

NOMINATIONS OF IVAN K. FONG AND TIMOTHY W. MANNING

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

OF THE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

NOMINATIONS OF IVAN K. FONG TO BE GENERAL COUNSEL, U.S.
DEPARTMENT OF HOMELAND SECURITY, AND TIMOTHY W. MANNING
TO BE DEPUTY ADMINISTRATOR FOR NATIONAL PREPAREDNESS, FED-
ERAL EMERGENCY MANAGEMENT AGENCY, U.S. DEPARTMENT OF
HOMELAND SECURITY

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NOMINATIONS OF IVAN K. FONG AND TIMOTHY W. MANNING

THURSDAY, APRIL 30, 2009

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

The Committee met, pursuant to notice, at 10:02 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Joseph I. Lieberman, Chairman of the Committee, presiding.

Present: Senators Lieberman and Akaka.

OPENING STATEMENT OF CHAIRMAN LIEBERMAN

Chairman LIEBERMAN. Good morning. The hearing will come to order. I want to apologize to the nominees and my colleagues who are here because I was held up at a previous meeting. I apologize for being late. And I decided on the walk over that my penitence for this tardiness would be that I would not force Senators Bingaman and Brown to hear my opening statement, though we will send copies of it to your offices because I know you are interested in reading it.

But, anyway, I thank you for being here, and if it is OK, we will go to Senator Bingaman for the introduction and then to Senator Brown.

TESTIMONY OF HON. JEFF BINGAMAN, A U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator BINGAMAN. Well, thank you very much, Mr. Chairman, for letting me participate in your hearing and introduce Tim Manning.

He is President Obama's nominee for Deputy Administrator for National Preparedness at the Federal Emergency Management Agency (FEMA). He is currently the State Director of New Mexico's Department of Homeland Security. Before that, he was the Director of the Governor's Office of Homeland Security. Before that, he was our State Director of Emergency Preparedness. And prior to all of those positions, he has had many other very impressive jobs, as a firefighter, emergency medical technician, rescue mountaineer, hazardous materials specialist, and hydrogeologist.

He was raised just outside of Chicago and received his bachelor's degree in geology from Eastern Illinois University. In 1994, he moved to New Mexico. He has lived in our State since then with his wife, Sarah, and their daughter, Katie.

(1)

Since coming to New Mexico's Department of Homeland Security, he has met and exceeded all expectations. He has proven himself as a true professional. He is obviously extremely steeped in the needs of our State and has had the occasion, while serving in our State government, to respond to natural disasters of all kinds. So I think he is extremely well qualified for this position for which the President has chosen him, and he will serve the Nation extremely well in this new role at FEMA.

Obviously, New Mexico will be sorry to see him leave, but we think, for the good of the country, it is an excellent appointment.

So thank you again for letting me introduce Mr. Manning, and I hope your Committee is able to recommend him to the full Senate for confirmation quickly.

Chairman LIEBERMAN. Thank you, Senator Bingaman, for an excellent introduction.

Senator Brown, welcome.

**TESTIMONY OF HON. SHERROD BROWN, A U.S. SENATOR
FROM THE STATE OF OHIO**

Senator BROWN. Thank you, Mr. Chairman. This is my first time in front of your Committee. It is a pleasure to be here.

I am thrilled to introduce Ivan Fong, the nominee for the position of General Counsel at the Department of Homeland Security (DHS). Particularly with the way things are in our country today, it is an especially important appointment, and I am honored to introduce him. I had the pleasure of meeting Sharon, Caroline, and Caitlin a moment ago, and also Mr. Fong's parents and brother-in-law, and it seems like a wonderful family. They live in Dublin, Ohio. We are, as Senator Bingaman said, in his case with Mr. Manning, sorry to see him leave the State. We hope to convince his family to stay in Ohio also, but that is certainly their decision.

Ivan's qualifications for this job are solid and clear. Let me give you a brief snapshot. He is currently the Chief Legal Officer and Secretary for Cardinal Health, which is the single largest company in my State. It is located in the Columbus area. He has had a history of public service. When he was in the private sector, he lived in the Chairman's State.

His history of public service, he was Deputy Associate Attorney General for the Department of Justice (DOJ) during the Clinton years. He played a key role in civil litigation and enforcement matters. He has testified before Congress on issues such as Internet access to chemical safety information, online pharmacies, and electronic signatures in contracting. Most importantly, or equally importantly, he was the primary author and editor of a ground-breaking report on cyber crime policy titled "The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet." He returned after his service in the government to the private sector and has held positions with both General Electric and Cardinal Health in Columbus, as I said.

Ivan holds bachelor and master of science degrees in chemical engineering from the Massachusetts Institute of Technology (MIT), his law degree from Stanford, and he was a Fulbright scholar at Oxford in the United Kingdom. I could go on. You get the picture. He clearly is ready for this job to face these challenges. His experi-

ence as a litigator, a manager, and an expert in cyber security and other emerging security issues will enable him to well serve that agency and, most importantly, the people of our great country.

I recommend him to you, Mr. Chairman, and hope the Committee will quickly recommend him to the full Senate for confirmation. Thank you.

Chairman LIEBERMAN. Thanks, Senator Brown.

The two of you have spoken very eloquently about the two nominees. These are two extraordinarily well qualified nominees for the positions for which they have been nominated, and I must say, though I know some people have found some of President Obama's nominations to be controversial for policy matters, generally speaking, I think the quality of the nominees has really been very high, and that is certainly true of these two. These two people may actually be qualified for the position for which they have been nominated. This is reassuring.

Senator Bingaman and Senator Brown, I know you have busy schedules. I thank you for taking the time. Your testimony and introduction matters a lot to the Committee, and we will certainly understand if you have to depart. Thank you.

We are going to proceed first with Mr. Fong's nomination, so I will ask Mr. Manning to drop back. Am I seeing double over there? [Laughter.]

You are confusing me a little. This holds real potential for the way in which you can be handling double crises at the same time. You will explain that when we come to you, Mr. Manning. Thank you.

We are going to move now to the nomination of Ivan Fong. I do want to state for the record that Senator Collins, the Ranking Member, who rarely misses a meeting or a hearing, has a conflicting hearing before the Appropriations Committee with Secretary Gates, I believe, and she sends her regards to the two nominees and her regrets not to be here.

Ivan Fong has been nominated to serve as General Counsel of the Department of Homeland Security. As I indicated, he has an impressive record both academically and professionally and a breadth of experience that will serve the Department of Homeland Security and the General Counsel's office very well. He has both a bachelor's and a master's degree in chemical engineering from MIT, where he was elected to Phi Beta Kappa. He received his Doctor of Jurisprudence with distinction from Stanford Law School and was president of the Stanford Law Review. He was a Fulbright scholar at Oxford University, clerked for Federal Appeals Court Judge Abner Mikva and Supreme Court Justice Sandra Day O'Connor. That is quite a curriculum vitae.

After a period at the law firm of Covington and Burling, Mr. Fong joined the Clinton Administration Justice Department as a Deputy Associate Attorney General where he oversaw civil litigation, environmental matters, and technology issues. As Senator Brown indicated, he was the principal author of a seminal report on cyber crime titled "The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet."

Mr. Fong returned to the private sector after his DOJ experience, I am pleased to say, living for a few years in Connecticut and work-

ing for a great company, General Electric, and most recently serving as the Chief Legal Officer at Cardinal Health, which is a Fortune 20 company. We are grateful that you are now willing to return to public service. The position of General Counsel is obviously a critical one at the Department, and the challenges and issues you will confront are likely to be as diverse and varied as the challenges faced by the Department as a whole.

Yesterday, Secretary Napolitano was before us to testify about the Department's central role, really designated by statute and Presidential directive as the incident manager for such events for the entire Federal Government, and there are important and, I would say, fascinating ethical, governmental, and legal questions that are raised by this current H1N1 flu epidemic.

First and foremost, the General Counsel, of course, must advise the Secretary and manage the legal functions of the Department. But the General Counsel must also ensure that the fundamental rights of the American people are protected as the Department carries out its mission.

The General Counsel also occupies a central position with respect to the relationship and interaction between the Department and Congress. The General Counsel must counsel the Secretary on how the laws Congress passes should be interpreted and implemented and also has an important part in guiding the Department's interactions and relationships with the other Federal agencies and departments with which it partners to keep us all secure. Good lawyers help their clients reach their goals quickly and with a minimum of risk. But I think you know, Mr. Fong, that the mark of a great lawyer is not just the desire "to get to yes," but to do so with the courage and wisdom to know also when to say no.

Indeed, the responsibilities of—and burdens placed upon—a lawyer in government service are different from those in the private sector, and I speak here as one who was privileged for 6 years to be the Attorney General of Connecticut. The private sector lawyer has the luxury, so to speak, of being singularly focused on his or her client's needs. The government lawyer has the obligation to look beyond the immediate needs of the agency and to consider the broader public interest and the fidelity to the laws of the country.

From all that I know about you, I am confident, Mr. Fong, that you understand these responsibilities and will carry them forward as the General Counsel at the Department.

Let me now proceed to some formal parts of the hearing. Ivan Fong has filed responses to a biographical and financial questionnaire, answered pre-hearing questions submitted by the Committee, and had his financial statements reviewed by the Office of Government Ethics. Without objection, this information will be made part of the hearing record with the exception of the financial data, which are on file and available for public inspection in the Committee offices.

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

Mr. FONG. I do.

Chairman LIEBERMAN. Thank you very much. Please be seated. I would welcome an opening statement and, at whatever time you feel appropriate, the introduction of the family that you have with you today.

TESTIMONY OF IVAN K. FONG¹ TO BE GENERAL COUNSEL, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. FONG. Thank you, Mr. Chairman. Let me also thank Senator Brown for his warm introduction and for his support, as well as that of Senator Voinovich, who I understand could not be here today.

It is a great honor and privilege for me to be here this morning as the nominee to be the General Counsel of the Department of Homeland Security. I thank the President and Secretary Napolitano for their confidence in me, and I thank the Committee for taking up this nomination.

I also want to thank and recognize members of my family, without whose love and support I would not be here today. First and foremost, I owe an immense and immeasurable debt of gratitude to my wife, Sharon, who has sacrificed greatly and supported me in all that I have done, to allow me to be here before you today.

Although our oldest daughter, Kelley, who is away at college in California, is unable to be here today, I am grateful that our younger two daughters, Caitlin and Caroline, are able to be here to share in this event. I am so very proud of all of them, and they, like my wife, will be sacrificing in their own ways to allow me to pursue this significant opportunity for public service.

I also want to introduce a few other members of my family who are here, including my parents, Jeffrey and Elizabeth Fong, both of whom are career civil servants with the National Institute of Standards and Technology, and from whom I learned the values of education and hard work, a love of learning, and the importance of giving back to one's community. My brother-in-law, Cliff Ty, is also here, as well as a number of others whose friendship and support mean so much to me.

I believe that public service—and, in particular, service to one's country—is among the highest of callings. I also believe that protecting the security of the American people is of singular importance—and one of the greatest challenges we face as a Nation today. And it is precisely that mission and challenge that brings me here today: The opportunity to work with the dedicated men and women of the Department who perform their duties, day in and day out, with diligence and professionalism; the opportunity to collaborate and coordinate with other Federal agencies in the broad work of the Department in achieving our shared mission of preventing, protecting against, responding to, and recovering from terrorist incidents and natural disasters; and the opportunity to partner with State, local, international, and private sector representatives to protect our critical infrastructures and to help prepare for and respond to disasters of all kinds.

¹ The prepared statement of Mr. Fong appears in the Appendix on page 31.

As you know, the General Counsel is the chief legal officer of the Department. It is a weighty responsibility and one that I take seriously. If confirmed, I pledge to work tirelessly to build upon the progress that has been made to strengthen the Department and to help it to be successful in achieving its goals.

My unique blend of professional experiences prepares me well, I believe, for this role. As you indicated, I bring over two decades of experience as a lawyer and litigator in private practice, as a Deputy Associate Attorney General with the Department of Justice, and as a general counsel and chief legal officer of large, complex organizations in the private sector. These positions have given me broad substantive experience in litigation and regulatory law, legal and policy experience in areas such as privacy and cyber security, and leadership skills directly related to the responsibilities of the chief legal officer of the Department and the mission of homeland security.

Those experiences have brought me here today, where I believe the role of General Counsel is a natural extension of the positions I have previously held.

Specifically, I believe that the position of General Counsel has three principal components:

First, the General Counsel is primarily responsible for providing legal advice and support to the Secretary, her senior leadership team, and the Department as a whole. Much of the day-to-day legal advice and services are, of course, provided by the career legal staff, who not only have the specific substantive experience, but who also give that advice in the context of the operational realities associated with implementation of the Department's programs. My role, if I am confirmed, would be to ensure that the legal advice given is as sound as possible, that I apply my best professional judgment, and that legal services are provided in a timely and responsive manner.

