senator ALLARD. So do we have any idea how they are selected, then?

Mr. BAKER. Typically, the question is who is willing to build the pier, pay for the crane, pave the lot. That is worked out with the port authority, the price that is paid, and then, we regulate that person by virtue of their record and security.

Senator ALLARD. Mr. Chairman, I think we need to look at the process, and this is, to me, I think we need to bring in somehow or the other how security is evaluated.

Chairman SHELBY. I agree.

Senator ALLARD. I think that we have better companies out there, various companies out there or port operators who have a different record as far as their ability to manage the company and to work with security. Some of them would probably do a better job than the others.

Now, I know that security is done by Customs, and I also know that it is done by the, you know, U.S. agencies. But the fact is that there is information that the operator has access to that I think can be valuable to a terrorist group. They may have access to arrivals and departures and when those occur on various cargo shipments.

And if you are a terrorist, that is pretty valuable information. But I do not see anybody looking at that and whether that type of information is secure, and over the long-term, that concerns me. They may look good today, but terrorists have a way of kind of moving in and being a problem, and I guess during the process, this would be something that I would raise a concern about. And I am just going to give you an opportunity to respond back to my thoughts.

Mr. BAKER. Senator, you are quite right that there is reason to be cautious about who is operating terminals in the United States. That is why we have some of the regulations we have.

During the course of this 45-day investigation, we will be doing inspections of operations of both companies in various locations, and that information will be fed back into our decisionmaking process. So we will be looking very hard at precisely those questions, but I would say that today, based on the information that we had available when we made this decision, I could not identify a company that has done more for us when we have asked in terms of cooperation than the companies that we are talking about today.

Senator ALLARD. I see my time has expired.

Thank you, Mr. Chairman.

Chairman SHELBY. Senator Stabenow.

Senator STABENOW. Thank you, Mr. Chairman, and thank you all for being here again.

First, I want to just comment that I agree with the statements we need friends and allies in the Middle East. There is no question. And the UAE, I believe, has been a solid partner in many ways. In Detroit, Michigan, we have many positive relationships, business relationships, city to city relationships with Dubai. And it has been positive.

My concern goes to the larger issue that I spoke about in my opening statement that relates to the policy of a business that is owned by a foreign government managing ports or anything else that deals with our security. And I have to say, listening today, I am sure there are many good people at every single level of these reviews, but I wonder if this is not what the September 11 Commission heard as they heard all of these various pieces going on that in the end just did not come together to make the right judgments as it related to security. A lot of good people; I agree with my colleagues that certainly, processes need to be improved and so on, but I also see a bureaucracy that looks like it could get pretty bogged down with not seeing the forest for the trees here on what we are really talking about here.

It is not just about reports, although they are critically important, and I do not mean to undermine that. But Mr. Chairman, I think, I hope we are going to debate one of the fundamental policies, which is should a business owned by a foreign government be allowed to participate or to manage our assets that relate to security?

And so, my first of two questions is tell me, it seems to me there are only risks to that situation. It does not matter how competent the business is. It does not even matter, really, what our relationship is at the moment, because we know relationships change. Times change.

What are the benefits of even having that kind of relationship for a port? I mean, do we not have American businesses that are competent and able to do this work? What are the benefits?

Mr. BAKER. Let me start by pointing out that in fact, terminal operation is a field dominated by foreign companies. For whatever reason, it is not a field in which U.S. companies have played a large role.

Senator STABENOW. If I may just interject one thing, though, Secretary Baker, you did say only one or two of the terminals were foreign government-owned.

Mr. BAKER. That is true. These are foreign companies, and only a relatively small number are owned by companies that are controlled by foreign governments.

The question then arises, are we going to say there are certain areas that we will not accept foreign government participation in, and what are those areas? That is a position that we can take. Our view, when we reviewed this transaction, was that if we took their current level of cooperation, because I agree with you, one of the questions is will they, for reasons of state, change their mind about what their policies are going to be, that if we could take their current level of cooperation, which is very, very good, and lock it in, make it mandatory, require them to tell us all about their personnel, all about their security practices, all about how they control access to their computers, to their facilities and the like, that that would give us an ability to make sure that they could not change their policy quickly and move to a different one, and if they did, we would know about it and be able to take additional action ourselves.

Senator STABENOW. Well, I appreciate that. I do not have confidence that it is ever possible to do that to the extent that the American people expect us to in terms of their security.

But just one other question that relates to the broader issue and again, to Secretary Baker, talking about security. Again, the Coast Guard estimated it would take $5.4 billion to really secure our ports. The Congress and the Administration has authorized less than $1 billion, $700 million. Of that, you talk about increasing 300 percent. It must have been from zero. I mean, I am not sure how you get those numbers.

But the reality is that the President, again, has proposed eliminating Port Security Grants. We are going to take that up in the Budget Committee. So when we look at this, and then, we listen to your testimony saying that, for instance, that we ask or require that the cargo companies coming in tell us 24 hours ahead of time what is in the containers and so on, I guess I would ask how do we verify that? How do we know they are telling the truth? And do you feel that right now, we are doing everything that we should be doing, and you can say to the American people that we are, in fact, securing our ports to the level that they need to be?

Mr. BAKER. Two points; the level of spending on port security is well over $2 billion, approaching $3 billion if you count in the Port Security Grant Program, much of it spent by the Coast Guard and CBP on the programs that we have been talking about today. And a very substantial contribution and almost all of it initiated since September 11, when port security spending was in the $200 million, $300 million range. So that is how I get the 700 percent increase.

As to the question of how do we know that people are not lying to us about what they put into the containers, we have two or three ways of dealing with that. First, many of the people who are giving us this information are part of our Best Security Practices team, so that there are checks on what they are doing, who they are hiring, how they secure that cargo.

Second, we get information from a variety of people. We may know what the shipper says he is sending, what the manufacturer

says that he is sending, and what the importer thinks that he is receiving. We can compare that information, and where there are discrepancies, the risk factor goes up, and we will inspect it, and then, we will know who is telling the truth and be able to find out why there was a discrepancy. So we do have mechanisms for checking the accuracy of the assertions that people make.

With all of that said, I cannot in any respect say we have a guarantee of security. We do not have a guarantee of security when we get on Metro or when we get on a plane. We have tried our best to manage these risks so that we have reduced and minimized the risk to the American people from a variety of possible attacks, and we think in cargo and port security that we have done a good job.

Senator STABENOW. I would just say in conclusion, Secretary Baker, we can in no way ever guarantee absolutely on anything. But are you saying today that you believe that we are doing the very best we can on port security?

Mr. BAKER. We will, in this transaction, for example, we will go back and look at every piece of information that we can find, and we will be doing substantial amounts of——

Senator STABENOW. I am talking about in general.

Mr. BAKER. In general?

Senator STABENOW. Are you saying that we are doing everything that we can on port security?

Mr. BAKER. Yes, everything we can, we could always spend more money more usefully, but we have to recognize that there are competing needs, including needs that are aimed directly at the security of the American people.

We have devoted an enormous amount of effort to precisely this concern, the possibility that someone would introduce a weapon of mass destruction into the container supply chain. And I would say that we have probably spent more effort, more time, more imagination, more regulation on that than on that than many other risks. So, I think we are doing a better job here than on many other areas that are also of great concern.

Senator STABENOW. Mr. Chairman, that is also of concern to me, since the September 11 Commission gave us collectively a D. So that is of concern, and I do not say that you are not working hard, but that is the grade we received, and I think we need to be serious about it.

Chairman SHELBY. Thank you, Senator.

Senator Dole.

Senator DOLE. Thank you, Mr. Chairman.

Secretary Baker, in response to DHS' concerns, it is reported that one of the commitments that DPW apparently made was to open their books and give DHS access to formal legal process. However, it is my understanding that DHS did not insist that DPW keep copies of business records on American soil, where they would be subject to court orders.

DHS also did not require, I understand, a designated American to response to Government requests. It is my understanding these conditions are routinely made a part of U.S. approvals of foreign sales. Did the Department ever ask DPW to comply with these requirements, and if not, why did not the Department insist on these requirements?

Mr. BAKER. I think let me first say that when we create these assurances, we try to tailor them to the industry and the particular security risks involved. The requirement of a U.S. security officer is drawn principally from the telecom industry, and there, it serves a very important purpose, because we often have to serve wiretap orders, including classified FISA wiretap orders, on the security officer. That person has to be an American citizen so as to be able to get the clearance to see those wiretap orders.

In fact, the security officer here is, and we have assurance will remain during the pendency of the investigation, a U.S. citizen, but there is not the same level of concern there. If they were to choose a British National, for example, I am not sure that we would say that that automatically should be excluded, whereas in the context of telecommunications, we would say that.

With respect to keeping data in the United States, again, in the telecommunications industry, where we often have these requirements, there is a very important reason to keep that data in the United States, because it is the calling records of the customers. All of my calls, all of your calls are recorded by telecommunications companies. We do not really want that information available to foreign governments where it might be misused, and so, we want it here.

There is less privacy concern about how many tons of sorghum are in a particular container, and so, we did not focus on that as a crucial priority. We did, however, insist, as you said, you sometimes want these records here so that you can serve a court order to get them. Instead of that, we have a binding commitment from the company to provide us access to information about U.S. operations wherever that information may be.

There is no restriction on whether it is in the United States or not with respect to their U.S. operations information, so that we do not need to worry about getting a court order. If they do not produce that information, they are in breach of their agreement.

Senator DOLE. Secretary Baker, according to a 2005 report by the GAO, auditors found a variety of problems in ports participating in the Container Security Initiative; specifically, containers identified as high risk sometimes were shipped to the United States before agents on the ground could find them at the originating port.

Did CFIUS investigate whether any of these problems occurred at ports operated by DPW?

Mr. BAKER. The CSI program in Dubai, where DPW is based and where they are critical to the success of the program, actually started up just a month after the report was issued, so I am sure that none of the problems arose there.

In fact, we have had difficulties in some ports getting complete cooperation from local authorities. They do not always agree with us that a particular container should be investigated.

That is not true in Dubai. We have made 700 requests for high risk cargo to be examined, and the Dubai authorities and DPW have complied with every single one of them.

Senator DOLE. Let me ask both Secretary Kimmitt and Secretary Baker, in a post-September 11 world, the Department of Homeland Security has the imminent responsibility of ensuring that our ports and borders are protected. That being said, should the final signoff

of these transactions come from the Treasury Secretary and not from the Secretary of Homeland Security?

Mr. KIMMITT. Senator Dole, the final signoff in this case will come from the President because of the 45-day review and then will be reported to you.

Senator DOLE. Right.

Mr. KIMMITT. And the way the system operates, again, once you get into the investigation, it would have to end up on the President's desk for decision, and certainly, no decision would be taken without Homeland Security signing off on it. And among the changes we are instituting is to make sure that people at higher levels in the Department not only are informed earlier but are also involved earlier.

Mr. BAKER. If I could add to that——

Senator DOLE. I am referring to the CFIUS process, the 30-day——

Mr. BAKER. I completely agreement with Deputy Secretary Kimmitt. Each of the participants, as the Deputy Secretary has made clear, has its own vote and can make that determination on its own, so each of us has the ability to insist that a transaction go to the President for review. That may not be clear in the statute, but that is the current practice. And if this Committee of Congress wanted to make that clearer, there would be no objection from our point of view.

Senator DOLE. Thank you, Mr. Chairman.

Chairman SHELBY. Thank you.

Senator Menendez.

Senator MENENDEZ. Thank you, Mr. Chairman.

This is such an important issue in its immediate application, beyond the overall issues of reforming CFIUS, which I agree with many of the comments made by the Chair and the Ranking Democrat and others. But I want to focus on the immediacy, because it is very important to the people of the State of New Jersey. And so, since I have so many questions, I hope that you will give me a responsive but tight answer.

Secretary Kimmitt, as I understand it, you said that Dubai Ports World has not filed for that additional 45-day review; is that correct?

Mr. KIMMITT. That is correct, Senator.

Senator MENENDEZ. So that means that as of this moment right now, legally, they have the authority, since the original review has run, and today is the enactment date, they have the authority to operate notwithstanding what they said they will voluntarily do, but they have the authority to operate these terminals at the various ports in the United States.

Mr. KIMMITT. Senator, my understanding is that the deal is not going to close today and that we will have the refiling before the deal closes.

Senator MENENDEZ. You say the deal is not closed today. In terms of the legal review of this, technically, they have the authority. If they close the deal later today, I see that the court in Great Britain gave them the authority. That is in the news today. So therefore, if they close the deal today, they have legal authority

right now to operate those ports, do they not, to operate the terminal facilities at those ports.

Mr. KIMMITT. That would be correct if they closed the deal, but although they had announced March 2 as the closing date, I think not only in response to us and the courts but also, frankly, because they have been listening closely to the Congress, I think that deal will now not close until tomorrow or Monday and that we will have the refiling before the closing. We have been informed by their counsel that we will have the refiling before the closing.

Senator MENENDEZ. Let me ask you one more question. I appreciate that, but if they do not file before the actual closing takes place, would it not be true that they have the legal authority to proceed if that is the case?

Mr. KIMMITT. That is a hypothetical, Senator. The answer to the hypothetical is yes. The good news is they said—I will try to keep this tight—they said on Sunday they were going to refile. They would abide by the results of that review; that they would hold separate the U.S. operations, and they would do that throughout the pendency of the review.

Senator MENENDEZ. Let us assume that they honor that and that they do not close before they file. Let us assume that. When they file, which they are filing, as I understand it, on this voluntary 45-day review, which I agree should have been the law automatically. Does that stop the clock as it relates to the operations at the ports of the United States until that review is finalized and signed off by the President? That is a simple yes or no.

Mr. KIMMITT. The operations at U.S. ports will be held separate. The refiling will moot the prior approval. The decision at the end of the new review and investigation will supersede the prior approval, and they have agreed to abide by the results of the 45-day investigation.

Senator MENENDEZ. So all of the other verbage that they had, that they do not give up their rights under the original determination, that was superfluous?

Mr. KIMMITT. What I would say is the parties, when they make presentations, I would imagine to the legislative as well as the executive branch, assert their position. We consider it, but at the end of the day, we follow the law.

Senator MENENDEZ. Secretary Baker, I have to be honest with you, I find your description in your testimony just a little bit too simplistic and I think of concern when you suggest that this is about a pier, a crane, and a parking lot. You know, the reality is you gave us the impression that you screen all of this cargo abroad, but the United States does not screen all this cargo abroad; is that correct?

Mr. BAKER. We do screen it all. That does not mean that we inspect it all. We run the containers and the information we have about them through a variety of algorithms designed to——

Senator MENENDEZ. With all due respect, Mr. Secretary, I am not talking about algorithms.

Mr. BAKER. Right.

Senator MENENDEZ. Let us not confuse the American people. I am talking about do you physically go abroad and do an inspection of the cargo that is coming to the United States? Yes or no?

Mr. BAKER. Yes.

Senator MENENDEZ. Do you do an inspection of all of the cargo that is coming to the United States?

Mr. BAKER. No.

Senator MENENDEZ. You do an inspection of less than 5 percent of the cargo that is coming to the United States.

Mr. BAKER. I would say we do the top and most risky 5 percent.

Senator MENENDEZ. So 95 percent, bottom line, does not get inspected abroad, let us make that clear, of what comes to the United States. Also, the suggestion that this is just a pier, a crane, and a parking lot, well if that was the case, then, why do you both in the Customs Trade Partnership Against Terrorism Act, which you cite in your testimony, as well as the Container Security Initiative, you list a whole host of things that the terminal operator does that has a security equation to it?

You go from a wide variety of security practice, from fences and lighting to requiring that the member companies conduct background checks on their employees, maintain current employee lists, require proper identification, address physical access controls, facility security, information technology security, container security, security awareness and training, personnel screening, and important business partner requirements? That is a lot more than a crane, a pier, and a parking lot.

Mr. BAKER. Most of those are addressed to making sure that there is the personnel, in particular, and the personnel that might gain access to that facility have been investigated and are people that we are willing to trust.

Senator MENENDEZ. Mr. Secretary, it is all about security, is it not?

Mr. BAKER. Well, of course.

Senator MENENDEZ. It is all about security. So this is not just a pier, a crane, and a parking lot. And by the way, all of these things that I just described, this is self-administered, in this case by the Government of Dubai that owns the company. This is self-administered. You do not administer this.

Mr. BAKER. We review and audit their compliance with this program.

Senator MENENDEZ. It is self-administered, is it not? Yes or no? You may review what they self-administer, but it is self-administered.

Mr. BAKER. They are expected to meet all of those requirements, and we check to make sure they meet them.

Senator MENENDEZ. Maybe my command of the English language is deficient. Do they administer all of the things I just read to you on their own, subject to your review, but do they ultimately administer it on their own, yes or no?

Mr. BAKER. Like any other regulatory program, you set the standards; you tell people what they have to do; and then, you make sure they do it.

Senator MENENDEZ. And by the way, a manifest is ultimately what you depend on, is it not?

Mr. BAKER. In most cases.

Senator MENENDEZ. Well, if a company wants to ultimately put something on a ship that is not on its manifest, how would you know?

Mr. BAKER. Then, it would come off the ship and would not have been notified to us.

Senator SARBANES. Particularly when the company is both the sending and the receiving party.

Mr. BAKER. We do have mechanisms for making sure that the supply chain is secure so that the ships are not accepting containers that are not listed on the manifests. There are a number of parties who have to handle this——

Senator MENENDEZ. Mr. Secretary, I am talking about thinking outside the box. The reality is that something can get on a ship that a company or, in this case, a foreign government wants to put on that ship that is not on the manifest and that lo and behold comes into a port of the United States, and God forbid it is not electronics or clothing but a nuclear, chemical, or biological weapon, and it explodes before it comes off. That is a little too late, is it not?

Mr. BAKER. I will not say that that risk is not present. I will say that that risk is not substantially increased by owning a terminal operation in the United States. You could do that without having a terminal. Take the ship into the port and set it off then without ever touching a terminal.