Second, the General Counsel, working through the lawyers in the Department, also helps ensure that the Department complies with applicable laws and regulations, including laws protecting civil rights, civil liberties, and privacy. I share this Administration's commitment to protecting our security while also protecting the civil rights, civil liberties, and privacy rights of all Americans. I do not take those important commitments lightly. Indeed, not only do I believe that they are not incompatible, but I also believe that while protecting both our security and our values is difficult, it is precisely our country's commitment to rise to that challenge that makes us different. In the same vein, given the importance, in our constitutional system of government, of congressional oversight over the Executive Branch, I also believe the General Counsel has an important responsibility to facilitate full cooperation in providing appropriate access to the information Congress needs to fulfill its legislative and oversight responsibilities.

Third, the General Counsel is responsible for leading and managing the Department's lawyers and legal staff, helping them to be as effective and efficient as possible, and promoting a culture in which they are trusted problem-solvers, proactive advisers, and strategic partners to those whom they support. I believe my experiences as a chief legal officer will help me, if I am confirmed, com-

municate a clear strategic vision for the legal department; align the legal department around a common set of goals and objectives; promote integration of the headquarters and component legal departments; and recruit, develop, and retain outstanding legal talent at all levels of the organization.

In addition, I believe the General Counsel can also play a broader role in helping foster a more unified DHS by coordinating cross-functional and cross-component efforts, streamlining program implementation, and forging department-wide solutions to shared challenges.

I would like to close by making two points. First, growing up in an immigrant family, I believe I have a special appreciation for the American dream. The opportunity to serve as DHS General Counsel is, for me, the fulfillment of the best that this country has to offer. It is a powerful proposition: That with hard work, perseverance, education, the support of family and friends, and no doubt some luck, I now have an opportunity to give back, in a small but significant way, to the country that has given me and my family so much.

Second, I want to close by reiterating how deeply honored I am to have been nominated for this position and to appear before this Committee today. I am humbled by the challenges that lie ahead, though I am confident that under Secretary Napolitano's leadership and with your assistance and support, we will work together to meet those challenges.

Indeed, this Committee has shown extraordinary leadership in creating and standing the Department up during its formative years, and I know that there is extensive expertise here. If confirmed, I look forward to working collaboratively and constructively with this Committee, and I will do my level best to ensure that the Department works closely with you.

Thank you again, Mr. Chairman, for this opportunity to appear before you, and I would be pleased now to answer any questions you may have.

Chairman LIEBERMAN. Thank you very much, Mr. Fong, for an excellent opening statement. I was thinking, as you mentioned the word "luck," that my mother, who also came from an immigrant family, always told my sisters and me that luck comes to those who work hard for it. And I would guess that is the case with you.

I am going to start my questioning with the standard questions we ask of all nominees. First, is there anything you are aware of in your background that might present a conflict of interest with the duties of the office to which you have been nominated?

Mr. FONG. No.

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

Mr. FONG. No.

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

Mr. FONG. Yes.

Chairman LIEBERMAN. Thank you. We will now go to the questions. Let me begin with a broad question. Your office is going to have a very wide array of challenges competing for its attention—threats to critical infrastructure, a growing sense and awareness of threats to our cyber networks, potential vulnerabilities on mass transit at our ports, preventing weapon of mass destruction (WMD) attacks, obviously responding to natural disasters now, being involved in the response to a flu epidemic, perhaps a pandemic, border security, immigration matters, and on top of all that, the challenge of managing 1,700 lawyers dispersed among the many components of a still new and very large Department.

So, if confirmed, what will be your top priorities? What issues do you intend to focus on first?

Mr. FONG. Thank you, Mr. Chairman, for highlighting, I think, one of the significant challenges of any of these senior roles within the Department of Homeland Security given the breadth of issues that it faces. I would say that my primary priority will be, first, to learn as much as I can about the Department and the issues that you have articulated. I believe that working closely with the Secretary and the senior leadership team that she has assembled will be very important to allow me to align the mission and goals that I will be developing for the legal department so that, as you said earlier, the lawyers can give advice informed by the issues that the Department will be facing.

In addition, I believe that protecting our security is perhaps the greatest issue, and I include within that the cyber security issues that have been the subject of much discussion recently. Obviously, the H1N1 flu issues are very critical this day and age. In addition, securing our borders remains a priority for the Secretary. As you know, the Southwest border violence issues have not gone away. And there are many others.

So I agree with you that there will be many balls to juggle, but I believe also that my experiences have given me the confidence to know that, working with others, I will be able to prioritize and focus, I believe, on the most critical issues that the Department faces.

Chairman LIEBERMAN. Good. Let me ask you a related question, but different. We all understood when we created the Department of Homeland Security that there were clear advantages which motivated us to bringing a lot of different departments together to coordinate our response to emergencies and disasters, natural and unnatural, to prevent them and also to be ready to respond, but that we were bringing together 22 different agencies that had different histories—indeed, you might say different cultures.

As you have prepared to assume this position—and, again, going back to the 1,700 lawyers—what is your sense of whether the General Counsel's office has made progress integrating the attorneys from across the Department? And if confirmed, what steps would you take to advance that process?

Mr. FONG. Senator, I believe that the legal department has the advantage of having had more integration than other parts of the Department. As you may know, because the General Counsel is the chief legal officer, the prior Administration had an organizational structure in which virtually all the lawyers in the Department re-

port up to the General Counsel. And so I believe that we are a step ahead in that sense, but I also believe that there is still great opportunity to further integrate the lawyers into a more cohesive and unified whole. And my experiences in particular at General Electric and Cardinal Health have given me experience doing precisely that. General Electric has many components, but under the leadership of then-General Counsel Ben Heineman, there was very much a sense that it was one legal department.

Likewise, when I arrived at Cardinal Health, Cardinal Health had grown through acquisitions, and so there were components of Cardinal Health that were also relatively siloed and not used to working with the rest of the organization. And I believe we made great progress in unifying the company and its lawyers through principally, I would say, three means.

The first is for the leader to set a clear vision—I think that is very important—so that everyone in the organization understands the direction where the group or the team is headed.

Second, I believe it is important to communicate a strategy. How is the team going to get there?

And then, third, what are the priorities so that everyone is aligned on some common goals? Otherwise, each of the components will have its own goals, and there is more of a likelihood that different parts of the organization will be going in different directions.

I know it is a tall order, given the size and the breadth of the Department, but I know Secretary Napolitano and the Deputy Secretary and the rest of the senior leadership team is committed to forging a more unified Department of Homeland Security. And I certainly will contribute to that goal.

Chairman LIEBERMAN. That is excellent, and it is a good reminder that the lawyers in the General Counsel's office all report up to the General Counsel, though in different agencies, and I wish you well in that.

Let me go on. The Government Accountability Office (GAO) and the Department's Inspector General (IG) play a really crucial role in assessing the Department's operations, and they are also important in advising Congress and helping Congress fulfill our oversight obligations, as obviously we are, in the Senate side, the oversight committee of the Department.

Unfortunately, the Department and the General Counsel's office, in particular, have in the past received poor marks for the level of cooperation provided. GAO has told us that of all the departments and agencies with which it works, DHS has been the slowest to respond to routine requests and is the most frequent to inject lawyers in the process.

The Inspector General has in the past reported similar problems, though more recently they tell us that is improved. And I must say that the Committee itself has had a couple of rounds with your predecessors as General Counsel in the Department.

So I want to ask you whether you will commit to reviewing the Department's policies for working with the GAO, the IG, and, in fact, this Committee—and, of course, our colleagues in the House—to streamline them to the maximum extent practicable and thereby obviously achieve a goal of having better, more open, more transparent relationships.

Mr. FONG. Mr. Chairman, I very much believe in the importance of congressional oversight in our system of checks and balances. I fully commit to reviewing the management directives relating to the Department's interactions with the GAO. As you may be aware, the management responsibility for interactions with GAO now resides with the Under Secretary for Management. I will, as indicated, if confirmed, review the procedures by which the Department responds not only to the GAO but also to the Inspector General and this Committee to make sure that we are facilitating appropriate access to the information that the GAO or the IG or this Committee needs.

I further will, if confirmed, encourage others to cooperate. I believe in full cooperation, and I believe my experience and record in private practice indicates that in analogous situations, I believed that it was important to have a dialogue to understand what it was that was being requested so that the lawyers could play a constructive role in identifying which witnesses actually may be helpful in determining or obtaining the information and which documents were going to be the most relevant.

It is true that there are circumstances in which lawyers must be present or must review documents to preserve classified or national security law enforcement-sensitive information. But I also believe that a process of accommodation will allow the GAO or the IG or this Committee to obtain the information it needs without compromising those interests.

Chairman LIEBERMAN. Well said. Thank you. One last question, and then I will yield to Senator Akaka. I know you have this unusually relevant background in cyber security with the book that I mentioned and the work that you have done. We are in a moment now in history when there are a couple of realities we are dealing with. The first is that it is very clear that our governmental and private sector cyber systems are under constant attack from a wide array of antagonists, from individual hackers to foreign governments, to organized crime groups, to terrorist groups.

And the second reality, unfortunately, is that our defenses, both in the Federal Government and in the private sector, are inadequate to the task—that is to say, the attackers always seem to be a step or two ahead of us.

During a hearing that we held on this subject just 2 days ago, we heard testimony that the U.S. Computer Emergency Response Team (US-CERT), the operational arm of the National Cyber Security Division within DHS, did not have sufficient authority to fulfill its mission to protect both Federal and private networks. In one instance, we received testimony that the US-CERT did not even receive responses from any Federal agencies when they were attempting to determine how badly the .gov networks had been affected by a recent so-called worm. That obviously is unacceptable. So some of the problem here rests with the legal authority of US-CERT, which is in the process of entering into agreements with other agencies to monitor their networks.

This Committee feels very strongly that the Department of Homeland Security has a unique and centrally important role in cyber security as we beef up under the President's leadership our resources here. And I wanted to ask you what steps you believe the

Department should take to fulfill this role and how you, as General Counsel, intend to help.

Mr. FONG. Mr. Chairman, I share this Committee's view that cyber attacks and cyber security are some of the most important, if not the most important, challenges that the Department and this country face from a security standpoint. I believe the threats are real and that they are serious.

If confirmed, I will do everything I can to ensure that we improve our capabilities, our preparedness, and our ability to prevent, detect, and respond to cyber attacks. If confirmed, we will work with the other Federal agencies, with this Administration, which, as you know, recently completed a 60-day review on this topic; and if confirmed, I will look forward to working closely with those individuals to implement the recommendations from that study.

I recognize the Committee's views regarding the Department of Homeland Security's leadership role, and I agree that there should be clarity and coordination, drawing upon the expertise of the other Federal agencies, ensuring that US-CERT and other components have the legal authorities they need to get the job done. So the steps I would take would be to review the recommendations from the President's recent study, to review the legal authorities of the relevant Department of Homeland Security components to make sure that we are able to, as I said, do everything possible to prepare for and respond to these kinds of attacks and make sure that we have the capabilities.

I believe that this is an area where the challenges are not going to be solved overnight. It is going to take time and resources and expertise. But I am also confident that the Department has the capability to achieve leadership in this role.

Chairman LIEBERMAN. Thanks very much. I hope, as you begin your review, that when you see areas particularly related to cyber security where you think the Department needs additional statutory authority, you will feel comfortable in working with the Committee on that. My own reaction—and I think it is shared by Senator Collins—is that as we ramp up both with resources, now that the President has recommended dollars be increased, but also in response to this 60-day review that Melissa Hathaway did, we will probably want to act legislatively to give you some additional authority, and obviously, we want to work with you as General Counsel in that regard.

Mr. FONG. Thank you.

Chairman LIEBERMAN. Thank you very much.

Senator Akaka, I am delighted that you are here. Senator Akaka is one of the senior Members of the Committee, but obviously a young man—certainly young at heart and mind.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you very much for those remarks, Mr. Chairman. I want to thank you for holding this hearing.

And I also want to congratulate you, Mr. Fong, on your nomination, and I want to welcome you here to the Committee, and also welcome your family and your friends and your supporters who are here with you this morning.

I want to tell you that I appreciate reading about you and also listening to what you are saying today because many things that you are espousing here is music to my ears, and I am so glad to hear you say them.

As you know, during the last Administration, the General Counsel's office often seemed to view oversight as an unnecessary burden instead of a useful way of improving government programs. And I am encouraged by your statement on the importance of congressional oversight, and if confirmed, I hope you will encourage greater transparency and accountability throughout the DHS.

Additionally, I want to note that I appreciate your emphasis on protecting civil rights, civil liberties, and privacy rights, along with the security of all Americans, as well as your view that collective bargaining rights can help Federal agencies run as effectively as possible and focus on their missions. This is refreshing to me, and I welcome your perspectives.

Mr. Fong, DHS hires approximately one-quarter of new employees through the Federal Career Intern Program. This allows the Department to keep employees on probation for an extra year and to bypass the standard competitive hiring process, which includes veterans' preference and other protections. The intern program is intended to help agencies develop employees needing in-depth agency-specific training. However, many of the employees that DHS hires as interns receive very little formal training.

Will you review DHS's use of this program to ensure that it complies with competitive hiring laws and the Executive Order that created it?