Senator MENENDEZ. Finally, with the indulgence of the Chair, if I may ask Secretary Edelman, would it be fair to say that what Benjamin Disraeli, the British Prime Minister one time said that governments have no permanent allies or enemies, only permanent interests, is pretty much true?

Chairman SHELBY. Go ahead, go ahead, Senator.

Mr. EDELMAN. Senator Menendez, you must have discovered in my biography that I am a former history graduate student. I thought it was Palmerston actually, not Disraeli, but I could be wrong about that.

Senator MENENDEZ. I would be happy some other time to have a cup of coffee with you and go over who said it, but basically, the principle——

Mr. EDELMAN. But we obviously have ongoing national interests, as does the UAE. I think in the current circumstance, we have found a confluence of interest in combating terrorism.

Senator MENENDEZ. My point is ultimately, a foreign government acts in its own interests at the end of the day. It may coincide with us at a given moment; it may diverge with us. Am I wrong, but at one time, was the United States not somehow supportive of Saddam Hussein in his war against Iran? Am I wrong about that?

Mr. EDELMAN. We had, obviously, a period of time when we felt that there was some commonality of interest with regard to Iranian domination of the Persian Gulf.

Senator MENENDEZ. So my final point is this, since governments, as we can see with what Hugo Chavez is doing with his oil company totally owned by a foreign government and not subject to the marketplace in terms of trying to promote his own foreign policy ideas right here in U.S. soil, can change their allegiances at any given time and their interests.

One of the things that this merger will do, according to a February 20 article in the British maritime publication *Lloyd's List,* that the P&O, which is the company that selling to Dubai, recently renewed a contract with the United States Surface Deployment and Distribution Command to provide stevedoring, which is about loading and offloading of military equipment at Beaumont and Corpus Christi ports in Texas until the year 2010.

And according to the Army logistician, that accounts for 40 percent of the Army cargo deployed in support of Operation Iraqi Freedom. On that and so many other realities, we use commercial ports increasingly to send supplies and equipment to our soldiers in the field. Imagine that a foreign government just simply takes the benign decision that I do not want to operate the terminal. I do not want to operate the terminal. I am not doing stevedoring at a critical moment in terms of deployment of goods and supplies abroad. Is that not a real consequence to the national security of the United States?

Mr. EDELMAN. Obviously, that hypothetical would be. I believe that the Army Materiel Command looked closely at the situation at Beaumont and Corpus Christi and did not conclude that it presented a risk for them. It was also looked at by U.S. Transportation Command.

Senator MENENDEZ. I only gave you one example; it is multiplied by many more times, and the continuous movement of port operations in the hands of foreign creates a risk to us.

Thank you for your indulgence, Mr. Chairman.

Chairman SHELBY. Senator Dodd.

Senator DODD. Thank you, Mr. Chairman.

And let me begin by thanking, first of all, our witnesses. You have been sitting here for a little more than three hours, and we appreciate it very much. I know Secretary Kimmitt. I have known his family for a long time; have great appreciation for him. And I would be remiss if I did not express those feelings to you. I do not know the other of the witnesses that well, but I thank you for your presence here today.

Let me pick up a bit on Senator Menendez's very good line of questioning in my view here. I have been intrigued in a sense, Secretary Baker, about the Department of Homeland Security's commitment to this whole process. You became a member of this CFIUS board in 2003, as I understand it, and yet, for the first time, it is in this year's budget that you are actually asking for some money to have a CFIUS office at the Department of Homeland Security; is that not correct?

Mr. BAKER. I was not around last year, but my understanding is there was a request for last year as well for funds. There was no policy office, so the policy office did not ask for it.

Senator DODD. But I am looking at the request here in 2000, and it is an $8 million request to provide funding to establish the CFIUS office within the Homeland Security Department. But what raises the issue is that it just did not seem to be a terribly high priority for the Department of Homeland Security, despite being a member of that Committee until most recently here. That is my concern.

Mr. BAKER. No, I would say that that is not correct. We have been a very aggressive and active participant, and there has been a substantial CFIUS activity at the Department for some years.

Senator DODD. The facts are there was no clear office of responsibility for CFIUS duties. That office does not exist, at least it does not according to the budgetary request. But let me move on.

The one word that has not been mentioned here in the discussion of all this, and it is something I want to raise with you in terms of what we might do to correct the problem is the voluntary nature of all of this. I mean, what happens to initiate CFIUS involvement is that the company or the country voluntarily comes forward and asks for permission of this office to operate.

We have an example, and I want to know if this is the case or not, but I am told that last year, in February 2005, an affiliate of DP World, DP International, successfully acquired container freight facilities previously owned by American—the CSX company, the company that Secretary Snow headed before becoming Secretary of the Treasury. Was CFIUS notified of the CSX or DP International in 2004 or 2005 of the pending acquisition by DP International of CSX Orange Blossom Investment Company Limited, a company which operates container freight terminal facilities and businesses in the United States, Hong Kong, Korea, Venezuela, and elsewhere? Did that request come before CFIUS?

Mr. KIMMITT. Sir, I will have to check that, Senator Dodd. My recollection was that because U.S. assets were not involved, it did not come before CFIUS. Could I just ask a quick question, because that was before I came into government; yes, there were no U.S. assets within the purchase. The U.S. assets had been sold previously.

Senator DODD. That is not true. Under this here, the Dubai Ports International here under that particular request, these companies operate container freight terminal facilities, and I listed the countries, and the last one on the list is the United States. Now, they are not required by law to come, are they?

Mr. KIMMITT. They are not required by law, but I mentioned when you were briefly out of the room, Senator Dodd, that the penalty for not filing is that the President has absolute authority to unwind the deal for anyone who has not gone through the approval process.

Early on, after you passed the law in 1988, as I mentioned, the annual filings were almost as high as 300 per year. They are now down to somewhere between 50 and 75 per year, I think in part because, and I think particularly after this case, no one is going to do an acquisition that might have a national security implication without at least asking the question of whether they should not go through CFIUS.

If they fail to do it, and we find that they should have done it, then, the President has the authority to modify or unwind that deal.

Senator DODD. Well, should we not be talking about in here as we are trying to get this right now, this process of looking forward, should there not be some mandatory requirement here where national security implications are involved that it does not become a voluntary nature, whether you want to set a dollar amount or

whether there is some other criterion, but it seems to me under existing law, whatever the decisions people make because they are fearful what may happen down the road, it is strictly a voluntary process at this point, and it should become mandatory; would you agree with that?

Mr. KIMMITT. I would like to engage in that discussion. I think certainly, after we get through this process, it would be good for the investing community, both in the United States and abroad, to know what the rules of the road are, and I think among the other suggestions that you made, we would like to add this one to the ones that we would discuss with you.

Senator DODD. And I would like you to check on this. Correct me if I am wrong, but my list shows that the United States—and I mentioned the——

Mr. KIMMITT. I will check mine and get back to you, sir.

Senator DODD. That is an example of what I have been talking about here. If that did not come before CFIUS for approval, and yet, there are U.S. ports involved in this thing, that is an example of something happening. If it is involved, by the way, I would respectfully request that that one be examined and be put part of the 45-day examination period as well, it seems to me.

Mr. KIMMITT. I will find the facts, sir.

Senator DODD. It was an article by, as I understand it here, this is the right piece I have here, I think it is, this is from—it is called "A Port in the Storm over Dubai" by Stephen Flynn and James Loy, who I gather are I think former Coast Guard officials in which they make the case here, Mr. Chairman, that requiring a global container inspection system that scans contents of every single container destined for American waterfronts before it leaves the port.

They note that this is already in place; since 2005, the containers entering the truck gates of two of the world's largest container terminals in Hong Kong have passed through scanning and radiation detection systems. It seems to me, if it is already being done in one place, and maybe this is to Secretary Baker, are we implementing such a proposal? It seems to me if the technology exists today to have something like this in place, we could begin to eliminate a lot of the very legitimate concerns being raised if you could have the scanning that would certainly would help determine whether or not materials coming in here are going to be harmful or not.

Mr. BAKER. We are following this quite closely. It is a pilot project that is an effort to see whether this can be done on a 100 percent screening basis. There are a lot of questions still to be answered. Currently, I believe the Hong Kong facility is x-raying all the cargo, but nobody is looking at the x-rays, so they are really doing this to show that you can actually x-ray trucks as they move through at a reasonable speed.

Senator DODD. Look at this. This is the article they wrote. I am not knowledgeable about it. They are claiming it is being done. These are two former officers of the Coast Guard who apparently have some knowledge about all of this. It seems to me that if that technology exists, then, it seems to me the Department of Homeland Security or the appropriate agency should be examining why this cannot become a part of our operations.

Mr. BAKER. We are certainly looking at it quite closely, and we certainly have not rejected the idea. We want to make sure that it is practical.

Senator DODD. Now, let me just quickly go back, because I raised these issues with you earlier in my opening comments here about some steps that need to be taken, and I appreciate the generous comments during the testimony you provided here.

But let me just mention the way they are again and ask you quickly on whether or not you would have any objections to what we are suggesting here, and obviously, we would like to continue talking to you about other matters you might add to some legislation here now to update the CFIUS program; one, to move away from a voluntary to more of a mandatory system. Now, you would have to have what criteria you establish to make that mandatory, but certainly, the general notion of getting away from voluntary notion of it; to include the Director of National Intelligence and the CIA as part of the panel of CFIUS; to have a subcommittee with the agencies, the intelligence agencies included, so they have to go to their respective shops to determine whether or not these matters raise concerns; to have vice-chairs, the Secretary of Defense and Homeland Security, so you are covering the economic, the intelligence, and the security matters; and then, whether or not you would be willing to accept a notion of Congressional disapproval process on a fast track even with necessarily a two-thirds vote or something but some manner by which the Congress could then respond to some of these matters.

Would you quickly just tell me how you are reacting to these suggestions?

Mr. KIMMITT. Senator Dodd, I think they are very constructive suggestions. I think we would like to examine them with you. I think up until the last one, it would be something that we would largely be engaged with the CFIUS members.

I would note that the intel subcommittee piece, I would defer to your Chairman on this. As we try to get a true national intelligence capability, I think we have to rely on the DNI to be able to produce that kind of comprehensive, coordinated intelligence. I would be a little bit concerned about setting up a subcommittee that itself could suggest that the DNI is not doing what is done.

The last one, in terms of the Congressional involvement, we would have to involve people beyond the Committee, but I think we are open to discussion of all your suggestions.

Senator DODD. Secretary Edelman.

Mr. EDELMAN. Senator Dodd, as I said in my testimony, I think the suggestions you have put forward today are extremely constructive. First time that I have thought about some of them, and so, I would want also to take them back. And one thing we have all learned in this process is that it needs to move up to higher levels in our respective departments when decisions are being made.

And so, since the Secretary of Defense's equities would be involved in what you have proposed, I think I would want to discuss it with him.

Senator DODD. I am sure.

Mr. BAKER. There are two aspects of your proposals that I think would require further thought on our part. If you are going to

make filings mandatory, then the definition of what triggers a filing must be fairly clear for people, and as we have discussed, one of the values of CFIUS has been that when Homeland Security joins the CFIUS process, they can help expand the issues that we are concerned about, and that word gets around.

I would almost rather rely on a certain informality in that and not have people still filing something that was important in 1988 but is not important now.

Senator DODD. I would just note here, be careful about the informality. I think the point that has been made by all of our colleagues up here, and I appreciate that point, but it is the informality of all of this that I think may create a lot of the problems here.

Mr. BAKER. I hear you. It is just that if we end up getting 1,000 a year, we may not give it as much attention as we should.

Senator DODD. By the way, that article I mentioned earlier, I should point out, also, the author of it is also the former Deputy Secretary of Homeland Security.

Mr. BAKER. And a fine man.

As to the DNI's participation, and the Chairman and I share a long history with the intelligence community. One of the difficulties is whether the DNI would participate as a policy representative speaking up for the interests of the intelligence community in having technology that they can trust, which is an important problem for them, or whether they are participating to provide intelligence.

And if they are participating to provide intelligence, then, you always worry that if they are also participating for a policy reason that their policy goals influences their intelligence analysis. And so, in this case, I think actually, the DNI's policy interests should lead them to participate, but then, they should not have an authoritative intelligence role. They should simply be responsible for getting as much intelligence as possible.

Senator DODD. I do not have a problem with that, because remember, the motivations behind the Byrd Amendment and other things were to get at those intelligence questions, and the concerns that Senator Sarbanes and others have raised that it appears in the GAO report that too much of this is being determined, the outcomes, by the economic interests and even in some cases, I think probably military interests. But they are not illegitimate interests, I might point out.

But they trump the security interests, and that is one of the concerns here. And I think the Chairman said it well in October; others have. Nothing trumps security issues. It should not, anyway, in the final analysis, so it is an important——

Mr. BAKER. I do not disagree, and I think that the DNI does have a significant security policy interest here.

Senator SARBANES. I understand that in the Treasury, the office that is responsible for investment flows is also the office that staffs CFIUS; is that correct?

Mr. KIMMITT. That is correct. But again, as I mentioned to you before, inside the Treasury, we have a range of responsibilities, including the terrorist financing responsibility that I mentioned to you. We involve all Treasury offices, as do other departments and

agencies. That has been where the CFIUS process has been located since 1975, even 13 years before the law was passed.

Senator DODD. Secretary Joseph, quickly.

Mr. JOSEPH. Senator, thank you.

I find all of your ideas to be potentially very constructive, and I think we should look at each of them very carefully as we work forward on this.

Senator DODD. I thank you.

Let me just last, because of my local interest here, but Doncasters, Senator Schumer raised this issue earlier; I raised it as well. It is a Connecticut company here, so we have more than just a passing interest. What is the nature of this review, Secretary Kimmitt, that is occurring with the Doncaster that was the subject of a lengthy article this morning by the Dubai firm?

Mr. KIMMITT. Senator Dodd, the company issued a release in December that they, Doncasters was going to sell its assets to Dubai International Capital, including some assets in the United States. They noted that the sale was subject to United States and German regulatory approvals. I do not know what is happening in other departments and agencies in the U.S. Government, but in the CFIUS process, it is now in the 45-day investigation period.

Senator DODD. Thank you. Keep us posted on this as well. This is a $1.2 billion transaction; is that correct?

Mr. KIMMITT. I do not think the U.S. part was that large. I will come back to you with the facts on it. But again, something that we discussed earlier, remember, we are barred by the terms of the Exon-Florio Act of discussing in public information available during the pendency of a review, but as the Chairman and Senator Sarbanes made clear, obviously, we could be responsive to you, we would be glad to come back and share with you what we can.

Senator DODD. Thank you.

Mr. Chairman, thank you very much.

Chairman SHELBY. Thank you.

Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman, and before I get into my questions, I want to thank all of you for your patience, and I am sure you have not had an easy couple of weeks, so thank you for your service. And I want to thank the Chairman for his usual generosity in terms of letting people ask questions, et cetera.

Chairman SHELBY. Thank you.

Senator SCHUMER. That does not happen too often.

I would like to return to where Senator Dodd left off, and that is the new report about Dubai International Capital taking over Doncaster, which has U.S. interests. And here is what totally befuddles me; why did CFIUS implement a 45-day review for tank engines in a box but not for potential nuclear weapons in a ship's container? Why did this one merit a review and the other one not? It is totally befuddling. Is there any rhyme or reason to it?

Mr. KIMMITT. There is a procedural rhyme and reason. I am not sure that it would satisfy the political dimension of your question.

Senator SCHUMER. It is a substantive dimension. Why one and not the other?

Mr. KIMMITT. Well, here is the substantive answer, then. The substantive—no, I am sorry, this is a procedural answer, and I

think we would have to discuss substance with you in private, Senator. But the procedural answer is because security concerns were not resolved by the end of the 30-day period; that is, there was not consensus among the CFIUS members that concerns that had been raised had been addressed. It went into the 45-day period.

Senator SCHUMER. But just give us, without giving us the details, which I know you are not allowed, how would—it is just going to befuddle, I think, most of us on this panel, if I can take the liberty, and certainly the vast majority of Americans that giving control to a Dubai company over our ports does not raise security concerns, but giving Dubai control over a company that makes parts to tank engines does.

Mr. KIMMITT. I understand the question.

Senator SCHUMER. It does not add up.

Mr. KIMMITT. I understand the question; I understand the concern. The fact is that the same broad range of security professionals, relying on information provided both by the companies and by the intelligence community, came to one decision on the Dubai Ports World case within the 30-day period. They came to a different decision on the second one. The effect, though, as of later today, Senator Schumer, when we get the refiling is that both cases will be in the 45-day period.

Senator SCHUMER. I understand that. Well, I think we are going to need further inquiry on this, even if we have to do it behind closed doors.

Next, also on this case, CFIUS is required to contact or brief Members of this Committee when a 45-day investigation is launched. Did you brief the Committee on the Dubai International Capital deal, and who on the Committee did you brief?

Mr. KIMMITT. We briefed Committee staff, Senator, on the basis of the public information made available by the companies and are prepared to respond to further questions, but we would have to do that not on the public record.

Senator SCHUMER. Okay; because you did brief Committee staff; was that right?

Mr. KIMMITT. We have, again, on the basis of the publicly available information.

Senator SCHUMER. I did not ask if you gave them the details, but they were aware that such a transaction was now undergoing a 45-day review.

Mr. KIMMITT. They were.

Senator SCHUMER. Because I was unaware of it.

Mr. KIMMITT. There had not been a requirement; I mean, you use the term requirement, but we are learning the lessons. As I said to the Chairman in response to an earlier question, we had focused a lot of attention on briefing on closed cases. There are some restrictions on pending cases. Those restrictions do not extend, by and large, to the Congress.

One of the things we wanted to make sure that was done was that for cases for which there had been public announcement or comment by the companies that we had called that to your attention and were able and then were prepared to respond to questions.

Senator SCHUMER. But you do not agree that you are required to brief people on this Committee when you initiate a 45-day full investigation?

Mr. KIMMITT. I do not think that has ever been a requirement. I think that is something that we need to discuss. As I had said earlier, Senator, I think what we need to find is a way that we can continue to encourage the companies to file sensitive proprietary information with us, so we can do a security review, you can do your oversight review; that if companies come in and find that the deal is not going to go forward, they can walk away without the reputational risk.

Now, again, I may have used the term briefing. That was generic. What we provided was notice of the status of the case and are available to respond further to questions but would have to do that in private.

Senator SCHUMER. And who was that provided to?

Mr. KIMMITT. The staff of this and other Committees plus the leadership in both Houses. That was on Monday.

Senator SCHUMER. Okay; next question goes to the way you do investigation. I was shocked to learn, this is one of the things that provided impetus for me to really be so involved in this, that even in the 30-day review of Dubai Ports World, no one at the Port Authority of New York-New Jersey had been contacted.

Now, again, I do not want to get into the details of this investigation, but do you not routinely, if it is a situation with a port, talk to some of the people who run the ports and see if they have concerns before you give somebody a green light?

Mr. KIMMITT. Well, I think what we relied on, Senator, although again, we are learning that we and you together perhaps need to do some more, particularly in terms of outreach, but we really rely on those agencies who are in direct contact with both the owners and operators of the ports.

And so, for example, not only Homeland Security with its important responsibilities with the Coast Guard and Customs and Border Patrol, but we also brought the Department of Transportation in.

Senator SCHUMER. Let me ask you. Did anyone in Homeland Security or any of the departments under your jurisdiction contact the Port Authority during this 30-day period?

Mr. BAKER. We believe we were constrained by the confidentiality restrictions from telling anyone about the pendency of this proceeding. So we did not ask for people to provide comment on the transaction.

Senator SCHUMER. So, in other words, it would be fair to say that you relied only on internal governmental people in the agencies and did not ask anybody from the outside about these concerns.

Mr. BAKER. I think that would be fair.

Senator SCHUMER. Is that typical?

Mr. BAKER. That would be typical.

Senator SCHUMER. I think that is really wrong. Will you not be able to do it in the 45-day review for Dubai Ports World?

Mr. BAKER. Because this is now public, the fact of the 45-day review, we will be consulting with the port security officials across the country——

Senator SCHUMER. Let me clarify. So the law would not have allowed you to talk to them in the 30-day review?

Mr. BAKER. That is how I read it, yes.

Senator SCHUMER. Do you read it that way, Secretary Kimmitt?

Mr. KIMMITT. Well, again, what the law says is that we are barred from publicly discussing any information provided to us during the pendency of a review. There is an exception, as the Chairman pointed out, for the Congress. There is not an exception for State and local people. Clearly, we are going to reach out to them now, and I think one of the things——

Senator SCHUMER. But could someone in Homeland Security not have gone to somebody in the Port Authority and said do you have concerns about who would—you maybe did not have to give the name, but someone is thinking of buying the British company, P&O, would you have security concerns? Because the talk out there is that oh, whoever is the operator does not matter in terms of security.

Well, that is not the view of everyone I talked to who is on the ground, whether it be the Port Authority, the shippers, or anybody else. Why could you not have gone to them and done this? You could have, could you not?

Mr. BAKER. No, our view——

Senator SCHUMER. You would not have to mention the name Dubai Ports World, but you could certainly——

Mr. BAKER. Yes, but I would say we are taking a great risk if the result is that someone decides, gee, they are doing a CFIUS review and infers from the fact that we are asking the questions that there is a CFIUS review underway. We were concerned that we could have been charged with essentially——

Senator SCHUMER. In all due respect, are you not taking a greater risk by not asking?

Mr. BAKER. Well, as matters have eventuated, for sure.

Senator SCHUMER. Thank you.

Mr. KIMMITT. But, Senator, we were relying on both the officials in the Department of Homeland Security, to include the Coast Guard, Customs and Border Patrol. We reached out, although they are not a member of CFIUS, to Transportation. These are the people who are in touch with those officials every day on port security issues. They may not have discussed the specific transaction, but just as Secretary Edelman said, the Army asked through transportation people about what was happening in Beaumont.

I think we were relying on those people to do as much as we could for——

Senator SCHUMER. Well, let me ask, then, Secretary Baker. Do you agree with the view that the port operator has nothing to do with security?

Mr. BAKER. I would not say that the port operator? You mean terminal operator?

Senator SCHUMER. The terminal operator.

Mr. BAKER. No, they obviously have a role in security.

Senator SCHUMER. Good; well, let us shout this out to the world and all those columnists and everybody else. They do have a role in security. Let us make that 100 percent clear, which has been obvious to anyone who has the details but not to anybody else.

One final question about this. When you do your review, the 30-day review now that is completed, do you affirmatively go out and affirmatively ask people to look into it, or do you just, because I have been told that you just look through the record, and if Dubai Ports World has nothing negative, there is nothing negative in the various records of the various agencies, both confidential and not, that you give a green light.

Is that accurate, Secretary Kimmitt?

Mr. KIMMITT. That is not accurate.

Senator SCHUMER. Good.

Mr. KIMMITT. This new review will be——

Senator SCHUMER. No, I mean the 30-day review. The 30-day review, the one that you did already.

Mr. KIMMITT. No, on the 30-day review, remember that we were 60 days into interaction with the company on this. We already had the intelligence assessment, and as I mentioned when you were out briefly, Senator, the intelligence assessment——

Senator SCHUMER. You are kind. I was out more than briefly, but that is okay. You were very nice.

Mr. KIMMITT. Well, maybe it was Disraeli; I do not know.

Senator SCHUMER. Right.

[Laughter.]

Mr. KIMMITT. But the point that I would make is that a lot of times, when the intelligence community is asked a question, they might look at it from a no derogatory or no adverse information. The standard used by my colleagues and me is what is right for the national security interests of the United States. Would my putting my name on that line saying that there is no national security adverse effect from that decision, that is really what guides us and will continue to guide us during the 45-day review. The review will be thorough; it will be impartial; and it will ask just one question. What is right for the Nation's security, including our ports?

Senator SCHUMER. So if you gain new information, you will not hesitate to reverse the position of the 30-day review.

Mr. KIMMITT. We will get new information, and we will consider it in deciding what is right for this country.

Senator SCHUMER. And will have no hesitation at changing, at the 45-day saying it might damage security if you believe it does.

Mr. KIMMITT. At the end of the day, I am in this business for one reason; to protect the national security interests of the United States, and I also know, Senator, that you and many others will be judging how we do, because you will get a detailed report from the President of the United States.

Senator SCHUMER. Right; one quick last one. I thank the Chairman; as I said, his generosity, I have rarely encountered it in my 25 years in Congress, as generous as the Chairman has been with all of this, and thank you.

Chairman SHELBY. Take another minute or two.

[Laughter.]

Senator SCHUMER. That is how it works around here, Gentlemen.

I mentioned in my opening statement the quadrennial review, which we have not heard from in 14 years. Have you done those quadrennial reviews?

Mr. KIMMITT. Boy, I will tell you; I do not know if this is the last question, but it is a thicket. I mean, this was something that was mandated as you mentioned in the law. It was done one time. It asks a lot of very detailed, data-oriented questions.

Senator SCHUMER. Right.

Mr. KIMMITT. When I came in and discovered this, and the Chairman and I were talking about the GAO report, I said my God, let us get this thing up right away. Turned out that we had a draft, but it just did not have the supporting information that we thought would have made it worthwhile. We have gone to the intelligence community. That was one of the first things I did, saying we need help to make sure that our intelligence, our information basis is right, because how can you reach an analytical conclusion against the legal standards until you get the base right, and it is a very fact intensive process. We are in the middle of it. We will get it to you as quickly as we can.

Senator SCHUMER. You agree you should've done it and did not.

Mr. KIMMITT. Administrations going back to 1992 should have complied with sending up the report.

Senator SCHUMER. Thank you, but you will now. How soon can we get that report?

Mr. KIMMITT. I will check with the intelligence community when I get back, but we want to make sure that we have got good facts and give you our best results.

Senator SCHUMER. Better to do it right than quicker.

Thank you, gentlemen.

Thank you, Mr. Chairman.

Chairman SHELBY. Thank you.

Just a few concluding thoughts. We recognize the importance of our open investment policy. You have heard that from both sides of the aisle. We also recognize that we have a duty, as you have, to consider the national security ramifications associated with foreign ownership of American assets. There will often be tension between these considerations. For this reason, the credibility, the integrity of this Committee on Foreign Investments process is crucial; it is paramount.

This hearing has made some things very clear. The American people and the Congress need to have greater confidence, and they do not in this process. To achieve this, I believe the Banking Committee needs to act. I look forward to working with my colleagues, Democrats and Republicans, as we address the various shortcomings. We hope to work with you, Secretary Kimmitt, Secretary Edelman, Secretary Baker, and Secretary Joseph. I hope we can.

But there are various shortcomings here. It is not just a perception. Ports are very important, crucial, and it has been pointed out, Secretary Baker, many times that the ports are probably our most vulnerable area as far as national security is concerned. So we have our work cut out to do.

We thank you for your time and your patience this morning.

The hearing is adjourned.

[Whereupon, at 1:45 p.m., the hearing was adjourned.]

[Prepared statements and response to written questions supplied for the record follow:]

PREPARED STATEMENT OF SENATOR MEL MARTINEZ

Good morning. Today's hearing could not be more timely or important and I want to thank Chairman Shelby for scheduling this so quickly. Like many of my colleagues here, I publicly stated my concerns soon after learning that that Dubai Ports World was approved to purchase the London-based Peninsular & Oriental Steam Navigation Company, giving control of terminal operations at six of our American ports—including one in Miami, Florida—to a company owned by the Dubai Government.

As we go forward with this debate, we should be mindful that this decision was not made by one person alone, but by a group of 12 government agencies including the State Department, the Treasury, Defense, Homeland Security, and Commerce Departments, the USTR, OMB, and several others. As a former Cabinet Secretary in this Administration, I have great confidence in the President's dedication to keeping our Nation secure and his commitment to fighting the war on terror at every level. I further trust that this Administration would not purposefully make decisions or endorse foreign investments that would jeopardize the security of our Nation.

There have been few issues in Washington that have aroused the emotional response that this $6.8 billion acquisition has. And I do not believe that this response is unwarranted—as it has been said, members of the United Arab Emirates have had ties to terrorism in the past and it is appropriate and necessary to debate their management of American ports. However, the UAE made a concerted effort against terrorism after the horrific attacks against our Nation in September 2001, and the UAE is now considered an important partner and ally in the war on terror and we rely on them for strategic access to the Middle East.

I believe that the most important guiding principal that we should focus on as we examine the Committee on Foreign Investment in the United States and whether or not Congress should play a role in the review and approval of international corporate business deals, is that we try to remain objective with a focus on good policy and national security.

I have several questions and concerns that I hope are addressed during your testimony. I hope to walk away from this hearing with a clear understanding of what this takeover means for our port operations and be assured that in no way will Dubai Ports World be responsible for port security. I am interested in hearing more about the actual agreement—including details of security screening at port facilities in Dubai, tightening security along P&O's global "supply chain" and what access U.S. officials will have to Dubai Port World's records and background information on employees and managers and be assured that this will be available without subpoena. I would also like to know the details on the financing of this acquisition—including who the principal investors are and whether or not there will be other states investing or involved in the deal.

When Congress approved the Exon-Florio provision of the Defense Production Act in 1988, it set guidelines for the process CFIUS is to follow when considering blocking an application for a foreign acquisition, merger, or takeovers. It was at this time that Congress decided that a committee with representation from various government departments would be best suited to investigate foreign investment in the United States and review all applications with a broad spectrum of national securities interests in mind. In your testimony, I would like to hear more about the process through which CFIUS came to its conclusion to approve this acquisition. I also want to hear from those members of CFIUS who are not here today.

Ensuring our homeland security is the top priority for all of us here—it would not be in the U.S. Government's interest to sign off on a deal that would be detrimental to the progress we have made in fighting the war on terror. I am appreciative of the 45-day extension that Dubai Ports World and the President agreed to and I hope we use this time effectively to review the CFIUS process to determine whether or not there is a real security threat to U.S. ports resulting from this deal.

Thank you. I look forward to the panel.

PREPARED STATEMENT OF ROBERT M. KIMMITT

DEPUTY SECRETARY, U.S. DEPARTMENT OF THE TREASURY

Mr. Chairman, Ranking Member Sarbanes, and distinguished Members of the Committee, I appreciate the opportunity to appear before you today to discuss once again the Committee on Foreign Investment in the United States (CFIUS) and the Committee's review of DP World's acquisition of P&O. I am here speaking on behalf of the Administration, the Treasury Department, and CFIUS.

The last time I testified before this Committee, the Committee was engaged in a broad examination of the CFIUS process in light of the recent report by the Government Accountability Office. The hearing this morning is an opportunity to continue that dialogue. Before discussing the review surrounding the DP World transaction, I would like to generally describe the CFIUS process.

CFIUS

Exon-Florio

CFIUS was established in 1975 by Executive order of the President with the Secretary of the Treasury as its chair. Its main responsibility was "monitoring the impact of foreign investment in the United States and coordinating the implementation of United States policy on such investment." It analyzed foreign investment trends and developments in the United States and provided guidance to the President on significant transactions. However, it had no authority to take action with regard to specific foreign investments.

The Omnibus Trade and Competitiveness Act of 1988 added Section 721 to the Defense Production Act of 1950 to provide authority to the President to suspend or prohibit any foreign acquisition, merger, or takeover of a U.S. company where the President determines that the foreign acquirer might take action that threatens to impair the national security of the United States. Section 721 is widely known as the Exon-Florio Amendment, after its original Congressional cosponsors.

Specifically, the Exon-Florio Amendment authorizes the President, or his designee, to investigate foreign acquisitions of U.S. companies to determine their effects on the national security. It also authorizes the President to take such action as he deems appropriate to prohibit or suspend such an acquisition if he finds that:

- There is credible evidence that leads him to believe that the foreign investor might take action that threatens to impair the national security; and
- Existing laws, other than the International Emergency Economic Powers Act (IEEPA) and the Exon-Florio Amendment itself, do not in his judgment provide adequate and appropriate authority to protect the national security.

The President may direct the Attorney General to seek appropriate judicial relief to enforce Exon-Florio, including divestment. The President's findings are not subject to judicial review.

Following the enactment of the Exon-Florio Amendment, the President delegated to CFIUS the responsibility to receive notices from companies engaged in transactions that are subject to Exon-Florio, to conduct reviews to identify the effects of such transactions on the national security, and, as appropriate, to undertake investigations. However, the President retained the authority to suspend or prohibit a transaction.

The Secretary of the Treasury is the Chair of CFIUS, and the Treasury's Office of International Investment serves as the Staff Chair of CFIUS. Treasury receives notices of transactions, serves as the contact point for the private sector, establishes a calendar for review of each transaction, and coordinates the interagency process. The other CFIUS member agencies are the Departments of State, Defense, Justice, and Commerce, OMB, CEA, USTR, OSTP, the NSC, the NEC, and the newest member, the Department of Homeland Security. Additional agencies, such as the Departments of Energy and Transportation or the Nuclear Regulatory Commission are routinely invited to participate in a review when they have relevant expertise.

The CFIUS process is governed by Treasury regulations that were first issued in 1991 (31 CFR part 800). Under these regulations, parties to a proposed or completed acquisition, merger, or takeover of a U.S. company by a foreign entity may file a voluntary written notice with CFIUS through Treasury. Alternatively, a CFIUS member agency may on its own submit notice of a transaction. If a company fails to file notice, the transaction remains subject to the President's authority to block the deal indefinitely.

The CFIUS process starts upon receipt by Treasury of a complete, written notice. Treasury determines whether a filing is in fact complete, thereby triggering the start of the 30-day review period. CFIUS may reject notices that do not comply with the notice requirements under the regulations. Upon receiving a complete filing, Treasury sends the notice to all CFIUS member agencies and to other agencies that might have an interest in a particular transaction. CFIUS then begins a thorough review of the notified transaction to determine its effect on national security. In some cases, this review prompts CFIUS to undertake an "investigation," which must begin no later than 30 days after receipt of a notice. The Amendment requires CFIUS to complete any investigation and provide a recommendation to the President within 45 days of the investigation's inception. The President in turn has up to 15 days to make a decision, for a total of up to 90 days for the entire process.

CFIUS Implementation

Although the formal review period commences when CFIUS receives a complete filing, there is often an informal review that begins in advance. Parties to a transaction may contact CFIUS before a filing in order to identify potential issues and seek guidance on information the parties to the transaction could provide to assist CFIUS' review. This type of informal consultation between CFIUS and transaction parties enables both to address potential issues earlier in the review process. The prefiling consultation allows the parties to answer many of CFIUS' questions in the formal filing and allows for a more comprehensive filing. In some cases, CFIUS members negotiate security agreements before a filing is made. In addition, the prefiling consultation may lead the parties to conclude that a transaction will not pass CFIUS review, in which case they may restructure their transaction to address national security issues or abandon it entirely.

During the initial 30-day review, each CFIUS member agency conducts its own internal analysis of the national security implications of the notified transaction. In addition, the U.S. Intelligence Community provides input to all CFIUS reviews. The Intelligence Community Acquisition Risk Center (CARC), now under the office of the Director of National Intelligence (DNI), provides threat assessments on the foreign acquirers. CFIUS will request a threat assessment report from CARC as early as possible in the review process. In order to facilitate reviews, CFIUS may request these reports before the parties to the transaction have made their formal filing. Further, additional agencies such as the Departments of Energy and Transportation and the Nuclear Regulatory Commission actively participate in the consideration of transactions that impact the industries under their respective jurisdictions.

During the review period, there are frequent contacts between CFIUS and the parties to the transaction. The transaction parties respond to information requests and provide briefings to CFIUS members in order to clarify issues and supplement filing materials. Although the CFIUS agencies may meet collectively with the parties as an interagency group, meetings also often occur between the parties and the agency or agencies that have a specific interest in the transaction. Typically, certain members of CFIUS will identify a concern early in the review and then assume the lead role in examining the issue and providing views and recommendations on whether the concern can be addressed. For example, if there are military contracts, the Department of Defense would lead the CFIUS review and recommend a course of action.