Mr. FONG. Thank you, Senator Akaka, for your kind remarks. As I indicated, I believe that one of the roles of the General Counsel is to ensure that the Department's programs are operating in compliance with applicable laws. I also believe that it is important for these kinds of programs to be applied in a fair and responsible way. So I am happy to work with you and the Committee to understand whether there are specific concerns or other questions you may have so that I can make sure that I am responsive to the concerns that you have raised.

Senator AKAKA. Mr. Fong, as an aside, I note that your two Senators, Senators Voinovich and Brown, did speak up for you, and we really cherish their leadership here, and I am glad to tell you that kind of support is strong support for your nomination.

Mr. Fong, DHS policy allows laptops and other electronic devices to be searched at the border without suspicion. And there have been complaints, as you know, about laptops being detained for long periods of time and information being copied from laptops. As you know, there was a bill introduced by Senator Feingold in the 110th Congress to restrict border searches of electronic equipment and require privacy protections.

Courts have ruled that the Constitution permits what DHS is doing. Nevertheless, these searches may have significant implications as many people keep sensitive information such as medical and financial records on their laptops.

Will you commit to reviewing this policy to ensure that, at a minimum, strong privacy protections are included?

Mr. FONG. Senator, I share your deep interest and concern for the protection of privacy and civil liberties. I understand, as you indicated, that courts have held that privacy interests are significantly reduced at the border. At the same time, I recognize, as you do, that individuals may store very personal information on their laptops. As a result, I would look forward to working with you to make sure that the balance between our law enforcement needs and our border security needs are appropriately weighed against the relevant privacy interests.

In particular, the Office of Civil Liberties and Civil Rights and the Office of Privacy at the Department, I understand, have reviewed the Department's guidance in this area, and if confirmed, I would look forward to working not only with the components but with those offices to ensure that the appropriate balances are struck.

Senator AKAKA. Mr. Chairman, may I ask another question?

Chairman LIEBERMAN. Please go right ahead, Senator Akaka.

Senator AKAKA. Mr. Fong, a June 2008 report by the National Academy of Public Administration revealed that 40 percent of the DHS Office of General Counsel executive positions were vacant. That was one of the highest executive vacancy levels in the Department. Additionally, more than one-third of the executive positions that were filled were political appointments.

I expressed concern at Mr. Coldebella's July 2008 confirmation hearing for this post that the vacancies could leave a leadership vacuum during the transition between Administrations. I would appreciate any update you are able to provide on the office's functioning during the transition, its executive vacancy rate, and your plans to address any remaining staffing problems.

Mr. FONG. Well, thank you, Senator, for that question. It is extremely important, I have learned in my experience, to attract and retain the best talent possible. The only way I can possibly do my job is to surround myself with the best possible talent. And so it is a very high priority of mine, if I am confirmed, to do exactly that. It is something that I have a passion for and, as I indicated, is critical to achieving the goals that I have outlined.

I have not been privy to the specific statistics regarding turnover and vacancy rates. I can tell you that in the limited time that I have had to work in preparation for these hearings, the lawyers are outstanding, they are dedicated, very professional, very knowledgeable, and I look forward to working with them to fill the vacancies.

I am also aware that recently, or at least in the past several years, there has been a move to convert some of the previously non-career senior positions into career positions, which I believe is an appropriate direction. But as I said, I will, if confirmed—and as you can appreciate, I have a limited ability prior to the confirmation to do anything along this front—move promptly to fill the positions that are currently vacant.

Senator AKAKA. I want to thank you very much for your response, and I want to tell you that what you just said and the passion you expressed will make Senator Voinovich from your State very happy because he is a champion of personnel, and I know he would be happy to hear that. So I just want to say as I close here

that from what I have read, from what I have heard, and from what you have said, you do have my support for your nomination.

Mr. FONG. Thank you.

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

Chairman LIEBERMAN. Thank you, Senator Akaka.

Mr. Fong, I think you know that Senator Akaka has been a great partner with Senator Voinovich in unsung work but which is really critically important on the personnel of the Federal Government and on human capital management. And it strikes me that since both of your parents are Federal employees, you can appreciate the significance of that.

You have given excellent answers to our questions. I think it is time to move on to Mr. Manning, but I want to thank you for appearing before the Committee. Thank you for being willing to come back into public service. I congratulate you on the good fortune of having such a wonderful family of all the generations that are with you today.

We are going to keep the record of this hearing open until 12 noon tomorrow for the submission of any additional statements or questions from the Committee Members, and we are going to try very hard to move your nomination and Mr. Manning's as quickly through the Senate next week as we can because we know Secretary Napolitano needs both of you on duty. So, with that, I thank you, and you are free to leave at this time.

Mr. FONG. Thank you very much, Mr. Chairman.

Chairman LIEBERMAN. Thank you.

Mr. Manning, please return to the witness table. Good morning, and welcome to part two of our hearing today. I want to thank you, Mr. Manning, as we consider your nomination to be Deputy Administrator for FEMA in charge of National Preparedness, for your willingness to serve and your proven record of service for many years. As Senator Bingaman said in introducing you, you have served in a number of positions directly relevant to national preparedness, most recently as Director of New Mexico's Department of Homeland Security and Emergency Management and as Homeland Security Adviser to the Governor.

I also want to point out that you have had some front-line experience, having worked as a firefighter and a rescue mountaineer on a voluntary basis.

With this experience, Mr. Manning would bring to FEMA the perspective of a State official and a first responder, which certainly will help strengthen the coalitions between the many entities that need to be involved in preparing for disasters.

The current public health emergency around H1N1 flu demonstrates again very clearly that, in times of crisis, we need response and preparedness officials who know what they are doing and that the functions of prevention and protection must be closely integrated with preparedness and response.

In 2006, following this Committee's extensive investigation into the bungled response to Hurricane Katrina, we brought forth legislation to strengthen the agency so that it would be capable of responding to a disaster as catastrophic as Hurricane Katrina proved to be, but also the host of other disasters, natural and unnatural, that the Department responds to.

The Post-Katrina Emergency Management Reform Act gave FEMA the responsibility to lead our efforts to prepare for and respond to disasters of all kinds.

One of our most important proposals to remake FEMA into a world-class disaster response agency was to join preparedness and response capabilities, which had previously been divided. We do not want FEMA to be in the position again where it is trying to build the kind of teamwork and logistical relief operations among all levels of government in the midst of the chaos or confusion that inevitably follows a disaster. And, of course, that happened during Hurricane Katrina.

Mr. Manning, if you are confirmed, it seems to me that one of your key responsibilities will be to make sure that this important provision of the Post-Katrina Act is fully implemented and that FEMA's preparedness capabilities are fully integrated into and across all stages of emergency management, including mitigation, response, and recovery. And I would like to discuss that with you during the question-and-answer period.

We have to be prepared at all levels of government, and that is going to be the specific responsibility that you will have. We do not want ever to have to hold hearings in this Committee which ask the question we asked over and over again after Hurricane Katrina, which is, "Why were we not prepared?"

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

As you know, Mr. Manning, our Committee rules require that all witnesses at nomination hearings give their testimony under oath, so I would ask you at this time if you would please stand, and raise your right hand.

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

Mr. MANNING. I do.

Chairman LIEBERMAN. I thank you very much. Please be seated. You may proceed with your statement and the introduction of family or friends who are with you today.

STATEMENT OF TIMOTHY W. MANNING¹ TO BE DEPUTY ADMINISTRATOR FOR NATIONAL PREPAREDNESS, FEDERAL EMERGENCY MANAGEMENT AGENCY, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. MANNING. Thank you, Mr. Chairman and good morning. Members of the Committee, thank you for allowing me to be here this morning. I have prepared remarks I would like to submit to the record as well.

Thank you for allowing me to be here this morning as the nominee for Deputy Administrator of the Federal Emergency Manage-

¹ The prepared statement of Mr. Manning appears in the Appendix on page 113.

ment Agency for National Preparedness. First I would like to thank Senator Bingaman for his kind introduction a few moments ago. I have worked with the Senator for many years helping New Mexicans, and I am honored to have had him here with me today. I am also honored to have a number of my friends and colleagues with us here today from the National Emergency Management Association, the International Association of Emergency Managers, the National Governors Association, and a number of my other friends and colleagues from the Homeland Security Consortium.

But, most importantly, I am pleased and honored to be joined by my family: My brother, Dan, Mr. Chairman, whom you acknowledged earlier; my parents, Terry and Lynn Manning. They have passed on the lessons they have learned from their parents and given a lifetime of public service and dedication to the community, and they have instilled that responsibility in my brother and me, and it is only with their encouragement and support, and the sacrifice of my wife, Sarah, and my daughter, Katy, that I am able to be here today, and I thank them for that.

I have been fortunate through my time as the Director of Homeland Security and Emergency Management for the State of New Mexico to have had the opportunity to serve my governor and the people of my State. And I am honored to be afforded the opportunity by the President now to serve my country.

Over the past many years, the Nation has been through a series of very trying times, most recently with the outbreak of the H1N1 influenza. These events have shown us the selfless courage of our first responders, our fellow citizens, and the resilience of our national fabric.

They have also shown us the weaknesses in our system of disaster preparedness, response, and recovery. The American people have come together to address these weaknesses, and we are a stronger Nation for it.

One of the most crucial pieces of this reform was the Post-Katrina Emergency Management Reform Act, the most important development in emergency management since the enactment of the Stafford Act. It provides FEMA a mission and sets goals for a broad-based framework to protect the American people through a comprehensive and integrated program of prevention, mitigation, preparedness, response, and recovery for natural disasters, acts of terrorism, accidents, and all other hazards, regardless of cause. And I am eager, if confirmed, to be part of its full implementation.

I believe a strong and resilient Nation can only be built on a solid foundation of preparedness, a system that transcends all phases of emergency management and homeland security and is rooted in strong partnerships, partnerships between cities, counties, States and territories, tribal governments, the Federal Government, the private sector, and, most importantly, the American people. And I believe this is achievable.

Emergency management and homeland security are fields in which no one level of government can succeed at going it alone; no one agency has a solution. The whole government is required, and close integration between agencies at the Federal, State, tribal, and local level is required to be successful.

Mr. Chairman, Members of the Committee, thank you for allowing me to be here today. If confirmed, I look forward to working with the Committee and with my colleagues to more fully prepare the Nation to withstand severe events, respond to and recover from natural disasters, and protect against acts of terrorism.

I respectfully request your recommendation to confirm my nomination to be the Deputy Administrator of the Federal Emergency Management Agency.

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

Chairman LIEBERMAN. Thank you, Mr. Manning. Thank you for that excellent opening statement.

Let me start with the questions that are standard for the Committee. First, is there anything you are aware of in your background that might present a conflict of interest with the duties of the office to which you have been nominated?

Mr. MANNING. No.

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

Mr. MANNING. No.

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

Mr. MANNING. Yes.

Chairman LIEBERMAN. Thank you. I always wonder when the first two questions invite the "No" response whether people listen enough to the third question to answer "Yes." But you passed the test. Let me proceed, and Senator Akaka and I will do 7-minute rounds of questions.

In the wake of Hurricane Katrina, I mentioned the investigation that we carried out, and many of the recommendations have been implemented pursuant to the law. I should think that the Department is in much better shape today, and FEMA is in much better shape. And as I mentioned in my opening statement, one of the most important aspects of the legislation, I think, is to rejoin preparedness and response, putting them both under FEMA.

In testimony before this Committee about a year ago, the Inspector General of the Department of Homeland Security, Mr. Skinner, concluded that FEMA was better prepared for a catastrophe—and I mention "catastrophe" in the gruesome language of this business as compared to a "disaster"—better prepared for a catastrophe than it was in 2005, and Mr. Skinner, in more recent testimony, was kind enough to credit the Post-Katrina Act for his conclusion.

I wanted to ask you generally, if confirmed, what will you do to ensure that the new enhanced FEMA, as envisioned by the Post-Katrina Act, continues to be strengthened? In particular, how will you make sure that the requirement that rejoins preparedness with response is fully implemented?

Mr. MANNING. Thank you, Mr. Chairman. I believe that the reforms that came from the Post-Katrina Act have immeasurably strengthened FEMA and emergency management in general. I be-

lieve preparedness is a function that transcends all of the other phases of emergency management. I believe it transcends all of the other domains of homeland security. I think it is the beginning and the end and the middle of everything else it is that we do.

If confirmed, I very much look forward to working through the Administration, working with the agency, to bring preparedness into the response phase, not just looked at as a function that gets you ready to respond, but actually helps you respond and work hand in hand during the response to identify things that are going well, things that could go better and adjust while the response is happening and improve our preparedness programs after the fact. I believe that transcendence across the entire spectrum of emergency management, the entire arc of our government programs is as important as any other function of emergency management, and I will work diligently to bring it there.

Chairman LIEBERMAN. Good. Let me ask you, in that regard, what you see as the role of the National Preparedness Directorate in bringing together and improving Federal preparedness efforts and just the comprehensive whole of government in the way that you have described in your statements.

Mr. MANNING. Well, as I understand in my experience in New Mexico working in preparedness programs and what I hope to bring to the National Preparedness Directorate is both the attention during the quiet times—during the peace times, if you may—to preparing our responders to not just respond to a disaster, but to recover from that disaster and to mitigate against disasters coming in the future, and to protect against attacks. My firm belief is that preparedness is something that we have to work to bring to the fore in every daily function throughout government, throughout the homeland security community.

I believe that during the disaster response, the National Preparedness Directorate's primary responsibility is threefold: One is the mission that was envisioned by the Post-Katrina Act to be that part of FEMA that looks past the current crisis, that looks toward the crisis of tomorrow and ensures that the agency and the American people are prepared to deal with what is coming on the horizon.

I believe it also has the responsibility to closely work with responders today to ensure that we are better prepared tomorrow.

And, ultimately, I firmly believe as a State Director of Homeland Security that we are all, at the beginning and the end of the day, emergency managers. And we all must be prepared to pitch in for the response itself when required, and if confirmed, I will bring that ethos to the Directorate.

Chairman LIEBERMAN. Excellent. Let me ask you to bring all that and all your experience to bear on the current H1N1 flu crisis. Yesterday, as you know, Secretary Napolitano appeared before us.

The Secretary related that all components of DHS are actively involved, including FEMA, primarily at this point in getting information out to the public and facilitating the flow of information between Federal and State governments, and of course, the Secretary is, as we say in the vocabulary, the National Incident Manager.

There is a real danger, if you follow the progress of the flu, that this will develop into a pandemic. It certainly seems to be the judg-

ment of the World Health Organization as it raises the alert level. Let me just ask you generally, as we approach this possibility, what role do you think FEMA is likely to play if this outbreak grows much bigger beyond the public communication activities and coordinating activities that the Secretary is playing? And what are some of the things that FEMA and the National Preparedness Directorate, in particular, will need to do together with key Federal, State, and local entities to prepare now for the possibility of a pandemic, which, as we heard yesterday, might not happen now, but might happen during the next flu season?

Mr. MANNING. Thank you, Mr. Chairman. As I understand, the mission of the National Preparedness Directorate at the current time is working closely with the response functions at the Office of Health Affairs and the Health and Human Services Department on the future planning, working and bringing the expertise on preparedness and planning to bear, looking past today and tomorrow and in the next week into the fall.

I believe that the National Preparedness Directorate and FEMA's expertise in general is that facilitation, that bringing of diverse partners together to a coordinated response. And as you mentioned, sir, the Homeland Security Presidential Directive 5 conveys to the Secretary the role of the Principal Federal Officer for domestic incident management, and in support of that, the Federal Emergency Management Agency's role in supporting the subject matter expertise. Health and Human Services, the public health community are the experts in how to deal with the propagation and the promulgation of disease.

What FEMA can bring to the table is the expertise in bringing these partners together to help implement the steps required from the public health community.

Chairman LIEBERMAN. Excellent. Thank you. My time is up. Senator Akaka.

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

Mr. Manning, I want to congratulate you on your nomination and thank you for being here today. I also want to add my welcome to you, your family, friends, and supporters who are here. Your nomination, without any doubt, comes at an important time.

The H1N1 flu outbreak is growing every day, and hurricane season is around the corner. As you look at what is possibly coming, your kind of work is very important to our Nation. You will be confronting these challenges, as well as many others, if you are confirmed. In particular, I hope you will focus on management issues, such as the high vacancy rate at FEMA.

Based on your background and experience, I believe you are highly qualified to join Mr. Fugate, pending his confirmation, in tackling these issues and supporting FEMA's mission. As I said to Mr. Fugate during his confirmation hearing, I would encourage you to reach out to all the various stakeholders and to engage their perspectives and to be a strong advocate for ensuring that FEMA has the resources it needs.

To follow up on the Chairman's questions about the recent outbreak of H1N1 influenza, as the Senator from Hawaii, a geographically remote part of the United States, I have a unique perspective on threats such as H1N1 flu. Hawaii faces distinct challenges in

preparing for a possible pandemic flu outbreak. For example, positioning equipment may be more difficult because everything has to arrive in Hawaii by air or sea cargo, and Hawaii cannot rely on neighboring States for assistance in the way that other States can. What is more, an outbreak on the Mainland can be more easily avoided in Hawaii.

How would you address the distinct challenges present in emergency preparedness and response to a public health threat for a geographically remote location like Hawaii?

Mr. MANNING. Thank you, Senator. I believe that from my experience, coming from a State, the primary role of FEMA in a situation where you have the diverse requirements of a number of States spread over a large geographic area is in working closely with those States and addressing the needs, the support requirements of the governors and the various States. Hawaii has a number of unique challenges to it, similar to those faced by Alaska and the Pacific Islands.

I believe that the National Preparedness Directorate has been working with the University of Hawaii to provide additional planning, expertise, and training to the people of Hawaii and working with the States throughout the Western United States on some of the geographically challenging issues of time and distance. I believe that working through a comprehensive preparedness program where providing additional assistance and training on logistics and things, planning in regard to staging equipment, materiel, and medicine is something that can go a long way toward helping in that sort of a situation, and if confirmed, I would look forward to working very closely with the people of Hawaii and any of the other areas throughout the West that have the long time and distance requirements to deal with in logistics planning and training endeavors.

Senator AKAKA. Over the past few years, Mr. Manning, State and local governments have developed emergency response plans of their own for pandemic influenza outbreaks. We also have a national strategy for pandemic influenza. These plans' effectiveness certainly will be reviewed in light of the current H1N1 outbreak.

What do you believe needs to be done to review State and local emergency preparedness plans? And what role do you believe FEMA should play in such a review?

Mr. MANNING. Senator, I believe that there has been an incredible amount of work done toward planning for a pandemic influenza in the past number of years, and I believe we are more well prepared for this than we have been for any foreseen eventuality maybe in the past many years.

I believe firmly in accountability and measurement of standards, in working with States and local governments to ensure that their planning efforts are adequate and work with their neighboring communities and neighboring States.

I believe my experience in that regard through a number of different initiatives will provide me the assistance I need to be able to ensure that we do that in the most appropriate, effective, and efficient manner possible.

I believe that capturing the actions, the after-action reviews of actual disasters as well as exercise, is the most effective way to

measure whether a plan works or not. I think that having a plan is a very important first step, but understanding and using that plan is the most important step. And it is in this measurement that we will know whether our communities are adequately prepared.

Senator AKAKA. Mr. Chairman, may I follow up here. I have a follow-up request for you. I understand that the Pacific area office has struggled to find a qualified candidate to lead the office, and the regional office has been covering for the position in the interim. And so I would ask for your commitment to look into this and see what you can do to help recruit a qualified person to fill that position. Thank you very much, Mr. Chairman.

Chairman LIEBERMAN. Thank you, Senator Akaka.

I just have one more question, Mr. Manning, about the National Exercise Program, and as you know this does not have to do with personal fitness, but with the preparedness exercises that are done in testing roles and responsibilities, capabilities, and plans.

The Post-Katrina Act gave FEMA the authority to administer the National Exercise Program, but it seems to me and many others that there remains a great deal of work to be done on the program. Obviously, one of the key purposes is to identify areas of weakness so that we can learn from them in these exercises and improve on performance.

The Department's recent Federal Preparedness Report noted that the evaluation and improvement phase of the preparedness cycle is the least mature, and I must say, recent exercises bear this out.

It has been a year and a half after the TOPOFF 4 exercise, and we still have not seen an after action report. So none of the Federal, State, and local participants are able to learn from the exercise, which obviously weakens the effectiveness of the exercise and impairs our ability to be prepared.

I wanted to ask you if you are aware of this and what you intend to do, if confirmed, to expedite the after action and correction action process?

Mr. MANNING. Yes, Mr. Chairman. I have been briefed on that particular issue, and as a State Director and a neighbor to one of the venues of TOPOFF, I am familiar with the report.

I believe that the evaluation and improvement portion of the cycle is the most important, that it is only through evaluation of real-world events and exercises that we can improve our response. And that is ultimately why we are here.

I understand the concerns of the community in drafting those reports. However, we need to get a quick answer. And if confirmed, I will work toward getting, at the very least, a quick answer immediately following an exercise while a more in-depth report is developed.

Chairman LIEBERMAN. Good. Thank you very much for your testimony, for your willingness to serve. You will be a great combination with Mr. Fugate, whom we heard last week and hope to have confirmed quickly. And I hope to do the same with you.

We are going to—as I said with Mr. Fong—without objection, keep the record open until 12 noon tomorrow for the submission of any written questions or statements for the record. And then it would be my intention, working with Senator Collins, to see if we can do an off-the-floor, as we call it, vote on your nomination and

get you out to the floor as quickly as we can. But I thank you and I thank your family. I congratulate your parents on producing such an admirable son—I assume the same for your brother. I take your nod to be an affirmation of that, which we will enter forever into the congressional record.

Anyway, thank you very much. I look forward to working with you. The hearing is adjourned.

[Whereupon, at 11:29 a.m., the Committee was adjourned.]

A P P E N D I X

Prepared Statement of Senator Joe Lieberman

Nomination of Ivan K. Fong General Counsel of the Department of Homeland Security

April 30, 2009

Good morning. The hearing will now come to order. Today our Committee will consider the nominations of Ivan K. Fong to be the General Counsel of the Department of Homeland Security and Timothy W. Manning to be the Deputy Administrator of FEMA in charge of national preparedness. I also want to welcome my friends and colleagues, Senator Sherrod Brown, who will be introducing the nominee and my Senate neighbor, Senator Bingaman who is here to introduce Mr. Manning.

Senators, since I know the two of you have busy schedules I will hold off on my opening statement and ask the two of you to make your introductory remarks.

Thank you Senators. We will move to our first nominee this morning, Ivan Fong who has been nominated to serve as General Counsel of the Department of Homeland Security. Mr. Fong has an impressive record, both academically and professionally, and a breadth of experience that will serve DHS and the General Counsel's office well.

He has both a bachelor's and a master's degree in chemical engineering from the Massachusetts Institute of Technology, where he was elected to Phi Beta Kappa. He received his J.D. with distinction from Stanford Law School and was president of the Stanford Law Review. He was a Fulbright Scholar at Oxford University, and clerked for Federal Appeals Court Judge Abner Mikva and Supreme Court Justice Sandra Day O'Connor.

After a period at the law firm of Covington and Burling, Mr. Fong joined the Clinton Administration Justice Department as a Deputy Associate Attorney General where he oversaw civil litigation, environmental matters, and technology issues. He was the principal author of a seminal report on cyber crime called *The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet*. Mr. Fong returned to the private sector after his DOJ experience, most recently serving as the Chief Legal Officer at Cardinal Health, a Fortune 20 company. We are grateful you are now willing to return to public service.

The position of General Counsel is obviously a critical one at the Department, and the challenges and issues you will confront are likely to be as diverse and varied as the challenges faced by the Department as a whole.

First and foremost, the General Counsel must advise the Secretary and manage the legal functions of the Department. But the General Counsel must also ensure that the fundamental rights of American citizens are protected as the Department carries out its mission.

The General Counsel also occupies a central position with respect to the relationship and interaction between the Department and Congress: the General Counsel must counsel the Secretary on how the laws Congress passes should be interpreted and implemented. The General Counsel also has an important part in guiding the Department's interactions and relationships with the other federal agencies and departments with which it partners to keep us all secure.

Good lawyers help their clients reach their goals quickly and with a minimum of risk. But the mark of a great lawyer is not just the desire "to get to yes," but to do so with the courage and wisdom to know when to say "no."

Indeed, the responsibilities of – and burdens placed upon – a lawyer in government service are different from those in the private-sector. The private sector lawyer has the luxury of being singularly focused on his or her client's needs. The government lawyer has the obligation to look beyond the immediate demands of the agency and to consider the broader public interest.

I am confident that Mr. Fong understands these heavy responsibilities. He is an extraordinary well-prepared nominee for this position, and I look forward to his testimony.

Prepared Statement of
Senator Susan M. Collins

Nominations of Ivan K. Fong to be General Counsel of the
Department of Homeland Security and Timothy W. Manning to be
Deputy Administrator for National Preparedness of the Federal
Emergency Management Agency

Committee on Homeland Security and Governmental Affairs
April 30, 2009

★ ★ ★

I join the chairman in welcoming our two nominees: Tim Manning to serve as Deputy Administrator of FEMA for National Preparedness and Ivan Fong to be General Counsel of the Department of Homeland Security.

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

The Department of Homeland Security operates a multitude of programs that are critical to promoting the safety of American citizens and the security of America's infrastructure and economy. Those programs require the cooperation and support of state and local governments and the understanding and trust of citizens if they are to succeed.

The official actions of the Department and the conduct of all its employees must therefore meet the highest standards set by the letter and spirit of the law.

I look forward to hearing the views of Mr. Fong on the reauthorizations that must occur during this session of Congress of the chemical facility security legislation and the SAFE Port Act, both of which I co-authored. Mr. Fong has a unique perspective on cyber security and cyber crime, having handled these issues in both the private sector and at the Department of Justice and having facilitated public-private partnerships to

address these challenges. I also recognize Mr. Fong's impressive legal background that would serve him well if he is confirmed.