Depending on the facts of a particular case, CFIUS agencies that have identified specific risks that a transaction could pose to the national security may, separately or through CFIUS auspices, develop appropriate mechanisms to address those risks when other existing laws and regulations alone are not adequate or appropriate to protect the national security. Agreements implementing security measures vary in scope and purpose, and are negotiated on a case-by-case basis to address the particular concerns raised by an individual transaction. Publicly available examples of some of the general types of agreements that have been negotiated include: Special Security Agreements, which provide security protection for classified or other sensitive contracts; Board Resolutions, which, for instance, require a U.S. company to certify that the foreign investor will not have access to particular information or influence over particular contracts; Proxy Agreements, which isolate the foreign acquirer from any control or influence over the U.S. company; and Network Security Agreements (NSA's), which are used in telecommunications cases and often are imposed in the context of the Federal Communications Commission's (FCC) licensing process.

CFIUS operates by consensus among its members. A decision not to undertake an investigation is made only if the members agree that the transaction creates no national security concerns, or any identified national security concerns have been addressed to the satisfaction of all CFIUS agencies. The daily operation of CFIUS is conducted by professional staff at each agency. Each agency sends the filing to multiple groups in its agency depending on the issues involved in the filing. CFIUS staff report to the policy level, which is the Assistant Secretary level. A decision can be elevated to the Deputy Secretary level and on to the Cabinet officials, if necessary. If within the initial 30-day period there is consensus that the transaction does not raise national security concerns or any national security concerns have been addressed, Treasury, on behalf of CFIUS, writes to the parties notifying them of that determination. This concludes the CFIUS review of the acquisition.

If one or more members of CFIUS believe that national security concerns remain unresolved, then CFIUS conducts a 45-day investigation. The additional 45 days enables CFIUS and the parties to obtain additional information from the parties, conduct additional internal analysis, and continue addressing outstanding concerns. Upon completion of a 45-day investigation, CFIUS must provide a report to the

President stating its recommendation. If CFIUS is unable to reach a unanimous recommendation, the Secretary of the Treasury, as Chairman, must submit a CFIUS report to the President setting forth the differing views and presenting the issues for decision. The President has up to 15 days to announce his decision on the case and inform Congress of his determination.

The last report sent to Congress occurred in September 2003, when the President sent a classified report detailing his decision to take no action to block the transaction between Singapore Technologies Telemedia and Global Crossing.

The Exon-Florio Amendment requires that information furnished to any CFIUS agency by the parties to a transaction shall be held confidential and not made public, except in the case of an administrative or judicial action or proceeding. This confidentiality provision does not prohibit CFIUS from sharing information with Congress. Treasury, as chair of CFIUS, upon request of Congressional committees or subcommittees with jurisdiction over Exon-Florio matters, has arranged Congressional briefings on transactions reviewed by CFIUS. These briefings are conducted in closed sessions and, when appropriate, at a classified level. CFIUS members with equities in the transaction under discussion are invited to participate in these briefings.

Since the enactment of Exon-Florio in 1988, CFIUS has reviewed 1,604 foreign acquisitions of companies for potential national security concerns. In most of these reviews, CFIUS agencies have either identified no specific risks to national security created by the transactions or risks have been addressed during the review period. However, to date 25 cases have gone through investigation, twelve of which reached the President's desk for decision. In eleven of those, the President took no action, leaving the parties to the proposed acquisitions free to proceed. In one case, the President ordered the foreign acquirer to divest all its interest in the U.S. company. In another case that did not go to the President, the foreign acquirer undertook a voluntary divestiture. Of those 25 investigations, seven have been undertaken since 2001 with one going to the President for decision. However, these statistics do not reflect the instances where CFIUS agencies implemented security measures that obviated the need for an investigation or where, in response to dialogue with CFIUS agencies, parties to a transaction either voluntarily restructured the transaction to address national security concerns or withdrew from the transaction altogether.

DP World

Contrary to many accounts, the DP World transaction was not rushed through the review process in early February. On October 17, 2005, lawyers for DP World and P&O informally approached Treasury Department staff to discuss the preliminary stages of the transaction. This type of informal contact enables CFIUS staff to identify potential issues before the review process formally begins. In this case, Treasury staff identified port security as the primary issue and directed the companies to DHS. On October 31, DHS and the Department of Justice staff met with the companies to review the transaction and security issues.

On November 2, Treasury staff requested a CARC intelligence assessment from the Office of the DNI. Treasury received this assessment on December 5, and it was circulated to CFIUS staff. On December 6, staff from CFIUS agencies with the addition of staff from the Departments of Transportation and Energy met with company officials to review the transaction and to request additional information. On December 16, after 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 responsibilities and experience with DP World.

During the 30-day review period, members of the CFIUS staff were in contact with one another and the companies. As part of this process, DHS negotiated an assurances letter that addressed port security concerns. The final assurances letter was circulated to the committee on January 6 for its review, and CFIUS concluded its review on January 17. In total, far from rushing their review, members of CFIUS staff spent nearly 90 days reviewing this transaction. There were national security issues raised during this review process, but any and all concerns were addressed to the satisfaction of all members of CFIUS. By the time the transaction was formally approved, there was full agreement among the CFIUS members.

Another misperception is that this transaction was concluded in secret. Although the Exon-Florio Amendment prohibits CFIUS from publicly disclosing information provided to it in connection with a filing under Exon-Florio, these transactions often become public through actions taken by the companies. Here, as is often the case, the companies issued a press release announcing the transaction on November 29. In addition, beginning on October 30, dozens of news articles were published regard-

ing this transaction, well before CFIUS officially initiated, much less concluded its review.

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

Conclusion

Since my last appearance before this Committee, I have worked with my colleagues to address several of the flaws that you identified in CFIUS reviews. We have revised the interagency process to ensure that all members, especially the security agencies, have sufficient time and opportunity to review transactions, identify any security concerns, and fully address those concerns. Nonetheless, it is clear that improvements are still required. In particular, we must improve the CFIUS process to help ensure the Congress can fulfill its important oversight responsibilities. Although CFIUS operates under restrictions on public disclosures regarding pending cases, we have tried to be responsive to inquiries from Congress. I am open to suggestions on how we foster closer communication in the future. I think that we can find the right balance between providing Congress the information it requires to fulfill its oversight role while respecting the deliberative processes of the executive branch and the proprietary information of the parties filing with CFIUS.

Let me stress in closing, Mr. Chairman, that all members of CFIUS understand that their top priority is to protect our national security. As President Bush said: "If there was any doubt in my mind, or people in my Administration's mind, that our ports would be less secure and the American people endangered, this deal wouldn't go forward."

I thank you for your time this afternoon and am happy to answer to any questions.

PREPARED STATEMENT ERIC EDELMAN

UNDER SECRETARY FOR POLICY, U.S. DEPARTMENT OF DEFENSE

MARCH 2, 2006

Mr. Chairman, Members of the Committee. Thank you for the opportunity to appear before you today to discuss the Department of Defense's role in the Committee on Foreign Investments in the United States (CFIUS) and our review of the Dubai Ports World (DPW) and Peninsular and Oriental Stream Navigation Company (P&O) transaction.

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

First and foremost, our primary objective in this process is to ensure that any proposed transaction does not pose risks to U.S. national security interests. To do this, the Department of Defense reviews several aspects of the transaction, including:

The importance of the firm to the U.S. defense industrial base (for example, is it a sole-source supplier, and, if so, what security and financial costs would be incurred in finding and/or qualifying a new supplier, if required?); Is the company involved in the proliferation of sensitive technology or WMD? Is the company to be acquired part of the critical infrastructure that the Defense Department depends upon to accomplish its mission; Can any potential national security concerns posed by the transaction be eliminated by the application of risk mitigation measures, either under the Department's own regulations or through negotiation with the parties?

Regarding this specific CFIUS transaction, the Departments of Treasury, Commerce, and Homeland Security met with the legal representatives of DPW and P&O for CFIUS prefiling notification consultations on October 31, 2005. On December 6, 2005, the companies held a prefiling briefing for all CFIUS agencies. The Defense Technology Security Administration (DTSA) attended the meeting for DoD. On December 16, 2005, the Department of the Treasury received an official CFIUS filing. On the same day, Treasury circulated the filing to all CFIUS member agencies for review and DTSA staffed the filing to sixteen other Department of Defense (DoD) elements or agencies for review and comment.

The review conducted by the Department of Defense on this transaction was neither cursory nor casual. Rather, it was in-depth and it was comprehensive. This transaction was staffed and reviewed within the DoD by 17 of our agencies or major organizations. In this case, DoD agencies reviewed the filing for impact on critical technologies, the presence of any classified operations existing with the company being purchased, military transportation and logistics as well as other concerns this transaction might raise. During the review process (December 21, 2005 through January 6, 2006), DoD did not uncover national security concerns that warranted objecting to the transaction or requiring a 45-day investigation. Positions were approved by staff that ranged from staff-matter experts up to a Deputy Under Secretary of Defense, as appropriate to the office undertaking the review. All who were consulted arrived at the same position: "Do not investigate further."

The DoD organizations that reviewed this and all other CFIUS transactions bring to bear a diverse set of subject matter expertise, responsibilities, and perspectives. The organizations included, for example, the Office of the Under Secretary for Intelligence; the Office of the Under Secretary for Acquisition, Logistics, and Technology; the Military Departments (Army, Navy, and Air Force); U.S. Transportation Command; the National Security Agency; and the Defense Intelligence Agency. The Army, for example, reviewed the case in the following manner: Army Materiel Command (AMC) Headquarters and Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA(AL&T)) staff gave a preliminary review, immediately upon receipt of the case. AMC staffed the filing to their subordinate readiness commands responsible for acquisition and logistics, including the Military Surface Deployment and Distribution Command (SDDC). For this case, the Army's review criteria included the question of assured shipping, and the Army's final position was "no objection."

The Defense Technology Security Administration, which reviews, coordinates and analyzes the recommendations from all the DoD components, as well as assessing export control and sensitive technology issues, ultimately "signed off" on the transaction for the Department. Therefore, we had a comprehensive and in-depth review of this transaction, and no issues were raised by any agencies or departments within the Department of Defense. We are comfortable with the decision that was made.

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

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

The United Arab Emirates is an outstanding example of the kind of partner critical to winning this Long War. Dubai was the first Middle Eastern entity to joint the Container Security Initiative—a multinational program to protect global trade from terrorism. It was also the first Middle Eastern entity to join the Department of Energy's Megaports Initiative, a program aimed at stopping illicit shipments of nuclear and other radioactive material. The UAE has also worked with us to stop terrorist financing and money laundering by freezing accounts, enacting aggressive anti-money laundering and counter-terrorist financing laws and regulations, and exchanging information on people and entities suspected of being involved in these activities.

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

The UAE provides excellent access to its seaports and airfields like al Dhafra Air Base, as well as overflight through UAE airspace and other logistical assistance. We have more Navy port visits in the UAE than any other port outside the United States. Last year, U.S. Naval warships and Military Sealift Command ships spent over 1,400 days in the ports of Dubai, Jebel Ali, Abu Dhabi, and Fujairah. And, by the way, the port at Jebel Ali—which is the only carrier-capable port in the Gulf—is managed by DPW. Coalition partner ships also used the UAE ports last year. The U.S. Air Force has operated out of al Dhafra Air Base since the Gulf War in 1990. Today, al Dhafra is an important location for air refueling and aerial reconnaissance aircraft supporting operations in Iraq and Afghanistan.

And we should note that our most important commodity—our military men and women—are frequent visitors to the UAE on liberty or leave while deployed to the region. So we rely on the Emirates for our security in their country, and I appreciate and thank them for that.

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

Finally, the United Arab Emirates have been very supportive of our efforts in Iraq and Afghanistan. They have provided military and operational support to Operation Enduring Freedom in Afghanistan and financial and humanitarian aid to Afghanistan and its people. The UAE has provided monetary and material support to the Iraqi Government, including a pledge of $215M in economic and reconstruction assistance.

Mr. Chairman, this concludes my formal statement. I would be happy to answer any further questions you may have regarding this subject.

PREPARED STATEMENT OF STEWART BAKER

ASSISTANT SECRETARY FOR POLICY, U.S. DEPARTMENT OF HOMELAND SECURITY

MARCH 2, 2006

Mr. Chairman, Senator Sarbanes, and Members of the Committee, I am pleased to be here today to help discuss the critically important issue of port security and help clarify any questions you have about DHS's role in the Committee on Foreign Investment in the United States (CFIUS) and both DHS's consideration of the Dubai Ports World (DP World) acquisition of the British-owned Peninsula and Oriental Steam Navigation Company (P&O) and P&O's wholly owned U.S. subsidiary, P.O. Ports North America, Inc.

As DHS's Assistant Secretary for Policy, Planning, and International Affairs, I play a key role both in DHS's ongoing efforts to continue to strengthen port security and the CFIUS process. As you know, I oversaw the DHS review of the CFIUS transaction involving DP World and P&O. Based on a thorough review, meetings with the company that began more than 6 weeks before the company filed for review, and the binding nature of an assurances agreement between DHS and the company to ensure security at U.S. ports, I fully stand behind the decision DHS made in January 2006 not to further investigate this transaction.

Developments in the DP World Case

Nevertheless, DP World has announced that it is requesting an additional review by CFIUS. According to press reports, the company is likely to file a request for CFIUS review this week and seek an additional 45-day review.

DHS, as one of 12 CFIUS agencies, will be a full and active participant in that review, and welcomes the opportunity to review the transaction anew. As I explain in more detail below, DHS will once again consult widely with its experts in the Department, including those at Coast Guard and Customs and Border Protection (CBP) who have primary responsibility for port and cargo security.

Before getting into the specifics of the DP World transaction, I would like to provide a general overview of DHS's participation in the CFIUS process.

Overview of DHS Participation in CFIUS

DHS is the newest member of CFIUS, added by Executive order in 2003, after DHS was created. DHS has participated in the CFIUS process actively, and has placed a significant focus on nontraditional threats, as DHS has broad responsibility for protecting a wide variety of critical infrastructures. DHS is often joined in raising these concerns by our partners at the Department of Justice and Department of Defense, and others. DHS is proud to work in close cooperation with these sister Cabinet agencies.

There are dozens of transactions in a year that require CFIUS review. In 2005, for example, CFIUS considered 65 discrete filings. DHS conducts a thorough review of each CFIUS case, and raises its concerns where issues arise.

The three most important questions DHS considers before deciding to seek an investigation are:

- Does DHS already have sufficient legal or regulatory authority to eliminate any threat to homeland security that might be raised by the transaction?
- Does DHS have homeland security concerns about the parties or nature of the transaction?

- If DHS has homeland security concerns, can they be resolved with binding assurances from the parties to the transaction?

Only after answering these questions does DHS decide whether to seek an investigation in CFIUS. DHS examined those questions in the DP World case and, as I will explain in more detail, made the judgment not to object to the transaction. All of the other 11 CFIUS member agencies made a similar decision after conducting their own independent reviews of the transaction.

DHS Legal Authority at the Ports

Congress has granted DHS sufficient legal authority to regulate the security of America's ports and the cargo that passes through each of those ports.

Under the Magnuson Act, the Ports and Waterways Safety Act, and, most recently, the Maritime Transportation Security Act of 2002 (MTSA), the U.S. Coast Guard has great authority to regulate security in all American ports. This includes the security for all facilities within a port, including terminal operators and vessels intending to call at a port or place subject to the jurisdiction of the United States.

The Role of Terminal Operators like P&O and DP World

Let me first clarify what terminal operators do.

They do not run ports.

They certainly 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 also do not obtain a comprehensive window into the breadth and depth of security measures that DHS employs to protect our ports and the cargo that enters those ports. The public fears that the DP World transaction have generated on this point are misplaced and lack a firm factual foundation, as I will explain later.

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

That is what we are talking about here. Through its acquisition of P&O, DP World is hoping to take over the leases at twenty-four terminals in the United States. That is a relatively small part of the operations in the six ports where they would operate terminals, including New Orleans, Houston, Miami, Newark, Baltimore, and Philadelphia. Their filings indicate that DP World will also take over the P&O equities at other ports, but these consist of stevedoring and labor operations where P&O is not the designated terminal operator.

I understand from the Coast Guard that there are more than 800 regulated port facilities in the six ports where P&O operates terminals in the United States. So the twenty-four terminals in question here constitute less than 5 percent of the facilities in those six ports.

MTSA requires each terminal operator—because they operate inside the port—to file a facilities security plan with the Coast Guard that specifically details their compliance with all of the security measures required by Federal law, including those enforced by the Coast Guard. The Coast Guard inspects the terminal and can check the terminal operator's plan at any time, and require more effective measures if the Coast Guard deems they are necessary.

These MTSA requirements for U.S. port security do not turn on the nationality of the terminal operator. United States, British, Chinese, and UAE terminal operators are all subject to the same legal requirements, and the Coast Guard Captains of the Port can tailor each security plan to address the particular circumstances of each location.

Coast Guard Actions under MTSA

The Coast Guard has inspected and approved facility security plans for some 3,200 facilities regulated by MTSA. In addition, Coast Guard has completed Port Security Assessments and Port Threat Assessments for all 55 military and/or economically critical ports.

Forty-four Area Maritime Security Committees have been formally chartered and have developed Area Maritime Security Plans for the purpose of detecting, deterring, and preventing terrorist attacks as well as responding in the event of an incident. These committees are chaired by a local Coast Guard official, the designated Federal Maritime Security Coordinator, and include port authority, vessel, facility, labor interest as well as Federal, State, and local agencies.

The Coast Guard established an International Port Security Program to assess the effectiveness of antiterrorism measures in place in overseas ports. Thirty-seven

of the 44 countries assessed to date have substantially implemented the International Ship and Port Facility Security (ISPS) Code. These 44 countries are responsible for over 80 percent of the maritime trade to the United States. The seven countries that are not in substantial compliance have been or will be notified shortly to take corrective actions or risk being placed on a Port Security Advisory and have Conditions of Entry imposed on vessels arriving from their ports.

The Coast Guard has conducted 16,000 foreign flag vessel boardings for security compliance with the ISPS Code since July 2004. These boardings were conducted either offshore or in port, depending on the risk assessment completed prior to each vessel's arrival in a U.S. port.

DHS Role in Cargo Security

The Administration recognized after September 11 that more was needed to protect the United States from terrorist attack, and it immediately identified the vulnerability posed by the millions of cargo containers entering our ports each year. DHS plays a primary role in strengthening port and cargo security, and with the support of the Administration, we have made dramatic increases in these areas. Since September 11, funding for port and cargo security has increased by more than 700 percent, from $259 million in fiscal year 2001 to $2.164 billion in fiscal year 2004 and $2.183 billion in fiscal year 2005. This upward trend continues with $2.455 billion for DHS port security allocated in fiscal year 2006, and an addition 35 percent increase to $3.172 billion in the President's Budget request for fiscal year 2007.

This money has of course funding port security grants of more than $870 million. It has also built a layered security strategy that pushes our security measures overseas. The reason is simple. The Federal Government realized after the September 11 attacks that it would be far better to detect and interdict a threat to the United States when that container was thousands of miles away, rather than sitting in a U.S. port. So we pushed our borders out to do much more inspection and screening of cargo before it ever arrives at our shores.

The 24-Hour Rule and CSI

Our authority over shipping containers begins even before the container is loaded in a foreign port—and long before that container arrives in the United States. We require foreign companies to send us a list of the contents of a container 24 hours before the container is loaded on board the ship *in the foreign country.*

If Customs and Border Protection (CBP) concludes that the contents of a particular container may be high risk, we can have it physically inspected or x-rayed in cooperating foreign ports.

This program, known as the Container Security Initiative (CSI) depends on the voluntary cooperation of foreign governments and foreign companies. We have gotten that cooperation around the world—including in Dubai, the United Arab Emirates. The CSI currently operates in 42 of the world's largest ports. By the end of this year, the number of cooperating ports is expected to grow to 50, covering approximately 82 percent of maritime containerized cargo shipped to the United States.

Twenty-four hours before a ship is loaded, and therefore prior to departing the last foreign port for the United States, DHS receives a complete manifest of all the cargo that will be on that ship when it arrives in a U.S. port. This includes all cargo information at the bill of lading level, whether the cargo is destined for the United States, or will remain on-board while in a U.S. port but destined for a foreign country. This rule applies to all containerized sea cargo whether departing from a CSI port or not.

Mandatory Advance Notice of Crew Members to DHS

Depending upon the length of the voyage, DHS receives additional notice concerning the crew of the vessel 24 to 96 hours before the vessel arrives in the United States. This is full biographic data identifying the crewmembers and passengers, if any, so that DHS can screen them against risk indicators, the terrorist watch list and other databases.

We also get information from the importer describing the declared value and description of the goods being imported.

Risk Analysis of Cargo and Crew

Thus, long before a cargo ship arrives at any U.S. port, DHS has the shipper's information, the ship's information, and usually the buyer's information about what is in the container. The data is compared to ensure that it matches, and is also compared against historical information to detect anomalous patterns.

This data is all scrutinized and processed through a complex program that runs against hundreds of risk indicators to assign the ship and its cargo a risk score. The crew and passengers are all vetted prior to arrival.

DHS has full information about the vessel, its contents, and the people on-board.

If DHS has a concern about the cargo, the Coast Guard and CBP meet and decide an appropriate course of action, which may include boarding the vessel at sea or at the entrance to the ship channel, or meeting the vessel dockside and immediately inspecting the suspect containers.

Coast Guard has established a process to identify and target High Interest Vessels. This process has resulted in 3,400 at sea security boardings, and 1,500 positive vessel control escorts since 2004 to ensure that these vessels cannot be used as a potential weapon.

What the Terminal Operator Knows about U.S. Security Measures

I noted earlier that ownership of a terminal operation does not give the terminal operator—foreign or domestic—a unique insight into the breadth and depth of DHS security measures nor provide a crafty terminal operator with ill intent access to inside information to avoid or evade DHS scrutiny.

The first time a terminal operator at a U.S. facility sees any of the law enforcement and security measures that DHS has in place concerning the vessel and cargo is when the ship arrives in the United States. Even then, all the terminal operator knows is that CBP has selected certain containers for examination. The operator is simply instructed to unload the containers, under DHS supervision, and deliver them to CBP for inspection. They are not told why.

CBP Examines 100 percent of Risky Containers

As I have noted already, CBP screens 100 percent of containers for risk. All containers that DHS determines to be of risk are examined using a variety of technologies. These technologies include: Radiation screening, nonintrusive x-ray inspection, and as appropriate, physical examination.

This screening and examination is carried out by DHS employees tasked with the security of our seaports. They are assisted by longshoreman and stevedores in moving the containers, and by local law-enforcement authorities and port police to ensure the security of the port facilities.

All a terminal operator knows is that a container has been selected for examination, but not why the container was selected. The inspections and radiation detections are performed by CBP, not by the operator. Security is provided by a variety of government programs, agencies, and local law enforcement officials, not the terminal operator.

Special Measures to Detect Radioactive Devices

DHS component agencies and the DHS Domestic Nuclear Detection Office have worked closely with the Department of Energy to deploy radiation detection technology at domestic and foreign seaports. The Department of Energy is providing technical support to Dubai Customs to install four Radiation Portal Monitors in their main port in June. Some of this equipment is specifically dedicated to "in-transit cargo" passing through the Dubai port on its way to places like the United States.

In the United States, we have deployed 181 radiation portal monitors at seaports to date, which allows us to screen 37 percent of arriving international cargo, and that number will continue to grow through the remainder of this year and 2007. CBP also has the ability to use portable devices to detect the presence of radiation at additional facilities, and CBP has issued over 12,000 hand-held devices to its officers. The President's fiscal year 2007 budget requests $157 million to secure next-generation detection equipment at our ports of entry.

Since there is often confusion on this point, I want to restate it. CBP subjects 100 percent of all containers shipped to the United States to a risk assessment analysis and subjects 100 percent of any container over a certain risk threshold to further inspection.

In short, DHS already has a large number of measures in place relating to port and cargo security that are designed to ensure the security of our ports. These measures, and additional measures taken by local port authorities, greatly reduce the risks presented by the presence of any foreign terminal operator in a U.S. port.

CFIUS Review of the DP World Transaction

DHS always examines the backgrounds of parties to a CFIUS transaction, and we did so in this case. DHS agencies—the Coast Guard and CBP—had previously worked with both DP World and its management and found them to be cooperative and professional. Demonstrating this is the fact that DP World met with senior offi-

cials of DHS and DOJ on October 31—more than 6 weeks before they filed on December 16 and our review began on December 17, to provide confidential notice of their plans and begin answering questions.

DP World

DP World has played an invaluable role in the establishment of the first foreign-port screening program that the United States started in the Middle East. That is because Dubai also volunteered to help in this innovative approach to security. DP World has voluntarily agreed to participate in screening of outbound cargo for nuclear material, and it has worked closely with CBP and the Dubai Customs Authority to target high-risk containers destined for the United States. These screening programs could not have been successfully implemented without the cooperation of Dubai Port World.

P&O's Participation in the Customs-Trade Partnership Against Terrorism (C–TPAT)

British-based P&O, the owner of the U.S. facilities DP World is seeking to acquire, is and was a voluntary participant in CBP's Customs-Trade Partnership Against Terrorism (C–TPAT). C–TPAT establishes voluntary best security practices for all parts of the supply chain, making it more difficult for a terrorist or terrorist sympathizer to introduce a weapon into a container being sent by a legitimate party to the United States. DP World has committed to maintaining C–TPAT participation for all of the P&O ports subject to this acquisition.

C–TPAT covers a wide variety of security practices, from fences and lighting to requiring that member companies conduct background checks on their employees, maintain current employee lists, and require that employees display proper identification.

C–TPAT's criteria also address physical access controls, facility security, information technology security, container security, security awareness and training, personnel screening, and important business partner requirements. These business partner requirements oblige C–TPAT members, like P&O, to conduct business with other C–TPAT members who have committed to the same enhanced security requirements established by the C–TPAT program.

In Newark, New Jersey, all eight of the carriers who use P&O's Port Newark Container Terminal are also members of C–TPAT which increases the overall security of the Newark facility.

The DP World CFIUS Transaction

As I noted toward the beginning of my testimony, DHS considers three important questions in any CFIUS transaction: (1) does DHS already have sufficient legal or regulatory authority to eliminate any threat to homeland security that might be raised by the transaction?; (2) does DHS have homeland security concerns about the parties or nature of the transaction?; and (3) if DHS has homeland security concerns, can they be resolved with binding assurances from the parties to the transaction?

I have addressed the first two of those questions, now let me turn to the third.

As part of its CFIUS review, DHS considers whether it should obtain any further commitments from the companies engaging in the transaction to protect homeland security. DHS has been aggressive in seeking such assurances as part of CFIUS reviews. The assurances are carefully tailored to the particular industry and transaction, as well as the national security risks that we have identified.

The Assurances Agreements

DHS had never required an assurances agreement before in the context of a terminal operator or a port. But after analyzing the facts, DHS decided that we should ask for and obtain binding assurances from both companies.

The companies agreed after discussions to provide a number of assurances, two of which are particularly important.

First, both parties agreed that they would maintain their level of participation and cooperation with the voluntary security programs that they had already joined. This means that, for these companies, and these companies alone, what was previously voluntary is now mandatory.

In the United States, the parties are committed to maintaining the best security practices set out in C–TPAT. In Dubai, the parties are committed to continued cooperation in the screening of containers bound for the United States, including the radiation screening discussed above.

Second, the parties agreed to an open book policy in the United States. DHS is entitled to see any records the companies maintain about their operations in the United States—without a subpoena and without a warrant. All DHS needs to pro-

vide to DP World is a written request and we can see it all. DHS can also see any records in the United States of efforts to control operations of the U.S. facilities from abroad.

Because C–TPAT requires a participating company to keep a current record of its employees, including Social Security number and date of birth, this open-book assurance also allows us to obtain up-to-date lists of employees, including any new employees. DHS will have sufficient information about DP World employees to run the names against terrorist watch lists, to do background checks of our own, or to conduct other investigations as necessary.

These agreements were negotiated and obtained during the 30-day period the transaction was under CFIUS review, and DHS conditioned its nonobjection to the transaction on the execution of those agreements.

The Assurances Letters to DHS are Binding and Legally Enforceable

The assurances that DHS obtained from the companies are binding and legally enforceable, so that DHS and the U.S. Government could go into court to enforce them.

The companies also agreed in the assurances letters that DHS could reopen the case, which could lead to divestment by the foreign company if the representations the companies made to DHS turned out to be false or misleading.

DHS believes that DP World will adhere to both the letter and the spirit of the assurances letter, because the worst thing that can happen to a terminal operator's business is to lose the trust of the CBP officials who decide how much of that operator's cargo must be inspected every day. If we lose faith in the security and honesty of these parties, we will have to increase government scrutiny of the cargo they handle. That means more inspections and more delays for their customers.

And that is very bad for business.

That is why DHS is confident that the companies will work hard to continue to earn and retain our trust—and to fulfill their assurances—every day.

Conclusion

In short, after examining this transaction with care, DHS concluded that: (1) we have legal authority to regulate the U.S. security practices of these parties, including the ability to assess the maritime threat and intervene, at the foreign port of origin or on the high-seas, before potentially problematic cargo arrives at a U.S. port to be serviced by the parties; (2) DP World's track record in cooperating with DHS on security practices is already very good; and (3) DHS obtained assurances that provide additional protection against any possible future change in the cooperative spirit we have seen so far and that allow us to do further checks on our own.

Based on all those factors, DHS concluded that it would not object to the CFIUS transaction or seek an additional 45-day investigation.

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

RESPONSE TO WRITTEN QUESTIONS OF SENATOR SHELBY FROM ROBERT M. KIMMITT

Q.1. Secretary Kimmitt, you have been testifying and briefing almost nonstop on the issues of the Dubai Ports transaction and the Committee on Foreign Investments. Given that fact, can you offer the Banking Committee some explanation why we did not receive your prepared statement until 10:30 the night before the hearing? Certainly your statement for this hearing cannot differ that markedly from what you have already spoken on this week.

A.1. I apologize for any delay. Treasury's interest is ensuring that testimony is responsive to the precise nature of each heming. As Chair of CFIUS, we also necessarily collaborate with other agencies, a process which takes a certain amount of time. We provided you the written testimony as soon as it was available.

Q.2. Secretary Kimmitt, could you clarify for the Committee your understanding of the authorities existing with the President that would allow for a nullification of the ports transaction in the event a new investigation results in a determination that U.S. national security would be endangered by the deal? Would a potentially protracted court case be the only recourse?

A.2. The President would have had the authority to undo the deal as a result of the new review. By agreeing to file a new notice under 31 CFR Sec. 800.401 (and to be bound thereby), the companies initiated a new "action under Section 721"—one that had the effect of allowing the President to take action under 31 CFR Sec. 800.601 in response to CFIUS's recommendation, notwithstanding CFIUS's previous decision not to proceed to an extended 45-day investigation. The President has the authority under Exon-Florio to order divestiture and can direct the Attorney General to enforce such an order if necessary. He can direct the Attorney General to enforce such an order, if the parties do not willingly comply with the President's divestiture order.

Q.3. Secretary Kimmitt, I would like to address the issue of the Arab boycott of Israel and of the parent company of Dubai Ports World's participation in that boycott.

I recognize that the Department of Commerce is not represented here today, and they would be the logical ones to field this question. As chair of the Committee on Foreign Investments, however, I would like you to respond, on whether the boycott issue was raised during consideration of the Dubai Ports acquisition and, if so, how was it resolved.

A.3. Consistent with the Exon-Florio Amendment, CFIUS considers a broad range of factors when investigating proposed foreign acquisitions of U.S. companies. The Committee takes an expansive view of national security and consistently examines the prospective acquirer's country of origin, as well as U.S. relations with the acquirer's country of origin. The Committee gives particular attention to this factor when investigating proposed transactions with foreign government-controlled entities. As part of its broad review of the proposed DP World acquisition of P&O and potential impacts on U.S. national security, CFIUS carefully considered the relationship between the United States and the United Arab Emirates. The

Committee unanimously concluded that the acquisition did not present a threat to national security.

Q.4. I would like to hear from each of the witnesses regarding their views on the wisdom of implementing a system for approaching reviews of state-owned entities from a risk-based perspective.

The port management company that is being bought by Dubai is British-owned. I recall no expressions of concern when P&O came into the picture, certainly nothing like has occurred with respect to Dubai Ports World. Does it make sense to treat some countries as presenting an inherently greater risk than others, so that legislative changes to Exon-Florio do not necessarily treat a close NATO ally in the same manner as a country from the Middle East? I am picturing in my mind the system of tiering countries according to risk used in regulating the export of high performance computers.

A.4. CFIUS always 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. When deciding whether to open a 45-day extended investigation, CFIUS considers whether the transaction may affect national security. In establishing whether an acquisition or merger by a foreign entity may affect national security, CFIUS examines relevant intelligence reporting and a number of other national security factors, including the foreign entity's country of origin, U.S. relations with the foreign entity's country of origin, and the foreign entity's compliance with any preexisting national security agreements and/or other preexisting agreements it has with the United States that seek to ensure protection of homeland security, as well as information regarding the foreign entity and its compliance with U.S. laws and regulations.

CFIUS's implementation of Exon-Florio has increased the awareness of investors to national security issues, brought transactions into conformity with existing laws where needed, and resulted in investors abandoning transactions that raised insurmountable national security problems. We do not believe the law needs to be amended to require consideration of the country of the foreign acquirer since CFIUS already takes that into consideration as part of its analysis.

Q.5. Could the panel explain for the Committee the precise routine role of the intelligence community in the review process?

A.5. 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 cases. The Intelligence Community—primarily the Intelligence Community Acquisition Risk Center (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 a provider of intelligence assessments regarding the foreign acquirer and the transaction. The Office of the Director for National Intelligence (DNI)—via the National Intelligence Council—is now providing an all-source assessment of any potential threats arising from proposed transactions.

The DNI can be engaged even before a case is formally filed with CFIUS. In fact, Treasury, on behalf of CFIUS, routinely requests DNI assessments when parties to a transaction notify CFIUS of an anticipated filing (that is, a prefiling). As part of the 30-day investigation, Treasury always asks the DNI to provide a threat assessment for each case. Generally, DNI provides its assessment no later than Day 23 of the initial 30-day investigation period. If a case goes into a 45-day extended investigation, DNI has a continued role in the consideration of national security concerns.

Q.6. One of the major concerns the Committee has with regard to implementation of Exon-Florio involves mitigation agreements, in which companies accept certain conditions in exchange for regulatory consent to the transaction in question.

Could the panel inform the Committee as to the measures taken to monitor and enforce mitigation and national security agreements? How is it determined which member agency within the Committee on Foreign Investment negotiates, monitors, and enforces such agreements? Have there been instances in which foreign governments or businesses have placed obstacles in the way of that process?

A.6. If it has particular national security concerns that it feels must be addressed, any CFIUS agency may, in consultation with CFIUS, engage the parties in negotiating a mitigation agreement. Agencies monitor and ensure compliance with respect to those agreements to which they have chosen to become parties.

With regard to any particular national security concern for which CFIUS agencies may want to pursue mitigation, it is typically the member of the Committee with the greatest relevant expertise that assumes the lead role in negotiating and ultimately concluding assurance letters or mitigation agreements to address that concern. Such assurance letters and/or mitigation agreements implement security measures that vary in scope and purpose according to the particular national security concerns raised by a specific transaction.

There are remedies built into mitigation agreements to address concerns that arise after the CFIUS case concludes. The "lead" agency or agencies are and should be responsible for monitoring the parties' compliance. Procedures for monitoring an agreement may, for example, include annual reporting by the company to the lead agency or site visits by the lead agency.

For a material breach of any representation or commitment in the mitigation agreement, the lead agency would be empowered to seek any remedy available at law or equity in a U.S. court of law.