This Committee's comprehensive investigation into the flawed response to Hurricane Katrina revealed fundamental problems with our nation's preparedness for catastrophic disasters. As a result of our Committee's work, Congress passed the Post-Katrina Emergency Management Reform Act in 2006. Our nation's ability to prepare for disasters – regardless of cause – has improved dramatically due to this legislation.

One of the important reforms in our legislation was the recombination of DHS's preparedness and response activities within FEMA. Reorganizations are never easy – but sometimes they are essential. In this case, we can already see the benefits of our actions.

Take, for instance, several of FEMA's notable successes over the past year: effective responses to multiple disasters, the new and improved National Response Framework, and the current efforts underway to develop a comprehensive national planning system.

These successes – and many more – have been accomplished by a new FEMA with its eye not only on traditional response, but with a renewed focus on improving our nation's preparedness to deal with emergencies and disasters.

While we see positive signs that FEMA is improving, there is more work to be done. If confirmed, Mr. Manning will inherit an organization facing many tough challenges – from management integration, to needed reforms of our national exercise program, to establishment of an effective preparedness assessment system. In fact, many of these challenges are mandates from the Post-Katrina Act that have not yet been met.

I look forward to hearing how Mr. Manning's background and experience will provide the National Preparedness Directorate with the guidance and leadership necessary to find solutions to these many challenges.

Prepared Statement of Senator Joe Lieberman**Nomination Hearing of Timothy W. Manning to be Deputy Administrator of
the Federal Emergency Management Agency****April 30, 2009**

We will now move to the second panel for today's hearing and consider the nomination of Timothy W. Manning to be Deputy Administrator for FEMA in charge of national preparedness.

First, let me thank you for your commitment to public service. For many years, Mr. Manning has served in a number of positions directly relevant to national preparedness, most recently as the Director of New Mexico's Department of Homeland Security and Emergency Management and as Homeland Security Advisor to the Governor. He has also held numerous positions with the New Mexico Department of Public Safety - Deputy Cabinet Secretary, Director of the Office of Emergency Management, Director of the Office of Emergency Services, and as coordinator of hazardous materials. Significantly, he has also had front line experience, working as a fire fighter and rescue mountaineer on a voluntary basis.

With this experience, Mr. Manning would bring to FEMA the perspective of a state official and a first responder, which would help strengthen the coalitions between the many entities involved in preparing for disasters. The current public health emergency surrounding the swine flu demonstrates beyond a shadow of a doubt that in times of crisis, we need response and preparedness officials who know what they are doing and that the functions of prevention and protection must be closely integrated with preparedness and response.

In 2006, following this Committee's extensive investigation into the bungled response to Hurricane Katrina, Senator Collins and I co-authored reform legislation to strengthen the agency so that it would be capable - for the first time in its history - of responding to a disaster as catastrophic as Hurricane Katrina proved to be.

The Post-Katrina Emergency Management Reform Act gave FEMA the responsibility to lead our efforts to prepare for and respond to disasters of all kinds - whether a natural catastrophe, a devastating accident, or a terrorist attack. If necessary, FEMA would be able to draw on the many resources and assets of the entire Department. We added resources for FEMA, elevated its position within DHS, and redesigned its leadership structure.

One of our most important proposals to remake FEMA into a world-class disaster response agency was to rejoin its preparedness and response capabilities, which had been split apart. We don't want FEMA to be in the position again where it is trying to build the kind of teamwork and logistical relief operations among all levels of government in the midst of the confusion that inevitably follows a disaster. This is what happened during Hurricane Katrina.

Mr. Manning, if you are confirmed, your key responsibility will be to make sure that this important provision of the Post-Katrina Act will be fully implemented and that FEMA's preparedness capabilities are fully integrated into across all stages of emergency management, including mitigation, response, and recovery. This is central to the nation's homeland security, and I look forward to discussing how, if confirmed, you will work to achieve that.

Catastrophes and disasters – natural and man-made – occur all too frequently. As we all know, we are in the midst of a health emergency now, and I hasten to add that the federal response has been strong and reassuring.

We must be prepared at all levels of government, at all times, for the next disaster, because it will come, and we don't want to hold any more hearings to ask the question: "Why weren't we prepared." Thank you.

**Statement for the Record
of
Senator George V. Voinovich**

**“Hearing to consider the nomination of Ivan K. Fong to be General Counsel, U.S.
Department of Homeland Security”**

April 30, 2009

Mr. Chairman, thank you for holding today’s hearing to consider the nomination of Ivan Fong to serve as General Counsel of the Department of Homeland Security.

When we wrote the Homeland Security Act of 2002, we created the position of DHS General Counsel and described that officer as “the chief legal officer of the Department” of Homeland Security. I think we can all agree that Mr. Fong is qualified to serve in that capacity.

Currently, Mr. Fong serves as the Chief Legal Officer and Secretary of Cardinal Health, Inc., a Fortune 20 public company with almost \$90 billion in annual revenue. He has also served as General Counsel of GE Vendor Financial Services and as a Senior Counsel for General Electric Company.

Before he gained this significant executive experience in the private sector, Mr. Fong demonstrated his commitment to public service, working as a Deputy Associate Attorney General for the Department of Justice and as a law clerk for the U.S. Supreme Court and the D.C. Circuit Court of Appeals.

In addition to this professional experience, Mr. Fong has a very strong academic background including being a Fulbright Scholar at Oxford University, receiving his law degree from Stanford University, and obtaining his bachelor’s and master’s degrees from MIT.

Mr. Chairman, I believe we are fortunate to have such an accomplished, capable person willing to commit himself to public service. I appreciate his willingness to serve the United States.

Thank you.

**Statement of Senator Tom Udall
Tim Manning for Deputy Administrator for National Preparedness at DHS**

I am honored to introduce to you one of my constituents—Tim Manning, President Obama's nominee for Deputy Administrator for National Preparedness at the Department of Homeland Security.

On March 23, 2007, a tornado struck Clovis, New Mexico—one of thirteen that hit the Texas-New Mexico border in a two day period. That afternoon, Mr. Manning, serving as Director of the Governor's Office of Homeland Security and Emergency Management, activated the New Mexico State Emergency Operation Center. As the crisis continued, Manning and his office provided assistance to local law enforcement, helped coordinate rescue activities and worked to save lives.

Less than a year later, Mr. Manning—now serving as Director of New Mexico's Department of Homeland Security—helped Chama, New Mexico, dig out from under more than ten feet of snow. Two months later, Manning was battling fires in the Bosque. Two months after that, he was in Ruidoso addressing the aftermath of a flood. The lessons learned from these experiences—and others like them—are not easily learned and not easily forgotten. Tim Manning has spent fifteen years in the field of emergency management—from firefighter to the private sector to state government. He has seen disaster after disaster. He knows how to respond effectively when the worst has happened.

In 2007, when the Office of Homeland Security became a cabinet-level department, Tim Manning's leadership, knowledge and management provided the State Legislature and Governor Richardson the confidence that this move would prove a success. As head of this new Department, he has learned how to build an effective state agency from the ground up. As our nation continues working to keep our citizens safe, his expertise will be a crucial asset.

Mr. Manning is an acknowledged leader in his field. He currently serves as the Co-chairman of the National Homeland Security Consortium, a board member of the National Governors Association's Homeland Security Advisors Council, a Regional Vice President of the National Emergency Management Association and Chair of the Emergency Management Accreditation Program. In these positions, he has had the opportunity to develop a national perspective on homeland security and preparedness. He has also worked with many of the nation's top experts and developed a broad and deep knowledge of security issues.

I believe Tim Manning is well suited to fill this important position. I hope you will join me in supporting his confirmation by the Senate.

Statement of Ivan K. Fong
Nominee for General Counsel,
U.S. Department of Homeland Security
Before the
Senate Committee on Homeland Security and Governmental Affairs
April 29, 2009

* * *

Thank you, Mr. Chairman, Ranking Member Collins, and Members of the Committee. Let me also thank Senators Voinovich and Brown for their kind introductions and for their support today.

It is a great honor and privilege for me to be here this morning as the nominee to be General Counsel of the Department of Homeland Security. I thank the President and Secretary Napolitano for their confidence in me, and I thank the Committee for taking up my nomination.

I also want to thank and recognize members of my family, without whose love and support I would not be here today. I owe an immense and immeasurable debt of gratitude to my wife Sharon, who is my soul mate and best friend, and who has sacrificed greatly and supported me in all that I have done, to allow me to be before you today. Although our oldest daughter Kelley, who is away in college in California, and my sister Linda are unable to be here today, I am grateful that our younger two daughters, Caitlin, who is a junior in high school, and Caroline, who is a freshman in high school, are able to be here to share in this event. I am so very proud of all of them, and they, like my wife, will be sacrificing in their own ways to allow me to pursue this significant opportunity for public service.

I also want to introduce other members of my family who are here, including my parents, Jeffrey and Elizabeth Fong, both of whom are career civil servants with the National Institute of Standards and Technology, and from whom I learned the values of education and hard work, a love of learning, and the importance of giving back to one's community. My brother-in-law Cliff Ty is also here, as well as a number of others whose friendship and support mean so much to me.

I believe that public service – and in particular service to one's country – is among the highest of callings. I believe that protecting the security of the American people is of singular importance – and one of the greatest challenges we face as a Nation today. And it is precisely that mission and challenge that I believe brings me here today. The opportunity to work with the dedicated men and women of the Department of Homeland Security who perform their duties, day in and day out, with diligence and professionalism. The opportunity to collaborate and coordinate with the many other federal agencies in the broad work of the Department in achieving our shared mission of preventing, protecting against, responding to, and recovering from terrorist incidents and natural disasters. And the opportunity to partner with state, local, international, and private-sector representatives to protect our critical infrastructures and to help prepare for and respond to disasters of all kinds.

As you know, the General Counsel is the chief legal officer of the Department of Homeland Security. It is a weighty responsibility, and one that I take very seriously. I believe I bring a unique blend of professional experiences to the position, and if confirmed I will work tirelessly to build upon the work that has been done to strengthen the Department and to help it to be successful in achieving its goals.

My professional background, I believe, prepares me well for the role of General Counsel. As you are aware, I bring over two decades of combined experience as a lawyer and litigator in private practice, as a Deputy Associate Attorney General with the Department of Justice, and as a general counsel and chief legal officer of large, complex organizations. These experiences have given me broad substantive expertise in litigation and regulatory law, policy expertise in privacy and cyber-security; and leadership skills directly related to the responsibilities of the chief legal officer of the Department and the mission of homeland security.

Those experiences have brought me here today, where I believe the role of General Counsel is a natural extension of the positions I have previously held. Specifically, I believe that the position of General Counsel of DHS has three principal components:

- The General Counsel is primarily responsible for providing legal advice and services to the Secretary, her senior leadership team, and the Department as a whole. Much of the day-to-day legal advice and services are, of course, provided by the career legal staff, who not only have the substantive expertise, but who also give that advice and provide those services in the context of helping to implement the challenging goals and operational realities of the Department's programs. My role, if I am confirmed, is to ensure that the legal advice given is as sound as possible, that I apply my best professional judgment, and that legal services are provided in a timely and responsive matter and are aligned with the overall mission of the Department.

- The General Counsel, working through the lawyers in the Department, also helps ensure that the Department complies with applicable laws and regulations, including laws protecting civil rights, civil liberties, and privacy. I share Secretary Napolitano's commitment to protecting our security while also protecting the civil rights, civil liberties, and privacy rights of all Americans. I do not take those important commitments lightly. Indeed, not only do I believe they are not incompatible, but I also believe that our commitment to rise to the challenge of protecting our security and our values is what makes this country different. In the same vein, given the importance of Congressional oversight over the Executive branch in our constitutional system, I also believe the General Counsel has a responsibility to cooperate fully in providing appropriate access to the information Congress needs to fulfill its legislative and oversight responsibilities.
- The General Counsel is also responsible for leading and managing the Department's lawyers and legal staff, helping them to be as effective and efficient as possible, and promoting a culture in which they are trusted problem-solvers, proactive advisers, and strategic partners to those whom they support. Although the size of the Department's legal function is noteworthy – over 1700 lawyers – I believe my experiences as a chief legal officer in the private sector will help me, if I am confirmed, communicate a clear strategic vision for the DHS legal department; promote integration of the headquarters and component legal departments into a more unified DHS legal department; and recruit, develop, and retain outstanding legal talent at all levels of the organization.

In addition, I believe the General Counsel can also play a broader role in helping create a more unified Department by coordinating cross-functional and cross-component efforts, streamlining program implementation, reducing bureaucratic hurdles, and forging Department-wide solutions to shared challenges. I believe my prior experiences in the private and public sectors also help prepare me well for these broader roles.

I would like to close by making two points. First, growing up in an immigrant family, I believe I have a special appreciation for and perspective on the American dream. The opportunity to serve as General Counsel of DHS is, for me, the fulfillment of the best that this country has to offer. It is a powerful proposition – that with hard work, perseverance, education, the support of family and friends, and no doubt some luck – I have an opportunity to give back, in a small but significant way, to the country that has given me and my family so much.