Companies that file with CFIUS have voluntarily engaged in the process in order to protect themselves in the future from potentially having their transactions unwound by the government. We have found companies, including those owned and controlled by foreign governments, to be cooperative and willing to provide assurances letters and engage in negotiations concerning mitigation agreements, when required by CFIUS.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR BUNNING FROM ROBERT M. KIMMITT

Q.1. What kind of help have we gotten from the UAE on tracing and stopping the flow of money to terrorist groups?

A.1. The United Arab Emirates has laws criminalizing money laundering and terrorist financing, and has prosecuted several cases under both laws. The UAE has enacted measures in compliance with the Financial Action Task Force 40 Recommendations on Money Laundering and the nine Special Recommendations on Terrorist Financing. Among those efforts, the UAE instituted a hawala registration system domestically, and it also has hosted two regional hawala conferences to educate other governments on best practices for regulating a traditionally unregulated informal financial sector. The UAE is establishing procedures for the regulation of cash couriers, charitable organizations, and other nongovernmental organizations, including oversight of their financial activities.

We consult frequently with senior UAE officials on terrorist financing issues and continue to rely on a frank, open, and productive exchange of information and insight. We have repeatedly asked the UAE, as a regional financial center, to demonstrate leadership on these issues by setting high standards and cooperating with regional governments on information exchange and counter terrorist financing actions. Since 2000, the UAE Government has frozen $1.3 million of funds in 17 different accounts based on U.N. Security Council resolutions. Its Financial Intelligence Unit exchanges information on people and entities suspected of being involved in terrorist financing with international Financial Intelligence Units, including FinCEN, through the Egmont Group.

In addition, the UAE has approved the opening of a permanent Drug Enforcement Administration (DEA) post in Dubai which will be staffed by two special agents (one of whom will act as the country attaché), an intelligence research specialist, and one support staff. DEA is working closely with UAE authorities on the investigation of drug trafficking and drug money laundering, which has the potential to support terrorism or the insurgency in Afghanistan.

Q.2. Are we still seeing money flow through the UAE to aid terrorists like we did before September 11?

A.2. 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 laws and regulations against money laundering and terrorist financing.

Q.3. How many transactions has the Committee on Foreign Investment rejected and approved in its history?

A.3. In considering more than 1,600 transactions since 1988, CFIUS has compiled a solid record of identifying potential adverse effects on national security and taking appropriate measures to mitigate those effects, where possible. As of this writing, 27 transactions have gone to investigation, and 13 have reached the President for decision (others were withdrawn prior to a Presidential decision). The President blocked one transaction in February 1990, when CATIC company—controlled by the Government of the People's Republic of China—sought to acquire MAMCO Manufacturing, Inc., an aerospace parts manufacturer in the State of Washington.

These figures must be viewed in the proper context. Relatively few acquisitions by foreign entities have the potential to affect national security. The vast majority of notified transactions do not require an investigation either because these transactions do not potentially threaten national security, or because CFIUS is able to mitigate the national security concerns that arise in connection with these transactions through other means.

CFIUS has raised the awareness of foreign investors contemplating acquisitions of U.S. companies to the importance of national security considerations. This awareness helps to ensure that foreign investments are structured in order to avoid national security problems. Prospective foreign acquirers understand that security measures may need to be negotiated to mitigate concerns. In some cases, CFIUS agencies have identified security measures during the 30-day review period that would adequately address national security concerns. In some of these instances, companies have requested withdrawal of their CFIUS notices to negotiate security agreements. Once such agreements are executed, the companies refile with CFIUS, and CFIUS concludes its review. For example, in the telecommunications sector, some foreign companies have entered into Network Security Agreements when acquiring U.S. companies. (Examples of completed Network Security Agreements are available on the FCC website.)

In addition, some notified transactions were abandoned because CFIUS conveyed to the companies that there was no way to mitigate the national security concerns.

Q.4. Are there any other commercial operations of companies from the UAE in sensitive industries in the United States?

A.4. According to the Bureau of Economic Analysis (BEA), the UAB's foreign direct investment position in the United States was $24 million at the end of 2004, down $21 million from a year earlier. This investment position was concentrated in real estate, with a smaller amount of direct investment in financial services. However, in some of the industry categories, the direct investment positions have not been made public to preserve the confidentially of the investor. At the end of 2004, total foreign direct investment in the United States was $1.5 trillion, and the UAE had a very small share.

The data on foreign direct investment, discussed above, excludes investments acquired through third countries, such as tax havens in the Caribbean. To include those amounts, the BEA prepares estimates in terms of the ultimate beneficial owner. On this basis,

the UAE had a foreign direct investment position in the United States of $1,772 million at the end of 2004, up from $1,202 a year earlier. These estimates do not include industry detail.

In addition to DPW, Dubai International Capital LLC, a subsidiary of Dubai Holding LLC, recently filed notice with CFIUS in connection with its acquisition of the Doncasters Group plc, a British company, and its U.S. subsidiaries. The President announced on April 28 that he would take no action on that transaction under Exon-Florio, as the acquisition did not present a possible impairment of national security. The Dubai International Capital transaction is an example of the continued attractiveness of the U.S. market to foreign investors, including investors based in the UAE. The UAE is strengthening its investment ties with the United States in a manner that advances American interests and is entirely consistent with the preservation of national security.

Q.5. Would you describe what is going to happen in the upcoming review of the deal and what are you going to look at to decide if it should go forward?

A.5. Upon receiving the parties' second notice on March 3, 2006, CFIUS focused on clarifying DPW's commitment to operate its U.S. businesses independently. CFIUS also asked the intelligence community for an updated threat assessment to keep its understanding of the transaction current. The Intelligence Community—via the National Intelligence Council of the Director of National Intelligence—completed this threat assessment and delivered it to CFIUS members on April 5.

That focus changed when DPW indicated that it no longer intended to seek control of the U.S. businesses. On behalf of CFIUS, Treasury engaged in discussions with DPW with respect to the company's proposed sale of its U.S. operations. On March 9, DPW announced that it would "transfer fully the U.S. operations of P&O Ports North America, Inc. to a United States entity." On March 15, DPW issued a second press release indicating that its U.S. operations would be operated independently until they could be sold to an American company. The company explained that "an expedited sale process is under way and with the cooperation of the port authorities and joint venture partners, it is expected that a sale can be agreed within 4 to 6 months."

On March 31, Assistant Secretary Lowery sent a letter to DPW indicating that CFIUS had rejected the company's filing of March 3 based on a material change—the company's decision to sell its U.S. operations. The letter notes that CFIUS will continue to monitor developments relating to the sale closely. The President retains the power to take action to safeguard national security with respect to this transaction, and CFIUS retains the authority to initiate a review in the event that circumstances suggest any material change in DPW's intentions announced on March 15.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR BAYH FROM ROBERT M. KIMMITT

Q.1. Was any consideration given to the country in which the acquiring entity is located? Should the law be amended to require such consideration?

A.1. CFIUS always 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, when deciding whether to open a 45-day investigation, consider whether the transaction could affect national security.

In establishing whether an acquisition or merger by a foreign entity may affect national security, CFIUS examines relevant intelligence reporting about the foreign entity and any reports of the foreign entity's violating U.S. laws and regulations, such as not complying with U.S. export control laws.

CFIUS agencies examine a broad range of national security considerations when evaluating any acquisition. CFIUS has implemented the Exon-Florio Amendment in a manner to protect the national security as prescribed in the statute while staying consistent with the U.S. open investment policy. CFIUS's implementation of Exon-Florio has increased the awareness of investors to national security issues, brought transactions into conformity with existing laws where needed, and resulted in investors abandoning transactions that raised insurmountable national security problems. We do not believe that the law needs to be amended to require consideration of the country of the foreign acquirer since CFIUS already takes that into consideration as part of its analysis.

Q.2. Was there any consideration and/or investigation into the UAE's links to terrorist groups? Should there have been?

A.2. Close consideration was given to the UAB's position on terrorism. The UAB has addressed terrorist financing issues since September 11, and has worked with the United States to shut down terrorist financing networks. The UAE has strengthened its banking laws and regulations to prevent the misuse of its financial institutions by money launderers and terrorist financiers. The UAE has taken steps to curb and block financial flows to terrorists. We continue to encourage the UAE Government to take further steps to strengthen its financial defenses and to vigorously enforce its existing laws and regulations against money laundering and terrorist financing.

In its thorough review of the proposed DPW transaction, CFIUS did not uncover any evidence that any DPW executive has contributed funds to terrorist organizations. CFIUS carefully considered the possibility that the proposed transaction could contribute to a heightened risk of terrorism. In connection with the March 3 filing, CFIUS also requested and received a fully coordinated threat assessment produced by the National Intelligence Council, which incorporated judgments based on terrorist-related name traces of senior DP World personnel conducted by the intelligence and law enforcement communities, and CFIUS agencies with counterterrorism responsibilities thoroughly analyzed the available information. This thorough interagency process did not produce any credible evidence of any terrorism-related activity by DPW or its management team.

Q.3. What consideration was given to the nature of the asset? Specifically, was there a closer examination because the acquisition in-

volved critical infrastructure? Should the law be amended to require such consideration?

A.3. In reviewing transactions under Exon-Florio, CFIUS members consider the nature of the assets being acquired, the parties involved in their operation, and whether such assets represent critical infrastructure for the United States. With respect to the DPW transaction, CFIUS member agencies carefully considered the fact that P&O North America carries out operations at ports across the Eastern and Gulf Coasts. As always, the Committee looked at both threats and vulnerabilities to the United States when assessing the implications of the DPW acquisition. In fact, the Department of Homeland Security signed an assurances letter with DPW with respect to law enforcement, public safety, and national security that it does not have from other terminal operators.

Q.4. Was there any thought to notifying Congress in advance of this pending transaction? Should the law require that Congressional notification be made?

A.4. CFIUS does not notify Congress before a review and investigation is complete, in part to avoid the disclosure of proprietary information that could undermine the confidentiality of a transaction or be used for competitive purposes and in part to protect the executive branch's deliberative processes. However, I support enhancing the transparency of the CFIUS process through more effective communication with Congress. I would be pleased to meet with you and other Members of the Senate Banking Committee to inform you of recent improvements in the CFIUS process. To keep Congress informed adequately and regularly about the CFIUS process, I have also offered that Treasury, on behalf of CFIUS, orally brief the Senate Banking and House Financial Services Committees generally every quarter on completed reviews. When appropriate, CFIUS may suggest that its oversight committees invite other potentially interested members and committees with jurisdiction over areas affected by decisions under Exon-Florio to attend these briefings. I am also open to other suggestions on ways to improve the transparency of the process in order to help Congress meet its oversight responsibilities.

Q.5. Does the Director of National Intelligence (DNI) sit on CFIUS? Should the DNI sit on CFIUS?

A.5. The Director of National Intelligence (DNI) now participates in the CFIUS process by providing intelligence support and participating in CFIUS meetings. The DNI does not vote on CFIUS matters, because the role of the DNI is to provide intelligence support 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.

Q.6. Has any consideration been given to convening declassified public hearings? Should the law be amended to allow some public participation?

A.6. Since implementation of the Exon-Florio provision involves national security as well as the disclosure of proprietary information, there is a limit on the extent to which the process can be public. Exon-Florio prohibits disclosure to the public of information and

materials submitted to CFIUS. This provision helps to encourage companies to file with CFIUS without fear that proprietary information will be disclosed to the public. In addition, sometimes the impetus for an investigation is 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, detailed unclassified reports could provide a road map for foreign acquiring companies to circumvent national security reviews under Exon-Florio.

Amending the law to require public participation would jeopardize the sensitive information discussed in CFIUS, much of which is either classified or treated as business confidential for legitimate business reasons. Companies would be reluctant to notify CFIUS and may even decide not to invest in the United States if they feared that proprietary information may be made public. The Committee believes that the decision rests with the companies to determine the most appropriate way to keep the public informed without divulging sensitive business information.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR CARPER FROM ROBERT M. KIMMITT

Q.1. Dubai Ports World filed with CFIUS for a review of their acquisition and the Committee approved it in January. According to the Exon-Florio law, Dubai Ports should not have any fear of being directed to divest of the American P&O operations because they have complied with the law and the acquisition was cleared. If that is true, is Exon-Florio retriggered with all its authorities by this voluntary filing? If an honest investigation finds any problems, does the Administration have any authority to disapprove the deal or even force Dubai Ports to comply with additional security measures that they oppose?

A.1. With respect to DP World (DPW), the power of the President to force divestment is no longer an issue. On March 9, DPW announced that it would "transfer fully the U.S. operations of P&O Ports North America, Inc. to a United States entity," and on March 15 DPW issued a second press release saying that its U.S. operations would be operated independently until they could be sold to an American company. DPW further asserted that "an expedited sale process is under way and with the cooperation of the port authorities and joint venture partners, it is expected that a sale can be agreed within 4 to 6 months."

On March 31, Treasury Assistant Secretary for International Affairs, Clay Lowery, sent a letter to DPW indicating that CFIUS had rejected the company's filing of March 3 based on a material change—the company's decision to sell its U.S. operations. The letter notes that CFIUS will continue to monitor developments relating to the sale closely. The President retains the power to take action to safeguard national security with respect to this transaction, and CFIUS retains the authority to initiate a review in the event that circumstances suggest any material change in DPW's intentions announced on March 15.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR SANTORUM FROM ROBERT M. KIMMITT

Q.1. What if security concerns arise after a transaction has been approved? Is there accountability or are there enforcement measures taken once a transaction is completed?

A.1. Once CFIUS has concluded action on a transaction that has been notified under Exon-Florio, a review can be reopened in limited circumstances. For example, under 31 CFR 800.601(e), if the parties to the transaction omitted material information or submitted false or misleading material information to CFIUS, the Committee may reopen review, and the President has the authority to take action. Additionally, individual CFIUS agencies often sign assurance agreements with parties to the transaction, and there are remedies built into those agreements to address concerns that arise after the CFIUS review concludes. In the case of DP World, DHS received assurances from DP World with respect to law enforcement, public safety, and national security that went beyond those received from other terminal operators. In addition to action under Exon-Florio, other legal authorities remain available to protect the national security both before and after CFIUS action has been completed. CFIUS actions did not affect authorities that the Department of Homeland Security and others have over the operation and security of U.S. ports.

Q.2. How will CFIUS make an extended review period of Dubai Ports World useful?

A.2. Upon receiving the parties' second notice on March 3, 2006, CFIUS focused on clarifying DP World's (DPW) commitment to operate its U.S. businesses independently. CFIUS also asked the intelligence community for an updated threat assessment to keep its understanding of the transaction current. The Intelligence Community—via the National Intelligence Council of the Director of National Intelligence—completed this threat assessment and delivered it to CFIUS members on April 5.

That focus changed when DPW indicated that it no longer intended to seek control of the U.S. businesses. On behalf of CFIUS, Treasury engaged in discussions with DPW with respect to the company's proposed sale of its U.S. operations. On March 9, DPW announced that it would "transfer fully the U.S. operations of P&O Ports North America, Inc. to a United States entity." On March 15, DPW issued a second press release indicating that its U.S. operations would be operated independently until they could be sold to an American company. The company explained that "an expedited sale process is under way and with the cooperation of the port authorities and joint venture partners, it is expected that a sale can be agreed within 4 to 6 months."

On March 31, Assistant Secretary Lowery sent a letter to DPW indicating that CFIUS had rejected the company's filing of March 3 based on a material change—the company's decision to sell its U.S. operations. The letter notes that CFIUS will continue to monitor developments relating to the sale closely. The President retains the power to take action to safeguard national security with respect to this transaction, and CFIUS retains the authority to initiate a

review in the event that circumstances suggest any material change in DPW's intentions announced on March 15.

Q.3. Despite the 1992 requirement for a report on foreign acquisition strategies every 4 years, there has been only one report—in 1994. Why have not these reports been forthcoming?

A.3. Exon-Florio requires the President, and such agencies as the President shall designate, to complete and furnish to the Congress a quadrennial report that:

- Evaluates whether there is credible evidence of a coordinated strategy by one or more countries or companies to acquire U.S. companies involved in research, development, or production of critical technologies for which the United States is a leading producer; and
- Evaluates whether there are industrial espionage activities directed or directly assisted by foreign governments against private U.S. companies aimed at obtaining commercial secrets related to critical technologies.

In 1993, the National Economic Council formed a working group, chaired by Treasury, to coordinate the preparation of the first report, which was submitted in 1994. A quadrennial report pursuant to paragraph (a) above-relating to a foreign country's or company's acquisition strategy—has not been produced since 1994. The Administration plans to provide a comprehensive report on that subject in 2006.

However, it is important to note that the information required under paragraph (b) has been provided to Congress through reports prepared by the Office of the National Counterintelligence Executive (NCIX). The Intelligence Authorization Act for fiscal year 1995 requires the President to submit annually to Congress updated information on the threat to U.S. industry from foreign economic collection and industrial espionage. This report, coordinated by the NCIX, draws on input from all the intelligence agencies. The Foreign Economic Collection and Industrial Espionage reports from 1995–2004 can be found at the following Internet address:

*http://www.NCIX.gov/publications/reports*__speeches/reports/fecie__*all/Index__fecie.html.*

The most recent NCIX report was provided to Congress in April 2005. Because the NCIX report addresses the issue of foreign government-sponsored industrial espionage activities to obtain U.S. critical technology secrets, the report effectively addresses a key requirement of the quadrennial report pertaining to economic espionage. Indeed, the NCIX report is actually more comprehensive in scope than what the quadrennial report requires in that it seeks to characterize and assess efforts by foreign entities—government and private—to unlawfully target or acquire critical U.S. technologies, trade secrets, and sensitive financial or proprietary economic information.

Although the NCIX report already provides information relating to the espionage portion of the mandate, we are working toward producing a report related to foreign acquisitions in 2006. While we work to complete this report, regular Congressional briefings will provide Congress with additional information on CFIUS matters.

Q.4. The October 2005 GAO report states that CFIUS generally grants requests to withdraw. What are some examples of requests to withdraw that were not granted and why were they not granted?