Second, I want to close by reiterating how deeply honored I am to have been nominated for this position and to appear before this Committee today. I am humbled by the challenges that lie ahead if I am privileged to be confirmed, though I am confident that under the Secretary's leadership and with your assistance and support, we will work together to meet those challenges. This Committee has shown extraordinary leadership in creating and standing the Department up during its formative years, and I know that there is extensive expertise here. If confirmed, I look forward to working collaboratively and constructively with this Committee, and I will do my best to ensure that the Department works closely with you.

Thank you again, Mr. Chairman and Ranking Member Collins, for this opportunity to appear before you, and I would be pleased to answer any questions you may have.

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

A. BIOGRAPHICAL INFORMATION

1. **Name:** (Include any former names used.)
Ivan Kenneth Fong
2. **Position to which nominated:**
General Counsel, U.S. Department of Homeland Security
3. **Date of nomination:**
March 11, 2009
4. **Address:** (List current place of residence and office addresses.)

Residence: REDACTED
Office: *Cardinal Health, Inc., 7000 Cardinal Pl., Dublin, OH 43017*
5. **Date and place of birth:**
August 3, 1961; New York, NY
6. **Marital status:** (Include maiden name of wife or husband's name.)
Married; Sharon T. Fong (nee Sharon K. Ty)
7. **Names and ages of children:**
Kelley T. Fong (21); REDACTED
8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.
 - *Oxford University, Magdalen College, Oxford, U.K., 1987-88, B.C.L. (7/88)*
 - *Stanford Law School, Stanford, CA, 1984-87, J.D. (6/87)*
 - *M.I.T., Cambridge, MA, 1979-84, S.B. (6/83), S.M. (6/84)*
 - *Seneca Valley High School, Germantown, MD, 1975-79, H.S. diploma (6/79)*
9. **Employment record:** List all jobs held since college, and any relevant or significant jobs held prior to that time, including the title or description of job, name of employer, location of work, and dates of employment. (Please use separate attachment, if necessary.)

- Chief Legal Officer & Secretary, *Cardinal Health, Inc.*, Dublin, OH (11/05-present)
- Senior Vice President & General Counsel, *GE Vendor Financial Services*, Danbury, CT (1/04-10/05)
- Chief Privacy Leader & Senior Counsel, Information Technology, *General Electric Co.*, Fairfield, CT (8/02-12/03)
- Senior Counsel, E-Commerce & Information Technology, *General Electric Co.*, Fairfield, CT (4/00-7/02)
- Deputy Associate Attorney General, *U.S. Department of Justice*, Washington, DC (12/97-2/00)
- Adjunct Professor of Law, *Georgetown University Law Center*, Washington, DC (1/97-12/99) (part-time)
- Partner, *Covington & Burling*, Washington, DC (10/95-12/97)
- Associate, *Covington & Burling*, Washington, DC (11/90-9/95)
- Law clerk, Hon. Sandra Day O'Connor, *Supreme Court of the United States*, Washington, DC (7/89-8/90)
- Lecturer, *University of Maryland*, College Park, MD (6/89-7/89) (part-time)
- Law clerk, Hon. Abner J. Mikva, *U.S. Court of Appeals for the D.C. Circuit*, Washington, DC (8/88-7/89)
- Summer associate, *Wilson Sonsini Goodrich & Rosati*, Palo Alto, CA (8/87-9/87)
- Summer associate, *Arnold & Porter*, Washington, DC (6/86-8/86)
- Summer associate, *Heller Ehrman White & McAuliffe*, San Francisco, CA (6/85-8/85)
- Research associate, *Gaston Snow & Ely Bartlett*, Palo Alto, CA (3/85-5/85)
- Technical marketing associate, *Aspen Technology, Inc.*, Cambridge, MA (6/84-8/84)
- Student engineer, *MIT Practice School (c/o Bethlehem Steel Corp.)*, Bethlehem, PA (4/84-6/84)
- Student engineer, *MIT Practice School (c/o General Electric Co.)*, Selkirk, NY (1/84-3/84)
- Process design engineer, *Chevron Research Co.*, Richmond, CA (6/83-8/83)

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

From 2003 to 2006, I served as a member of TEAM Westport, an advisory committee appointed by the First Selectwoman to promote diversity and inclusion in the Town of Westport, CT. Members of TEAM Westport were unpaid volunteers.

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

Current:

- Chief Legal Officer & Secretary, *Cardinal Health, Inc.*

Former:

- Partner, Covington & Burling (law firm)
- Trustee, Stanford University (educational institution)

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

Current:

- Member, American Bar Association (former chair, Section of Science & Technology Law; former member, Standing Committee on Pro Bono & Public Service; former member, Section/Division Committee on Professionalism & Ethics)
- Member, American Law Institute
- Director, Asian Pacific American Bar Association of Central Ohio (non-profit bar association)
- Chair & member, Association of Corporate Counsel (non-profit bar association) (previously Treasurer)
- Member, Association of General Counsel (non-profit association)
- Member (inactive), State Bar of California (non-profit bar association)
- Director, Cardinal Health Foundation (non-profit foundation)
- Director, Columbus Bar Foundation (non-profit foundation)
- Member, Committee of 100 (non-profit association)
- Member, Connecticut Bar Association (non-profit bar association)
- Member, DC Bar (non-profit bar association)
- Member, MIT Alumni Association
- Member, Ohio Bar Association (non-profit bar association)
- Director, Pro Bono Partnership (non-profit charitable)
- Member, Stanford Alumni Association

Former:

- Member, American Association for the Advancement of Science
- Member, American Institute of Chemical Engineers
- Member, American Intellectual Property Association
- President & director, Asian Pacific American Bar Association of the Greater Washington, DC Area (non-profit bar association)
- Member, Bradley Hills Elementary School PTA
- Member & Member of Session, Bradley Hills Presbyterian Church
- Member, CCH Computer Law Advisory Council
- Member, Cold Spring Elementary School PTA
- Director, Connecticut Asian Pacific American Bar Association (non-profit bar association)
- Member, DC Bar Rules of Professional Conduct Review Committee
- Treasurer, Edward Bennett Williams Inn of Court (non-profit bar association)
- Member, Environmental Law Institute
- Director, Fulbright Association (non-profit charitable)

- *Member, Greens Farm Congregational Church*
- *Member, Hillmead Citizens Association (neighborhood association)*
- *Member, MIT Visiting Committee on Sponsored Research*
- *Regional Governor, National Asian Pacific American Bar Association (non-profit bar association)*
- *Member, Phi Beta Epsilon (MIT fraternity)*
- *Member, Phi Beta Kappa (honor society)*
- *Member, Sigma Xi (scientific research honor society)*
- *Member, Board of Governors, Stanford Associates*
- *Trustee, Stanford University (non-profit educational)*
- *Member, Tau Beta Pi (engineering honor society)*
- *Member, TEAM Westport (town advisory committee)*
- *Member, US District Court (DC) Advisory Committee on Pro Se Litigation*

State and Other Bar Admissions:

- *California (No. 132252) (12/18/87) (currently inactive)*
- *Connecticut (No. 420101) (3/18/02) (by motion)*
- *District of Columbia (No. 417694) (3/15/89) (by motion)*
- *Ohio (No. 79993) (4/8/08) (by motion) (admitted to corporate status, 11/3/05)*
- *U.S. Patent and Trademark Office (No. 41,757) (4/28/98)*
- *Supreme Court of the U.S. (11/6/95)*
- *U.S. Court of Appeals, D.C. Circuit (6/9/92)*
- *U.S. Court of Appeals, Ninth Circuit (12/1/97)*
- *U.S. Court of Appeals, Tenth Circuit (5/6/98)*
- *U.S. Court of Appeals, Federal Circuit (9/29/97)*
- *U.S. District Court, District of Columbia (7/6/92)*
- *U.S. District Court, District of Maryland (7/15/94)*

13. Political affiliations and activities:

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

N/A

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

N/A

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

- *3/09: Friends of Sherrod Brown (\$250)*
- *7/08: Obama Victory Fund (\$250)*

- 5/08: *Friends of Sherrod Brown* (\$500)
- 1/08: *Obama for America* (\$500)
- 5/06: *Cardinal Health PAC* (\$4775)
- 9/05: *Diane Farrell for Congress* (\$500)
- 8/05: *General Electric PAC* (\$1000)
- 9/04: *Democratic National Committee* (\$1000)
- 8/04: *General Electric PAC* (\$1000)
- 5/04: *John Kerry for President* (\$1000)
- 1/04: *John Kerry for President* (\$500)
- 9/03: *General Electric PAC* (\$1000)
- 6/03: *Joe Lieberman for President* (\$500)

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

- *Justice-in-Action Award, Asian American Legal Defense and Education Fund, 2006*
- *American Law Institute, 1999*
- *Trailblazer Award, National Asian Pacific American Bar Association, 1998*
- *Leadership Award, Asian Pacific American Bar Association of New York, 1998*
- *Justice for Victims of Crime Award, U.S. Dept. of Justice, 1995*
- *College Prize (for outstanding performance on the B.C.L. examination, Magdalen College, Oxford University), 1988*
- *Fulbright Scholarship, 1987-88*
- *Hilmer Oehlmann, Jr. Memorial Award (for outstanding first-year legal research and writing, Stanford Law School), 1985*
- *Phi Beta Kappa Graduate Scholarship, 1984-85*
- *Chemical Engineering Practice School Fellowship, 1983-84*
- *Robert T. Haslam Cup (for outstanding professional promise, MIT Dept. of Chemical Engineering), 1983*
- *Phi Beta Kappa*
- *Sigma Xi (scientific research honor society)*
- *Tau Beta Pi (engineering honor society)*
- *Eagle Scout, Boy Scouts of America*

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

- *Law and New Technology: The Virtues of Muddling Through, 19 Yale Law & Policy Review 443 (2001) (book review of National Research Council, The Digital Dilemma (2000))*
- *The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet, U.S. Dept. of Justice (Mar. 2000) (principal editor and author)*
- *Paying for White Collar Crime, Legal Times, p. S41 (July 29, 1996) (Supreme Court Review issue)*

- *Artificial Intelligence: Some Legal Issues, in The Law and Business of Computer Software (D. Toedt ed. 1990) (with S. Nycum) (also published as S. Nycum & I. Fong, Artificial Intelligence and Certain Resulting Legal Issues, The Computer Lawyer (May 1985))*
- *International High Technology Joint Ventures: An Antitrust and Antidumping Analysis, 7 International Tax & Business Lawyer 57 (1989) (with J.K. Walker)*
- *Ineffective Assistance of Counsel at Capital Sentencing, 39 Stanford Law Review 461 (1987)*
- *Hazardous Waste Facility Siting Through Negotiation, 6 Stanford Environmental Law Journal 161 (1987)*
- *Resolution of the Hydrogen Control Issue at the McGuire Reactor: A Case Study, MIT Dept. of Chemical Engineering (1983) (bachelor's thesis)*

16. **Speeches:**

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

N/A

- (b) Provide a list of all speeches and testimony you have delivered in the past 10 years, except for those the text of which you are providing to the Committee. Please provide a short description of the speech or testimony, its date of delivery, and the audience to whom you delivered it.

See Addendum. I have testified before Congress as follows:

- *On H.R. 1714, The Electronic Signatures in Global and National Commerce (E-SIGN) Act, before the Subcommittee on Courts and Intellectual Property (Rep. Coble, R-NC, chair), Committee on the Judiciary, U.S. House of Representatives (Sept. 30, 1999) (on behalf of the U.S. Dept. of Justice)*
- *Drugstores on the Net: The Benefits and Risks of On-line Pharmacies, before the Subcommittee on Oversight and Investigations (Rep. Upton, R-MI, chair), Committee on Commerce, U.S. House of Representatives (July 30, 1999) (on behalf of the U.S. Dept. of Justice)*
- *On H.R. 1790, The Chemical Safety Information and Site Security Act of 1999, before the Subcommittee on Health and Environment, Committee on Commerce, U.S. House of Representatives (May 19, 1999) (on behalf of the U.S. Dept. of Justice)*

17. **Selection:**

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

I believe I was chosen for this nomination because of my qualifications, extensive experience in government and the private sector, legal ability, and leadership and other personal qualities.

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

Several aspects of my background and employment experience uniquely qualify me for this particular appointment:

- *I am currently Chief Legal Officer and Secretary of a Fortune 20 public company with \$87 billion in annual revenue and a legal department of about 60 lawyers and other professionals. I was previously General Counsel of a General Electric financial services business with over \$25 billion in assets and a similarly sized legal department. In both positions, I had global responsibility (supervising lawyers in North America, Europe, and Asia) and handled the companies' most significant, complex, and sensitive legal matters. These experiences have given me substantial legal, organizational, management, and leadership skills to be an effective general counsel of a major Cabinet department.*
- *My substantive expertise in complex litigation, administrative and regulatory law, law and technology, and privacy, cybersecurity, and healthcare law, among other areas – combined with my experience at senior levels with the Department of Justice – provide an ideal fit for the Department of Homeland Security. For example, while at the Department of Justice, I participated in interagency working groups on issues such as encryption, privacy, and public safety wireless interoperability; was lead author and editor of a major cybercrime report; and testified before a House subcommittee on proposed legislation regarding chemical safety and security.*
- *In addition, because critical infrastructure protection is an essential part of the mission of the Department of Homeland Security, and because about 85% of our country's critical infrastructure is owned or operated by the private sector, my experience in the private sector (especially at senior levels in large companies such as Cardinal Health and General Electric) gives me valuable perspectives and allows me to be better able to help facilitate important public-private sector partnerships.*
- *As a former partner in a large Washington, DC law firm and a former Supreme Court law clerk, combined with my outstanding academic record and experience as a corporate chief legal officer, I believe I have*

demonstrated legal acumen and practical judgment necessary to perform with distinction at the highest levels in government.