A.4. The Exon-Florio regulations state that CFIUS will "generally" grant the parties' request to withdraw their notice. To date, CFIUS has granted all requests to withdraw. In some cases, foreign entities cease to pursue the proposed acquisition, obviating the need for CFIUS review. In other cases, companies withdraw to allow more time to negotiate an effective means to mitigate national security concerns. Once these negotiations are concluded, the companies are requested to refile to commence another 30-day review in order for CFIUS to conclude action.

RESPONSE TO A WRITTEN QUESTION OF SENATOR SHELBY FROM ERIC EDELMAN

Q.1. Could you provide some assurance, however, that the Department of Defense role in reviewing this transaction looked at the ugly as well as the good? In other words, I hope that the focus on the government-to-government relationship was not given priority over focused consideration of the national security implications of this proposed deal, including consideration of the potential risk to a critical infrastructure and of exploitation of ports by terrorists. Can you comment on this?

A.1. The Department of Defense looked at the deal with regard to both the potential threat to defense assets and the overall relationship with the United Arab Emirates (UAE). The Department of Defense did not agree to approve the deal as a "trade" in exchange for our existing military relationships with the UAE. The review conducted by the Department of Defense was in-depth and comprehensive. This transaction was staffed and reviewed within the Department of Defense 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, the Department of Defense conducted a very comprehensive and in-depth review of this transaction, and no issues were raised by any of the reviewing agencies or organizations within the Department of Defense.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR BUNNING FROM ERIC EDELMAN

Q.1. The UAE has given us a lot of help in the war on terror, especially military support. Are they making money on our use of their ports and air facilities? If so do you think their help is genuine or is it just good for business?

A.1 The United Arab Emirates' (UAE) help is genuine. The UAE has been a strong and valuable strategic partner of the United States since the first Gulf war in 1991. After the September 11 attacks, the UAE stepped up its level of support with port and air base access, but more importantly, the UAE cracked down on ter-

ror organizations that were using the UAE as a base for operations. Operational successes in Operation Iraqi Freedom, Operation Enduring Freedom, and Operation Horn of Africa have been directly linked to UAE's support.

The Government of the UAE has been extremely generous in their financial support of U.S. operations. Direct sharing in costs of U.S. deployments amounted to $12.6 million. Indirect sharing of costs estimated at approximately $532.2 million. The UAE donated $100 million to the United States for Hurricane Katrina relief. While the UAE charged $2.4 million port fees and cargo handling in 2004 and 2005, they waived $8.03 million in taxes and customs duties.

Q.2. What has the UAE done in the war on terror that points to a genuine desire on the part of the state to stop Muslim extremists, rather than just making nice with the United States?

A.2. The United Arab Emirates (UAE) is an outstanding example of the kind of partner critical to winning this long war, standing side-by-side with the United States. The access the UAE provides to U.S. forces is not without risks to the Emirates and makes their country a target for terrorists. The UAE has assisted us in Iraq and Afghanistan, and provided critical intelligence invaluable to our efforts in the war on terrorism. As far as specifics, the UAE arrested and detained several al Qaeda members including the mastermind of the U.S.S. Cole attack, Abd ai-Rahim Husayn Muhammad al-Nashri in November 2002.

Q.3. What progress has the UAE made in rooting out terrorists and terrorist networks in their own country?

A.3. The United Arab Emirates (UAE) has worked closely with the United States to suppress terrorist financing and money laundering, including by freezing accounts, enacting and aggressively enforcing its anti-money laundering regulations, exchanging information, and conducting investigations. Dubai was the first Middle Eastern entity to join the Container Security Initiative, a multinational program to protect global trade from terrorism. Dubai was also the first Middle Eastern entity to join the Department of Energy's Megaports Initiative, a program aimed as stopping illicit shipments of nuclear and other radioactive material.

Q.4.: Is there any evidence of terrorist influence in the governments in the UAE?

A.4.: The United Arab Emirates (UAE) is a moderate Arab state and a longtime supporter of all aspects of Middle East peace efforts. The United States and the UAE also work together to create a stable economic, political, and security environment in the Middle East. Since September 11, the UAE has cracked down on terror organizations that were using the UAE as a base for operations. The UAE has worked closely with the United States to suppress terrorist activities to include: Financing and port security.

Q.5. What kind of response did the governments in the UAE take to the recent cartoon controversy and how did the citizens there react?

A.5. The United Arab Emirates (UAE) Minister of Justice, Islamic Affairs, Awqaf Mohammad Nakhir al-Daheri, condemned the publi-

cation of the cartoons and stated the incident could spark "a dreadful clash of civilizations." The civilian reaction was mild. The reaction was limited to the publication of several articles by UAE newspapers and a small, peaceful, and orderly procession of less than 3,000 people on February 3, 2006.

Q.6. It has been reported that people close to the leadership of the UAE were spotted with Osama bin Laden prior to September 11, and that an airstrike was stopped because of that, or alternatively because he was alerted to the potential action by someone in the UAE. Are those reports true, and are there any signs that such high-level contacts with terrorists continued past September 11?

A.6. The September 11 Commission Report, recounts that there was concern "about the danger that a strike would kill an Emirati prince or other senior officials who might be with Bin Laden."; however, then-National Security Council Coordinator for Counter-Terrorism, Richard Clarke, noted that "the strike was called off after consultations with (CIA) Director Tenet because intelligence was dubious, and it seemed to Clarke as if the CIA was presenting an option to attack America's best counter-terrorism ally in the Gulf [UAE]." On the matter of continuing high-level contacts continuing past September 11, the Department of Defense defers this question to the U.S. Intelligence Community.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR BAYH FROM ERIC EDELMAN

Q.1. Was any consideration given to the country in which the acquiring entity is located? Should the law be amended to require such consideration?

A.1. The Department of Defense considered the country, the United Arab Emirates (UAE), in which the acquiring entity is located as part of its review of the case. While our relationship with the UAE is very important to the Global War on Terrorism, we take our responsibilities as a member of the Committee on Foreign Investment in the United States (CFIUS) process seriously. The UAE is an outstanding example of the kind of partner critical to winning this long war, standing side-by-side with us. For the Department of Defense, consideration was given to the critical infrastructure of this case, as some of those port facilities also have U.S. military operations. The Department of Defense analyzed the Dubai Ports World case thoroughly and determined that it posed no risk to national security, including the shipment of military cargo. If the Department of Defense or any other agency identified threats to national security that could not be resolved adequately during the 30-day review period, the Department of Defense would have asked for an investigation of the transaction. In this case, the Department of Defense did not have concerns with the foreign government involved, the acquiring company, or the nature and structure of the actual business operations. The six U.S. ports would have remained under the ownership and control of U.S. State and local authorities, not Dubai Ports World. The Department of Defense defers the question of whether the law should be amended to require such consideration to the Department of the Treasury, the Chairman of

the Committee on Foreign Investment in the United States (CFIUS).

Q.2. Was there any consideration and/or investigation into the UAE's links to terrorist groups? Should the law be amended to require such consideration?

A.2. The U.S. Intelligence Community completes a comprehensive threat assessment of each case reviewed by the Committee on Foreign Investment in the United States (CFIUS). This threat assessment focuses on the threat to U.S. national security by the foreign acquiring company. This assessment examines this threat based on a variety of factors to achieve a fully integrated intelligence product for CFIUS.

Q.3. What consideration was given to the nature of the asset? Specifically, was there a closer examination because the acquisition involved critical infrastructure? Should the law be amended to require such consideration?

A.3. For the Department of Defense, consideration was given to critical infrastructure because some of the port facilities also handle U.S. military operations. The Department of Defense analyzed the Dubai Ports World case thoroughly and determined that it posed no risk to national security, including the shipment of military cargo. The U.S. Transportation Command (USTRANSCOM) is the Department of Defense'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 Peninsular & Oriental Navigation Company. The Department of Defense defers the question of whether the law should be amended to require such consideration to the Department of The Treasury, the Chairman of the Committee on Foreign Investment in the United States (CFIUS).

Q.4. Was there any thought to notifying Congress in advance of this pending transaction? Should the law require that Congressional notification be made?

A.4. As a member of the Committee on Foreign Investment in the United States (CFIUS), the Department of Defense is working with the Department of the Treasury, the chairman of CFIUS as well as other CFIUS agencies to provide better transparency to Congress regarding CFIUS actions. The CFIUS process is also structured to protect proprietary knowledge and information, and confidence in the confidentiality of the process must be maintained. The interagency review is looking at ways to balance the need to keep Congress informed with the need to protect confidentiality and proprietary knowledge.

Q.5. Does the Director of National Intelligence (DNI) sit on CFIUS? Should the DNI sit on CFIUS?

A.5. The Director of National Intelligence (DNI) participates in the Committee on Foreign Investment in the United States (CFIUS) by providing CFIUS with a fully, integrated U.S. Intelligence Community threat assessment of the foreign acquiring company for all CFIUS cases.

Q.6. Has any consideration been given to convening declassified public hearings? Should the law be amended to allow some public participation?

A.6. As part of the overall improvements to the Committee on Foreign Investments in the United States (CFIUS) process, all CFIUS agencies are considering ways to ensure public views are taken into consideration while balancing the need for confidentiality of the CFIUS process.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR SHELBY FROM STEWART BAKER

Q.1.a. One of the major concerns the Committee has with regard to implementation of Exon-Florio involves mitigation agreements, in which companies accept certain conditions in exchange for regulatory consent to the transaction in question. Could the panel inform the Committee as to the measures taken to monitor and enforce mitigation and national security agreements?

A.1.a. DHS monitors and ensures compliance with respect to those agreements to which DHS is a party. It does so by tracking the reports, audits, and other products owed to DHS pursuant to each agreement, reviewing these products, and contacting the parties when there are questions or concerns.

Q.1.b. How is it determined which member agency within the Committee on Foreign Investment negotiates, monitors, and enforces such agreements?

A.1.b. DHS decides, in consultation with CFIUS, when to engage parties in negotiating mitigation agreements, and DHS then monitors and ensures compliance with respect to each agreement to which it is a party. Other CFIUS agencies similarly negotiate and monitor compliance with agreements to which they choose to become parties.

Q.1.c. Have there been instances in which foreign governments or businesses have placed obstacles in the way of that process?

A.1.c. The negotiation of mitigation agreements, like negotiations of other agreements, is a process of give and take. If DHS believed that a party were unwilling to provide assurances that DHS deemed necessary to protect national security, then DHS would not assent to the transaction.

Q.2.a. Could the panel explain for the Committee the precise routine role of the intelligence community in the review process?

A.2.a. This question is better addressed to the DNI or to the Treasury Department as Chair of the CFIUS. DHS values the role of the intelligence community in providing facts that may bear on the risk presented by the transactions subject to CFIUS review.

Q.2.b. Assistant Secretary Baker, within this context, how should intelligence from within your department be handled relative to how it apparently was handled in the case of the now-infamous Coast Guard Intelligence Coordination Center document?

A.2.b. There may be some misunderstanding about the nature of the Coast Guard document. While that document raised a concern about incomplete information, that concern was preliminary in na-

ture and was resolved in the course of the CFIUS review as more information was acquired. Further, DHS has formalized and improved the process by which its various components review and provide input on CFIUS transactions.

Q.2.c. Was the document in question reviewed by anyone involved in the Dubai review process prior to that process being closed?

A.2.c. Yes. As noted above, that document expressed some preliminary concerns that were resolved in the course of the CFIUS review.

Q.3. I would like to hear from each of the witnesses regarding their views on the wisdom of implementing a system for approaching reviews of state-owned entities from a risk-based perspective. The port management company that is being bought by Dubai is British-owned. I recall no expressions of concern when P&O came into the picture, certainly nothing like has occurred with respect to Dubai Ports World. Does it make sense to treat some countries as presenting an inherently greater risk than others, so that legislative changes to Exon-Florio do not necessarily treat a close NATO ally in the same manner as a country from the Middle East? I am picturing in my mind the system of tiering countries according to risk used in regulating the export of high performance computers.

A.3. CFIUS always 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, when deciding whether to open a 45-day investigation, consider whether the transaction could affect national security.

In establishing whether an acquisition or merger by a foreign entity may affect national security, CFIUS examines relevant intelligence reporting about the foreign entity and any reports of the foreign entity's violating U.S. laws and regulations, such as not complying with U.S. export control laws.

CFIUS agencies examine a broad range of national security considerations when evaluating any acquisition. CFIUS has implemented the Exon-Florio Amendment in a manner to protect the national security as prescribed in the statute while staying consistent with the U.S. open investment policy. CFIUS's implementation of Exon-Florio has increased the awareness of investors to national security issues, brought transactions into conformity with existing laws where needed, and resulted in investors abandoning transactions that raised insurmountable national security problems. We do not believe that the law needs to be amended to require consideration of the country of the foreign acquirer since CFIUS already takes that into consideration as part of its analysis.

Q.4. Secretary Kimmitt, you have been testifying and briefing almost nonstop on the issues of the Dubai Ports transaction and the Committee on Foreign Investments. Given that fact, can offer the Banking Committee some explanation why we did not receive your prepared statement until 10:30 the night before the hearing? Certainly your statement for this hearing can not differ that markedly from what you have already spoken on this week. Secretary Baker,

you have similarly been testifying and briefing all over Capitol Hill, yet your statement did not arrive until 8:30 A.M. Any comment?

A.4. I apologize for any delay.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR BUNNING FROM STEWART BAKER

Q.1. What kind of security information will Dubai Ports World gain access to as a result of this deal that they would not otherwise get?

A.1. DPW has stated that it intends to sell P&O's U.S. operations in the next 4 to 6 months and that, until the sale occurs, P&O's U.S. operations will be operated entirely independently of DPW. Even before deciding to sell P&O, DPW had committed to maintaining P&O's current security personnel.

In any event, terminal operators neither provide, nor oversee, security for a port complex. Security for an entire port complex is the responsibility of the government and the local port authority. Because terminal operators are not afforded access to this information, they can not develop an understanding into the breadth and depth of security measures that DHS employs to protect our ports and the cargo that enters those ports. Terminal operators do not have access to security information related to arriving cargo or vessels; rather, a terminal operator only has access to its facility security plan, which it developed and provided to the Coast Guard under MTSA.

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; the terminal operator generates profits from lifting containers out of ships and holding them for shippers. The first time a terminal operator at a U.S. facility sees any of the law enforcement and security measures that DHS has in place concerning the vessel and cargo is when the ship arrives in the United States. Even then, all the terminal operator knows is that CBP has selected certain containers for examination. Operators are simply instructed to unload the containers, under DHS supervision, and deliver them to CBP for inspection. They are not told why.

Q.2. What exactly will the company be doing at the ports and what role do port operators play in security?

A.2. DPW has stated that it intends to sell P&O's U.S. operations in the next 4 to 6 months and that, until the sale occurs, P&O's U.S. operations will be operated entirely independently of DPW.

Terminal operating companies provide a number of services to their steamship company clients, which can include the actual stevedoring of vessels; storing of cargo containers awaiting delivery; performing repairs to cargo containers or chassis; delivering cargo containers to consignees; providing direct invoicing to clients on behalf of the steamship company; as well as numerous additional ancillary services. Services provided are outlined in the individual contracts signed between the terminal operator and the steamship company customer.

Regarding security, a terminal operator must first and foremost adhere to its Coast Guard approved Facility Security Plan (FSP),

as required under the Maritime Transportation Security Act of 2002. Beyond adhering to the FSP, a terminal operator's security role often depends on the lease agreement signed with the municipal port authority. Some port authorities operate strictly as "turn key" landlords, meaning that they provide the acreage to the terminal operator but no other services or equipment. In other ports, the port authority may include not just the leased acreage but some additional value-added services like security guards and port authority provided container cranes to work the vessels of the terminal operator's client.

Q.3. How many and what kind of personnel is the company likely to replace at the ports, and will DHS be able to veto any employees you are concerned about?

A.3. DPW has stated that it intends to sell P&O's U.S. operations in the next 4 to 6 months and that, until the sale occurs, P&O's U.S. operations will be operated entirely independently of DPW. Even before deciding to sell P&O, DPW had committed to maintaining P&O's current security personnel.

Should any company wish to change or add maritime facility personnel in the future, those persons will be subject to the vetting process associated with the Transportation Worker's Identification Credential. That credential will be issued by the Transportation Security Administration to all transportation workers and the employees of all companies engaged in transportation will have to undergo the background check required as part of the application process. Thus, while DHS may not exercise any "veto" authority over new employees, there is a robust system being developed that will identify and prohibit certain persons of concern from gaining unescorted access to regulated maritime facilities.

Q.4. What is the status of screening the backgrounds dock workers for criminal records or terrorist ties?

A.4. The Department of Homeland Security has completed vetting against terrorist watch-list and immigration databases for employees of P&O Ports North America, Inc., who work at ports in the United States. P&O Ports was fully responsive to the Department's request for information, and at this time there have been no problems identified.

Q.5. It has been reported that you were the only panel member to raise objections to this transaction. What were your concerns, and what was done to address them? And did you want more changes that were not made?

A.5. As a lead agency in the DP World case, DHS thought it prudent to obtain certain written assurances from DPW, including: (i) that DPW would participate in certain port security programs that are voluntary for other companies but would become mandatory for DPW because of its written assurances; and (ii) that DPW would provide, upon request, any records maintained regarding DPW's operations in the United States.

Q.6. Did anyone object to your concerns or your efforts to address them?

A.6. No.

Q.7. Is it more important to have steps in place to screen cargo before it is loaded on ships at foreign ports or after it arrives in the United States?

A.7. CBP utilizes a multilayered cargo enforcement strategy which includes: The analysis of advanced information, as required by the Trade Act of 2002 and CBP's 24 Hour Rule; programs intended to "push the borders out," such as the Container Security Initiative (CSI) and the Customs-Trade Partnership Against Terrorism (C–TPAT); and the use of high tech nonintrusive inspection equipment and radiation detection portals. CBP developed and implemented the 24 Hour Rule and CSI to assess the risk of each container before it is laden onto the vessel destined for the United States. Under these programs, all containerized sea cargo is screened using with CBP's automated Advanced Targeting System prior to loading. Decisions to physically examine or physically screen each container for the presence of radiation prior to loading onto the vessel are determined by balancing the likely security risk against need to facilitate the movement of trade; where CBP officers identify cargo that poses sufficient risk, a "do not load" order can be given.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR BAYH FROM STEWART BAKER

Q.1. Was any consideration given to the country in which the acquiring entity is located? Should the law be amended to require such consideration?

A.1. The Department of the Treasury previously submitted a response to this request. DHS defers to Treasury on this question.

Q.2. Was there any consideration and/or investigation into the UAE's links to terrorist groups? Should there have been?

A.2. The Department of the Treasury previously submitted a response to this request. DHS defers to Treasury on this question.

Q.3. What consideration was given to the nature of the asset? Specifically, was there a closer examination because the acquisition involved critical infrastructure? Should the law be amended to require such consideration?

A.3. DHS decided that it would be prudent to obtain certain security assurances from DPW, and this prudential decision was partly a function of the nature of the asset. DHS does not favor changing the flexible manner in which the law currently allows consideration of national security and homeland security factors.

Q.4. Was there any thought to notifying Congress in advance of this pending transaction? Should the law require that Congressional notification be made?

A.4. CFIUS's longstanding practice has been that pending cases are confidential within CFIUS. While DHS believes that Congress does and should play an important oversight role with respect to the CFIUS process, and while DHS has no objection to Congressional notification regarding closed cases, DHS does not believe that the law should require Congressional notification of pending cases.

Q.5. Does the Director of National Intelligence (DNI) sit on CFIUS? Should the DNI sit on CFIUS?

A.5. The Department of the Treasury previously submitted a response to this request. DHS defers to Treasury on this question.

Q.6. Has any consideration been given to convening declassified public hearings? Should the law be amended to allow some public participation?

A.6. The Department of the Treasury previously submitted a response to this request. DHS defers to Treasury on this question.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR CARPER FROM STEWART BAKER

Q.1. This morning, I went to the Port of Wilmington to discuss security issues as well as the Dubai Ports World acquisition. A company that operates at the Port of Wilmington-Delaware River Stevedores—is a joint venture between P&O and Stevedoring Services of America, a company out of Seattle.

The representative from Delaware River Stevedores mentioned that their personnel working at the ports will not change due to this acquisition because they have a contract with the longshoremen that does not expire until 2010. I assume P&O operations at other ports have similar arrangements.

But once those contracts expire, what options will Dubai Ports World have with regard to who they employ at U.S. ports? Will Dubai Ports be required to continue to contract with the longshoremen? Or continue to employ American workers?

A.1. DPW has stated that it intends to sell P&O's U.S. operations in the next 4 to 6 months and that, until the sale occurs, P&O's U.S. operations will be operated entirely independently of DPW. Even before deciding to sell P&O, DPW had committed to maintaining P&O's current security personnel.

The provisions of the International Longshoremen's Association (ILA) contract apply to any signatory to the agreement. As long as a company is a member of any association that has signed the contract, it is bound by the requirement to use unionized longshore labor in their operations and pay certain hourly wages. To illustrate, Delaware River Stevedores is a member of the Ports of the Delaware River Trade Association which, in turn, belongs to the United States Maritime Alliance, the signatory to the ILA contract on behalf of East Coast and Gulf maritime employers. As long as that relationship is maintained, the company is committed to utilizing members of the ILA. If, however, a company would choose to discontinue its membership in these organizations, it could attempt to establish nonunion operations. This, however, is difficult because there is a very limited supply of labor with the skills necessary to work in a terminal/stevedoring operation and they are, almost exclusively, unionized longshoremen. The possibility of operating a nonunion facility with any employees able to pass the background check for the Transportation Worker Identification Credential, though, does exist. However, U.S. immigration laws would not permit a company to replace U.S. longshoremen with foreign workers.

Q.2. The Delaware River Stevedores representative also said they are willing to submit their employees to background checks. Is this

something the Department of Homeland Security has considered requiring?

A.2. The Port of Wilmington, where the Delaware River Stevedores have been providing stevedoring and terminal services since 1987, has been the site of a prototype test conducted by the Department of Homeland Security of an identification card system for screening port workers that will deny individuals with criminal or terrorist backgrounds or immigration issues from accessing sensitive areas at our ports.

The Transportation Worker Identification Credential (TWIC) is a top departmental priority, and Secretary Chertoff has directed DHS components to move forward with the program as quickly as possible. Under the TWIC program, all port workers requiring unescorted access to the secure areas of facilities regulated by the Maritime Transportation Security Act of 2002 (P.L. 107–295) will be subject to background checks before they are issued a credential. TSA recently published a "request for qualifications" seeking firms who are appropriately experienced and interested to help deploy certain components of the TWIC program. This is the first step toward operational deployment of the TWIC program for unescorted access to all U.S. ports. This deployment includes accelerated and parallel rulemaking work by both TSA and Coast Guard, which will enable implementation to begin and fees to be collected for the services provided.

Q.3. The Port of Wilmington has been the site of a test conducted by the Department of Homeland Security of an identification card system for screening port workers and blocking individuals with criminal or terrorist backgrounds from accessing sensitive areas at our ports. The program—known as the Transportation Worker Identification Credential (TWIC)—has been underway at the port and at three other locations for more than 4 years, has been successful. However, the Department of Homeland Security is ending the test, even though a national screening and identification system is more than a year away. Why has the Department decided to remove the TWIC program from the ports where it is working? Shouldn't we speed the implementation of the national program rather than discontinue the program at the ports where it is already working?

A.3. The Transportation Security Administration (TSA) greatly appreciates the willingness of Port of Wilmington officials and their workers to partner with TSA in testing the prototype TWIC at their facility. The knowledge gained in issuing cards to over 1,500 Port of Wilmington workers over the past year will speed full implementation of the TWIC program.

The prototype program ended in June 2005. It was not intended to be a permanent bridge to implementation of the program. The Port of Wilmington is the last of the prototype facilities still using the prototype Transportation Worker Identification Credential (TWIC) for its identity and access control credential. TSA has assisted the Port of Wilmington and other sites in the Philadelphia area to transition to a self-sustaining credentialing process. All the other TWIC prototype facilities have already returned to their self-sustaining identity management processes.

The Transportation Worker Identification Credential (TWIC) is a top Departmental priority, and Secretary Chertoff has directed DHS components to move forward with the program as quickly as possible. TSA recently published a "request for qualifications" seeking firms who are appropriately experienced and interested to help deploy certain components of the TWIC program. This is the first step toward operational deployment of the TWIC program for unescorted access to all U.S. ports. This deployment includes accelerated and parallel rulemaking work by both TSA and Coast Guard, which will enable implementation to begin and fees to be collected for the services provided.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR SANTORUM FROM STEWART BAKER

Q.1. Where is the remaining 20 percent of inbound cargo not participating in the Container Security Initiative originating and what measures are taken beyond reviewing the manifests to reduce risks posed by that cargo?

A.1.

Origin of Cargo not Participating in CSI

CSI is currently operational in 44 ports. These ports, which cover 75 percent of maritime containerized cargo destined to the United States, are located in Asia, the Middle East, Africa, Europe, and North, South, and Central America.

Measures Taken to Reduce Cargo Risks

With over 700 seaports around the world lading cargo containers destined to the United States, CSI was established to cover seaports with the greatest volume of goods destined to the United States and which are based in strategically critical locations abroad. It was not, however, ever intended to cover 100 percent of all maritime containerized cargo. Instead, CSI was developed to operate as a "system of systems" and is but one component in Customs and Border Protection's (CBP) arsenal of programs and activities that serve to significantly mitigate the vulnerabilities of a post-September 11 environment. Other programs established to keep U.S. borders secure include the Twenty-Four Hour Rule, the National Targeting Center/Automated Targeting System, MTSA, ISPS, C–TPAT, U.S. Coast Guard's Ninety-Six Hour Notice of Arrival Rule, and the utilization of NII/RPM's. CSI complements these other programs, which must be taken as a "whole" and not as individual programs when evaluating container security.

International cargo statistics justify this multifaceted approach. Specifically, shipments laden on board vessels arrive in the United States from over 700 foreign seaports. One hundred foreign seaports accounted for approximately 96 percent of the cargo. The remaining 600 seaports accounted for the last 4 percent. It is further anticipated that, when CSI reaches 58 to 60 ports, approximately 85 percent of cargo arriving from foreign ports will be represented. CBP plans to address the remaining 15 percent using other combinations of its layered systems, including the Twenty-Four Hour Rule, NTC/ATS, Do-Not-Load and NII/RPM at U.S. Ports of Entries, and, if necessary, utilizing the World Customs Organization

(WCO) Framework to engage host governments' participation in the examination of containers.

Q.2. How can we encourage the remaining 20 percent to participate?

A.2. As discussed above, the sheer volume of cargo activity and the number of foreign seaports that have containers laden on board vessels destined to the United States necessitate CBP's strategy of a layered, defense in-depth system to address the risk in the most cost effective manner. This will not include participation by every port in the world, but will focus on strategic ports. CBP is currently in the process of working with other countries to establish additional CSI ports and will build off previous success with foreign hosts to encourage participation.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR BUNNING FROM ROBERT JOSEPH

Q.1. The UAE has given us a lot of help in the war on terror, especially military support. Are they making money off our use of their ports and air facilities? If so, do you think their help is genuine, or is it just good for business?

A.1. I would refer you to the Department of Defense for information on whether the UAE receives income from the U.S. military's use of Emirati ports and air facilities. However, the use of those facilities has been immensely helpful to our efforts in both Operation Enduring Freedom and Operation Iraqi Freedom.

Q.2. What has the UAE done in the war on terror that points to a genuine desire on the part of the state to stop Muslim extremists, rather than just making nice with the United States? What progress has the UAE made in rooting out terrorists and terrorist networks in their own country?

A.2. The UAE has been an important ally in the war on terror. Since September 11, the UAE leadership has strongly and consistently condemned all acts of terrorism—in London, Istanbul, Madrid, and elsewhere. The UAE passed an anti-money laundering law in 2002 and a strengthened anti-terrorism law in 2004. It has signed all 12 U.N. Counterterrorism Conventions.

Since 2000, UAE banks have frozen $1.3 million of funds in 17 different accounts based on U.N. sanctions. The UAE's Financial Intelligence Unit has been a member of the Egmont Group since 2002. The UAE monitors registered charities and their financial transfers abroad, and it has been a leader in setting new standards for controlling the hawala, or informal money exchange system. The UAE was a charter signatory to the Middle East North Africa Financial Action Task Force inaugurated in Bahrain in November 2004. The United States and the UAE formed and held the first meeting of a Joint Terror Finance Coordinating Committee in January 2006 to further coordinate our efforts to combat this problem.

The UAE also has worked closely with us to disrupt proliferation activities. It was the first state in the Middle East to have one of its ports join the Container Security Initiative; as part of this program, U.S. Customs personnel based in Dubai are ensuring that U.S.-bound containers are free of WMD. The UAE also is a member of the U.S. Megaports Initiative, which seeks to stop the illicit

movement of nuclear and radiological materials. The UAE played an important role in unraveling the activities of the A.Q. Khan network, which stretched over three continents.

Q.3. Is there any evidence of contacts of UAE officials with terrorists or terrorist groups? Is there any evidence of terrorist influence in the governments in the UAE?

A.3. The UAE leadership, with its moderate outlook and close ties to the United States, is a prospective target for—not an ally of—terrorist groups. Far from sharing terrorists' fanatical ideology, the UAE has a long history of religious tolerance—Christian churches of several denominations, as well as Hindu and Sikh places of worship, operate without restriction in the country (other than the requirement not to proselytize Muslims). Since September 11, UAE political and religious leaders have strongly condemned acts of terrorism—in London, Istanbul, Madrid, and elsewhere—and consistently called for moderation and tolerance of ethnic differences in the Middle East.

Although the UAE's open banking system has been exploited by terrorists and their financiers (see the response to Question 2 above on steps the UAE Government is taking to prevent such exploitation), the UAE Government has no policy of supporting terrorism, financially or otherwise. We have no reason to believe that these fanatics influence the moderate leaders of the UAE.

Prior to September 11, the UAE recognized the Taliban as the Government of Afghanistan and maintained desert camps and airstrips in that country for periodic hunting trips. The UAE rejected frequent U.S. requests to end contact with the Taliban, but it never in any way supported the ideology or operational agenda of either the Taliban or al Qaeda. The September 11 Commission Report (page 137 and following), cites a report that, in February 1999, Usama bin Laden (UBL) visited a location near a hunting camp in Afghanistan "being used by visitors . . . from the United Arab Emirates." The September 11 Commission Report also notes that a U.S. missile strike against UBL was considered at that time, although there are conflicting accounts of why no such strike occurred. One source asserts that the presence of Emiratis was a factor, while a senior White House official is quoted as stating no strike was launched because "the intelligence [regarding UBL's presence] was dubious."

According to media reports, al Qaeda in May/June 2002 sent a threatening letter to the UAE Government, claiming to have infiltrated the UAE Government and threatening a terrorist attack in the UAE as a result of that country's pro-Western, moderate stance. While the claim of infiltration remains unsubstantiated—which is not surprising, as al Qaeda's statements are typically designed to mislead and threaten, rather than to inform—the al Qaeda threat to the UAE is clear and credible.

Q.4. What kind of response did the governments in the UAE take to the recent cartoon controversy and how did the citizens there react?

A.4. A Jan. 29, 2006, statement by Minister of Justice and Islamic Affairs Mohammed Nakhira Al Dhaheri to a group of Islamic clerics summarizes the government's reaction to the cartoon:

The UAE Minister of Justice and Islamic Affairs has strongly condemned some Danish and Norwegian papers for publishing cartoons blasphemous of Prophet Mohammed. Minister Mohammed Al Dhaheri dismissed the cartoons . . . as "disgusting and irresponsible." Noting a rising wave of anti-Islam sentiments, the Minister said these sentiments serve only to undermine the values of tolerance, peace, and coexistence, "the very principles heralded by the divine religions and adopted by international organizations." Al Dhaheri said . . . the cartoons were "cultural terrorism, not freedom of expression." Labeling these acts as "alarming religious intolerance and discrimination," Al Dhaheri called for . . . deterrent international legal measures against such desecrating acts, because they are disgraceful to the entire humankind.

The cartoons were a subject of the UAE's Government-directed Friday mosque sermons, which advocated respect for religion and nonviolence. Most UAE supermarkets pulled Danish products from their shelves in response to a boycott call from consumers; those products are starting to reappear now.

Q.5. A report in the *Jerusalem Post* links the parent company of Dubai Ports World to the Arab boycott of Israel. Can any of you confirm or deny that, and if true was that considered in the original review of the deal?

A.5. While this is not a security issue and is not related to the CFIUS review, we understand that currently the UAE does observe a "primary" boycott of Israeli goods, meaning that it does not trade directly with Israel. However, the UAE does not enforce secondary and tertiary aspects of this boycott—meaning that the UAE does business with companies (including American companies) that do business with Israel.

A Dubai Government-owned company, the Ports, Customs and Free Zone Corporation, controls both Dubai Customs and Dubai Ports World, but the two are wholly separate entities.

Dubai Ports World is a port terminal operator. It does not perform customs functions, nor is it involved in boycott enforcement. As a port operator, DPW conducts business with Israeli shipping firms, including ZIM. This was confirmed by ZIM's Chairman, Idan Ofer, in a recent letter sent to Senator Clinton (D–NY).

We are currently negotiating a Free Trade Agreement with the UAE and have made it clear that for the FTA to be concluded and go into effect, the UAE cannot boycott Israel. In this regard, a joint State/Commerce antiboycott compliance team visited the UAE in February to assist UAE officials in harmonizing their laws with U.S. antiboycott regulations. Under Secretary of Commerce McCormick visited in March to discuss trade issues, of which this is one. The UAE has expressed its willingness to meet all U.S. legal requirements.

The FTA with the UAE will be a major step forward in realizing the President's vision to establish the Middle East Free Trade Area by 2013 in order to promote economic freedom and development, the tearing down of barriers, and the integration of Middle East economies into the global system.

Q.6. Can any of you describe what kind of censorship the governments in the UAE conduct on information coming into the country?

A.6. The UAE Government censors information that it considers immoral and offensive, although the UAE remains one of the most open societies in the region. It has an active, independent press, and a free zone known as Media City that hosts the pan-Arab sat-

ellite channel al-Arabiya and hundreds of other journalists representing international and Western media. Many American media outlets, such as CNBC and CNN, have regional centers in Dubai.

Censors review all imported media and ban or censor before distribution material considered pornographic, excessively violent, derogatory to Islam, supportive of certain Israeli Government positions, unduly critical of friendly countries, or critical of the government or ruling families. Academic materials destined for schools are routinely censored by the Ministry of Education. Students are banned from reading texts featuring sexuality or pictures of the human body.

The government-owned Internet provider, Etisalat, regularly blocks internet sites determined to be "objectionable." These sites include information on the Baha'i faith, Judaism, negative critiques of Islam, and testimonies of former Muslims who have converted to Christianity. Etisalat also blocks Internet addresses originating from Israel (using the ".il" address), any web address that includes the word "lesbian;" and numerous other sites declared to be "inconsistent with the religious, cultural, political, and moral values of the UAE."

Q.7. Is foreign investment allowed in the UAE? In particular, would an American company be allowed to manage port operations in Dubai?

A.7. While the UAE wants to attract foreign investment, investment laws and regulations are still evolving. At present, the regulatory and legal framework favors local over foreign investors in most sectors. We understand that the UAE may impose foreign equity limitations on investment in "supporting services for maritime transport." However, United States and other foreign terminal operators can and do invest in UAE ports. All UAE ports and port operations are owned by the governments of the seven individual emirates.

Two UAE ports are currently operated by foreign companies that have contracts with local authorities: The Port of Khor Fakkan in Sharjah, and the Port of Ras Al-Khaimah.

The United States actively encourages the opening of Middle East markets to U.S. investment and is engaging in Free Trade Agreement negotiations in the region, including with the UAE. We are addressing the whole range of investment and services issues in our FTA negotiations. The CFIUS process will apply to foreign acquisitions regardless of whether or not they are covered by the investment provisions of an FTA.