- *In addition, my interest in and dedication to public service – as evidenced by my prior government service, pro bono and other volunteer work, and service in my community – demonstrate my commitment to serving the Nation and the public interest.*

B. EMPLOYMENT RELATIONSHIPS

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

Yes. I have entered into a severance agreement with my current employer, Cardinal Health, that provides for termination of my employment prior to my confirmation date, if I am confirmed. Although the severance agreement provides for certain severance payments to be made after my termination date (as disclosed in my SF 278 Financial Disclosure form), those payments are considered in my ethics agreement, which has been reviewed and approved by representatives of the Office of Government Ethics and the DHS Designated Agency Ethics Officer.

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

No.

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

No.

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

No.

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

Yes.

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

No.

C. POTENTIAL CONFLICTS OF INTEREST

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

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Homeland Security's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Department's designated agency ethics official.

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

In my capacity as Chief Legal Officer and Secretary of Cardinal Health, I oversaw (among other areas) the company's government affairs department. In addition, when I was employed by GE as Chief Privacy Leader and Senior Counsel, Information Technology, I helped shape the company's policy positions and strategies relating to privacy and data protection issues. During those times, although I periodically received reports and engaged in internal discussions about legislative policy and strategy, I did not personally engage in any activity for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration or execution of law or public policy.

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

Yes.

D. LEGAL MATTERS

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

No.

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

No.

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

Yes. Although I have not been personally involved as a party in interest in any administrative agency proceeding or civil litigation, I have been an officer of Cardinal Health since November 2005, and as a large, public company that operates in highly regulated industries, Cardinal Health has been involved in numerous administrative agency proceedings and civil litigation matters.

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

N/A

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

N/A

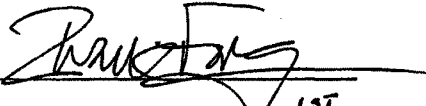
E. FINANCIAL DATA

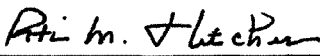
All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

REDACTED

AFFIDAVIT

Ivan K. Fong being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.


Subscribed and sworn before me this 1st day of April, 2009


Notary Public

Robin M. Fletcher
Notary Public, District of Columbia
My Commission Expires 8-14-2009

ADDENDUM – IVAN K. FONG**16. Speeches**

- Speaker, Asian Pacific American Heritage Month - 1994, Office of Justice Programs, U.S. Department of Justice, Washington, DC (May 25, 1994).
- Panelist, Computers: Modeling and Predicting Environmental Contamination and Exposure, Section of Science and Technology, ABA Annual Meeting, New Orleans, LA (Aug. 6, 1994).
- Panelist, Combating Hate Crimes through Community Lawyering, DC Bar 1995 Winter Convention, Washington, DC (Feb. 16, 1995).
- Panelist, Relationships Between In-House Counsel and Minority Lawyers in Majority Firms, DC Conference on Opportunities for Minorities in the Legal Profession, Oakton, VA (May 1, 1995).
- Speaker, Privacy and the Fourth Amendment Under Siege, World Future Society, Eighth General Assembly, Washington, DC (July 16, 1996).
- Panelist, Modern Day Ethics: Representing Clients in a High-Tech World, Section of Science and Technology, ABA Annual Meeting, Orlando, FL (Aug. 3, 1996).
- Panelist, The Role of Risk Assessments in Superfund, Section of Science and Technology, ABA Annual Meeting, Orlando, FL (Aug. 5, 1996).
- Panelist, The APA at 50: The Costs and Benefits of Regulatory Reform, Administrative Law and Agency Practice Section, DC Bar 1997 Winter Convention, Washington, DC (Feb. 25, 1997).
- Panelist, A Judicial Approach to Technical Evidence and Expert Witnesses, ABA Judicial Division, National Conference of Administrative Law Judges, Washington, DC (May 2, 1997).
- Panelist, Rainmaking, NAPABA Northeast Regional Conference, Philadelphia, PA (May 31, 1997).
- Panelist, Mentoring Relationships and the Retention of Asian Pacific American Attorneys in the Workplace, NAPABA and APABA Reception for Summer Associates and Interns, Washington, DC (June 26, 1997).
- Panelist, Interviewing Skills, Moot Interview Program, Asian Pacific American Bar Association Education Fund, Washington, DC (Sept. 6, 1997).
- Speaker, How to Protect Your Intellectual Property, Mount Jade Association, Rockville, MD (Sept. 19, 1997).

- Panelist, Networking Skills and Issues in Making Partner, Asian Pacific American Bar Association of the Greater Washington, DC Area, Washington, DC (Jan. 14, 1998).
- Keynote Speaker, Annual Meeting and Dinner, Asian American Bar Association of New York, New York, NY (Feb. 12, 1998).
- Moderator, Judicial Appointments and the Challenge to the Judiciary, Stanford-in-Washington 10th Anniversary Conference: American Institutions at the Turn of the Century, National Press Club, Washington, DC (April 18, 1998) (panelists included Judge Abner J. Mikva (former Counsel to the President), Assistant Attorney General Eleanor D. Acheson, and Judge Deborah Chasanow (D. Md.)).
- Speaker, Introduction to the Department of Justice, 1998 Okura Mental Health Leadership Foundation Fellows, Washington, DC (April 22, 1998).
- Speaker, U.S. Department of Justice Briefing, Fourth Annual Legislative Conference, Asian Pacific American Institute for Congressional Studies, Washington, DC (May 8, 1998).
- Speaker, Asian American Achievement Awards Gala, Organization of Chinese Americans, Peninsula Chapter of San Mateo County, Burlingame, CA (Sept. 26, 1998).
- Speaker, Introduction to the Supreme Court (for Law and Order merit badge), Girl Scout Troop 661, Bethesda, MD (Oct. 19, 1998).
- Panelist, The U.S. Supreme Court and Intellectual Property Law, D.C. Bar Intellectual Property Law Section, Patent Committee, Washington, DC (July 29, 1999) (with Jeffrey P. Minear, Assistant to the Solicitor General).
- Participant, Colloquium on Diversity in the Legal Profession, American Bar Association, Aspen, CO (Oct. 14-16, 1999) (invited to participate by ABA President Bill Paul).
- Speaker, National Cybercrime Initiative, National District Attorneys Association, Board of Directors Meeting, Management and Technology Committee, Howey in the Hills, FL (Nov. 11, 1999).
- Panelist, The Internet and Property Rights in the Digital Age, The Federalist Society 1999 National Lawyers Convention, Washington, DC (Nov. 13, 1999).
- Presentation to the Judicial Conference of the United States, Committee on Court Administration and Case Management, Subcommittee on Privacy and Public Access to Electronic Case Files, Washington, DC (Jan. 26, 2000).

- **Presentation to the Trans Atlantic Consumer Dialogue, Electronic Commerce Working Group, Washington, DC (Feb. 10, 2000).**
- **Moderator, Privacy and Security in the Digital Age, Georgetown University Law Center (sponsored by the Georgetown Law & Technology Society and Georgetown Law Democrats), Washington, DC (Mar. 20, 2000).**
- **Faculty Member, The Federal Agencies Speak Out on the Online Sale of Prescription Drugs, Legal Forum on the Online Sale of Prescription Drugs, American Conference Institute, Washington, DC (May 23, 2000).**
- **Faculty Member, Is Federal Regulation Irrelevant in the Age of the Internet?: The Challenge of Offshore Online Pharmacies, Legal Forum on the Online Sale of Prescription Drugs, American Conference Institute, Washington, DC (May 23, 2000).**
- **Faculty Member, Been There, Done That: Corporate Counsel Roundtable on Electronic Exchanges, E-Commerce Law: New Rules for a New Way of Doing Business, Illinois Institute for Continuing Legal Education, Chicago, IL (Sept. 13, 2000).**
- **Faculty Member, B2B Infrastructures, eCommerce: Strategies for Success in the Digital Economy, Practising Law Institute, New York, NY (video conference in Boston, MA) (Sept. 25, 2000).**
- **Panelist, Taking It to the Net: The Saga of "yourcompany.com," American Corporate Counsel Association Annual Meeting, Washington, DC (Oct. 3, 2000).**
- **Panelist, The Ethics of Lawyering @ Light Speed (closing program), American Corporate Counsel Association Annual Meeting, Washington, DC (Oct. 4, 2000).**
- **Moderator, Internet Pitfalls for your Corporate Client, National Asian Pacific American Bar Association Annual Convention, Washington, DC (Oct. 14, 2000).**
- **Speaker, Portrait Presentation Ceremony for the Honorable Abner J. Mikva, U.S. Court of Appeals for the D.C. Circuit, Washington, DC (Oct. 16, 2000).**
- **Panelist, Making the Most of the Internet Economy, 2001 Stanford University Alumni Weekend, Stanford, CA (Oct. 21, 2000) (moderated by Professor Joe Grundfest).**
- **Panelist, From Not-Com to Dot-Com: An In-House Counsel Roundtable, A Legal Guide to International E-Commerce, American Conference Institute, San Francisco, CA (Oct. 24, 2000).**

- **Keynote Speaker, Electronic Commerce: Evolving Online Business Models – Legal Issues, Fifth Annual Online & Internet Commerce Law Institute, Glasser LegalWorks Seminars, Chicago, IL (Nov. 17, 2000).**
- **Panelist, B2B, B2C, and B2E: Business Models, Fifth Annual Online & Internet Commerce Law Institute, Glasser LegalWorks Seminars, Chicago, IL (Nov. 17, 2000).**
- **Panelist, Legal Issues in E-Commerce, New England Legal Foundation, 2000 CEO Forum, Boston, MA (Dec. 5, 2000) (Prof. Arthur Miller, moderator).**
- **Moderator, Public Policy Alert on B2B Exchanges: The Regulators' Perspective, B2B E-Commerce, American Conference Institute, New York, NY (Dec. 12, 2000).**
- **Moderator, Legal and Practical Considerations for Your B2B E-Commerce Initiative: An In-House Multi-Industry Roundtable, B2B E-Commerce, American Conference Institute, New York, NY (Dec. 12, 2000).**
- **Keynote Speaker, Can the Law Keep Up With the Internet?, Hispanic Internet Summit, San Juan, Puerto Rico (Apr. 28, 2001).**
- **Faculty Member, Privacy as Practice: An In-House Panel, Fifth Annual Internet Law Institute, Practising Law Institute, New York, NY (July 10, 2001).**
- **Speaker and Panelist, Privacy and Emerging Technology: Where Do We Go From Here?, RAND Privacy and Emerging Technologies Conference, RAND Washington Office, Arlington, VA (July 23, 2001).**
- **Speaker, Privacy: A Global Perspective, ABA Section of Business Law, ABA Annual Meeting, Chicago, IL (Aug. 4, 2001).**
- **Speaker, Litigating in the New Economy: The Clash Between Law and Technology, ABA Section of Litigation, ABA Annual Meeting, Chicago, IL (Aug. 5, 2001).**
- **Co-Moderator, Beyond the Media Hype: What Every Lawyer Needs to Know About E-Privacy (Presidential CLE Program), ABA Section of Science & Technology Law, ABA Annual Meeting, Chicago, IL (Aug. 5, 2001).**
- **Panelist, Career Development, Racial and Ethnic Diversity in the Legal Profession, Connecticut Asian Pacific American Bar Association, Univ. of Conn. School of Law, Hartford, CT (Nov. 3, 2001).**
- **Panelist, Breaking the Asian Glass Ceiling, NAPABA Annual Convention,**

Scottsdale, AZ (Nov. 16, 2001).

- Panelist, Hot Topics in IP, E-Commerce & Privacy Law, NAPABA Annual Convention, Scottsdale, AZ (Nov. 16, 2001).
- Panelist, A Primer on Partnerships, National Forum on In-House Corporate Pro Bono, Pro Bono Institute Annual Seminar, Washington, DC (Mar. 23, 2002).
- Moderator, What I Know Now that I Wish I Had Known as a Law Student, CAPABA Mentor-Mentee Reception, New Haven, CT (Mar. 27, 2002) (with Profs. Harold Koh and Neal Katyal).
- Panelist, Privacy in Cyberspace: The World Wide Web of Regulation, ABA Section of Antitrust Law, Annual Spring Meeting, Washington, DC (Apr. 24, 2002) (with FTC Commissioner Mozelle Thompson and ACLU Associate Director Barry Steinhardt).
- Panelist, Privacy and Security in an Age of Emerging Technologies, 2002 Judicial Conference of the D.C. Circuit, Williamsburg, VA (June 14, 2002) (moderated by Hon. Merrick Garland, US Court of Appeals for the DC Circuit, with Asst. AG Viet Dinh, ACLU President Nadine Strossen, and others).
- Panelist, Cybercrime: An International Problem for Every Lawyer, Business & Country, ABA Annual Meeting, Washington, DC (Aug. 10, 2002) (moderated by Jody Westby).
- Co-moderator, Electronic Privacy and Surveillance in the 21st Century Workplace, ABA Annual Meeting, Washington, DC (Aug. 11, 2002) (with Hon. Alex Kozinski, US Court of Appeals for the 9th Circuit).
- Faculty speaker, How to Design Your Corporate Privacy Infrastructure, IAPO Privacy & Data Security Academy & Expo, International Association of Privacy Officers, Chicago, IL (Oct. 17, 2002).
- Faculty speaker, Roundtable: Protecting Privacy in a Virtual World, ACCA Annual Meeting, Washington, DC (Oct. 21, 2002).
- Moderator, Electronic Privacy and Surveillance in the 21st Century Workplace, ABA CLE Teleconference and Live Audio Webcast (Nov. 6, 2002) (Ruth Bro, Baker & McKenzie, and Marc Rotenberg, Electronic Privacy Information Center).
- Moderator, Consumer Trust on the Internet: Rising, Falling, or the Same?, Privacy & American Business Privacy Leadership Group and Privacy Practitioner's Workshop, Washington, DC (Mar. 12, 2003).

- Panelist, Privacy Pays: Making Privacy Part of the Corporate Culture, ABA Annual Meeting, San Francisco, CA (Aug. 9, 2003).
- Panelist, Doing Business Around the Globe: New Guides to Protecting and Securing Your Data and Network, ABA Annual Meeting, San Francisco, CA (Aug. 9, 2003).
- Panelist, Technologies for Privacy and the Role of Law, ABA Annual Meeting, San Francisco, CA (Aug. 11, 2003).
- Panelist, Asian Pacific American Leadership Panel, GE APAF National Summit, Milwaukee, WI (Oct. 16, 2003).
- Remarks on behalf of Service Award recipients, OCA Fairfield County, Chinese New Year Banquet, Norwalk, CT (Jan. 17, 2004).
- Panelist, Starting Up a Transactional Program, ABA/NLADA Equal Justice Conference, Atlanta, GA (Apr. 16, 2004).
- Speaker, Fiftieth Anniversary of Boy Scout Troop 489, Germantown, MD (Sept. 19, 2004).
- Panelist, Legal Conference, Equipment Leasing Association, Miami Beach, FL (May 15-17, 2005).
- Awardee Speaker, "Justice in Action" Awards, Lunar New Year Celebration, Asian American Legal Defense Fund, New York, NY (Feb. 2, 2006).
- Panelist, Climbing the Corporate Ladder: In-House Counsel Roundtable 2006, NAPABA National Convention, Philadelphia, PA (Nov. 10, 2006).
- Keynote Address, Annual Celebration of the CBA's Martin Luther King, Jr. Committee, Columbus Bar Association, Columbus, OH (Jan. 18, 2007).
- Panelist, Career Panel Roundtable/Networking Event, Asian Pacific American Bar Association of Central Ohio, Columbus, OH (Mar. 8, 2007).
- Speaker, Inaugural Gala, Asian Pacific American Bar Association of Central Ohio, Columbus, OH (Apr. 18, 2007).
- Speaker, Attorney Lunch, Covington & Burling, Washington, DC (July 23, 2007).
- Panelist, Minority Summer Associate Event, Asian Pacific American Bar Association of Central Ohio, Columbus, OH (July 26, 2007).

- **Panelist, What They Think About: Inside the Minds of Today's High Tech General Counsel, ABA Annual Meeting, San Francisco, CA (Aug. 11, 2007).**
- **Roundtable Participant, Sarbanes-Oxley Turns Five, Columbus C.E.O. Magazine, Columbus, OH (Oct. 1, 2007).**
- **Panelist, Diversity: APAs in the Legal Profession, NAPABA Annual Convention, Las Vegas, NV (Nov. 16, 2007).**
- **Speaker, Leadership Lessons, Columbus Chinese Young Professionals Association and OSU Chinese Students and Scholars Association, Columbus, OH (May 4, 2008).**
- **Panelist, ACC Value Challenge, ACC Annual Meeting, Seattle, WA (Oct. 20, 2008) (moderated by Michael Roster).**
- **Panelist, The Importance of Pro Bono to the Bench, Law Firms, and Corporate Clients, NAPABA Annual Convention, Seattle, WA (Nov. 21, 2008).**
- **Panelist, General Counsel Survival Skills: Critical Issues in Challenging Environments, NAPABA Annual Convention, Seattle, WA (Nov. 21, 2008).**
- **Panelist, General Counsel Roundtable, Marketing Partner Forum 2009, Dana Point, CA (Jan. 30, 2009).**

**U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-hearing Questionnaire for the
Nomination of Ivan K. Fong to be
General Counsel, Department of Homeland Security**

I. Nomination Process and Conflicts of Interest

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

I believe I was nominated to serve as General Counsel of the Department of Homeland Security because of my qualifications, over two decades of experience as a lawyer in government and the private sector, strong legal ability, and leadership and other personal qualities.

On January 29, 2009, Secretary Napolitano stated in connection with my appointment that my "extensive private sector and senior government experience will provide invaluable counsel in managing the complex issues and important tasks we take on daily, and I look forward to the enthusiasm and expertise this accomplished team brings to the important missions of this department."

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

No.

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

Several aspects of my background and experience affirmatively qualify me to be General Counsel of DHS:

- *I am a member in good standing of the bars of California (currently inactive), Connecticut, the District of Columbia, and Ohio and am admitted to practice before several federal courts, including the Supreme Court of the U.S. I am currently Chief Legal Officer and Secretary of a Fortune 20 public company with \$87 billion in annual revenue and a legal department of about 60 lawyers and other professionals. I was previously General Counsel of a General Electric financial services business with over \$25 billion in assets and a similarly sized legal department. In both positions, I had global responsibility (supervising lawyers in North America, Europe, and Asia) and handled the companies' most significant, complex, and sensitive legal matters. These experiences have allowed me to develop the legal, organizational, management, and leadership skills to be an effective general counsel of a major Cabinet department.*

- *My extensive expertise in complex litigation, administrative and regulatory law, law and technology, and privacy, cybersecurity, and healthcare law, among other areas – combined with my experience at senior levels with the Department of Justice – provide an ideal fit for DHS. For example, while at the Department of Justice, I participated in interagency working groups on issues such as encryption, privacy, and public safety wireless interoperability; was lead author and editor of a major cybercrime report; and testified before a House subcommittee on proposed legislation regarding chemical safety and security.*
 - *In addition, because critical infrastructure protection is an essential part of the mission of DHS, and because about 85% of our country's critical infrastructure is owned or operated by the private sector, my experience in the private sector (especially at senior levels in large companies such as Cardinal Health and General Electric) gives me valuable perspectives and allows me to be better able to help facilitate public-private collaboration and coordination.*
 - *As a former partner in a large Washington, DC law firm and a former federal appellate court and Supreme Court law clerk, combined with my outstanding academic record and experience as a corporate chief legal officer, I believe I have demonstrated legal acumen and practical judgment necessary to perform with distinction at the highest levels in government.*
 - *Finally, my interest in and dedication to public service – as evidenced by my prior government service, pro bono and other volunteer work, and service in my community – demonstrate my commitment to serving the Nation and the public interest, particularly in advancing the paramount mission of DHS to prevent, protect against, respond to, and recover from terrorist incidents and natural disasters.*
4. Have you made any commitments with respect to the policies and principles you will attempt to implement as General Counsel? If so, what are they and to whom have the commitments been made?
- No, other than an implicit commitment to support and defend the Constitution of the United States, to take care that its laws be faithfully executed, and to exercise my best judgment and act with integrity, all to the best of my ability.*
5. If confirmed, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.

In connection with the nomination process, I have consulted with the Office of Government Ethics and DHS's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Department's designated agency ethics official.

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

No.

II. Role and Responsibilities of General Counsel of DHS

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

The General Counsel of the Department of Homeland Security is, by statute, the chief legal officer of the Department. See 6 U.S.C. § 113(a)(10). In my view, that role has three principal components:

- *The General Counsel is primarily responsible for providing legal advice and services to the Secretary, her senior leadership team, and the Department as a whole. Of course, much of the day-to-day legal advice and services are provided by lawyers and a legal staff that work under the overall direction and control of the General Counsel. Nonetheless, the General Counsel must ensure, to the extent possible, that the legal advice given is as sound as possible and that the legal services are timely, responsive, and aligned with DHS's overall mission.*
- *The General Counsel, working through his or her staff, ensures the Department complies with applicable laws and regulations, including but not limited to compliance with laws protecting civil liberties and privacy, Congressional oversight requirements, and requests by the Government Accountability Office (GAO) and the Department's Inspector General (IG).*
- *The General Counsel is also responsible for leading and managing the Department's lawyers and legal staff, helping them to be as effective and efficient as possible and promoting a culture in which the Department's lawyers are trusted problem-solvers, proactive advisers, and strategic partners to those whom they support.*

In addition, I believe the General Counsel can play a broader role in helping create a more unified Department by coordinating cross-functional and cross-component efforts, streamlining program implementation, reducing bureaucratic hurdles, and forging Department-wide solutions to shared challenges.

8. In what ways, if any, do you believe the role, responsibilities and obligations of a government lawyer are different from those of a private-sector lawyer? How do you see your role of General Counsel at DHS, if you are confirmed, as different from that of your past roles as the General Counsel at a private-sector corporation or an attorney at a law firm representing private-sector clients?

Although there are many similarities between the roles and responsibilities of a government lawyer and a private-sector lawyer, there are also important differences. For example, unlike a private-sector lawyer, a government lawyer generally does not have an individual or a corporate entity as a client. Rather, a government lawyer will sometimes be viewed as representing a range of possible clients – e.g., the particular agency employing the lawyer, the branch of government employing the lawyer, the entire government, or the public interest. See generally Kathleen Clark, Government Lawyers and Confidentiality Norms, 85 Wash. U.L. Rev. 1033 (2007). Awareness of the differences between the roles of a government and private-sector lawyer is important, because those distinctions shape, among other things, the contours of a government lawyer's ethical obligations to maintain confidences and to avoid conflicts of interest.

If confirmed, I would view my role as General Counsel of DHS as including the broader obligations to represent not just the Department as an organizational client, but also the Executive branch and the federal government generally, and ultimately the wider public interest. I believe, for instance, that "The Government wins its point when justice is done in its courts." Although such a more expansive conception of the role of a General Counsel will require a careful and complex balancing of often competing interests, and may require consideration of factors such as the coherent development of legal doctrine and the long-term interests of the U.S. government and its citizens, I believe that broader conception is necessary and indeed critical to fulfilling the obligations of the office to which I have been nominated.

9. If confirmed, what will be the immediate highest priority legal issues that you expect to address? What longer-term goals would you like to achieve in your tenure as General Counsel?

If confirmed, my first as well as longer-term priority will be to provide the highest quality legal advice and services in support of Secretary Napolitano's stated priorities for the Department – namely, to prevent terrorist attacks on the American people, to prepare and plan for emergencies and natural disasters, and to build strong response and recovery capabilities. We must do so while also ensuring that our economy thrives, that we continue to be a welcoming Nation, and that we protect individual rights and civil liberties.

My immediate priority legal issues, if I am confirmed, will of course depend on the circumstances at that time, but I am aware of a number of on-going reviews and task forces – such as the President's 60-day cybersecurity review and DHS's key involvement in a review of detention policies – that will likely require relatively prompt legal attention. Indeed, many of the issues highlighted in this Questionnaire – such as intelligence and information-sharing issues, border security issues, critical infrastructure and cyber security, and the protection of civil liberties and privacy – will call for me to analyze current legal interpretations and authorities and to evaluate the need for further action.

My longer-term goals, if I am confirmed, include communicating a clear strategic vision for the DHS legal department, promoting integration of the legal department into "one DHS" with a common set of core priorities and processes, and recruiting, developing, and retaining outstanding legal talent at all levels of the organization.

10. What do you believe is the appropriate relationship between the DHS Office of General Counsel and component legal departments?

It is my understanding that the lawyers and legal staff in the component legal departments generally report to and are organizationally part of the Office of the General Counsel. If confirmed, I would continue these reporting relationships, because I believe such an organizational structure enables the General Counsel to serve as the final legal authority within the Department on questions of law, helps ensure consistency of interpretation and compliance with applicable legal and regulatory requirements, and promotes appropriate functional accountability and oversight over the legal advice given and law-related policies developed within the Department. That said, because the component legal departments are likely to be closer to the factual and legal context of legal and policy issues that arise within their components, it is critical for the work of the headquarters legal departments and the component legal departments to be closely aligned and coordinated and in frequent dialogue.

11. What steps will you take to ensure consistency of legal positions across the Department, including in its components?

As noted above, one of my longer-term goals is to promote a more unified DHS legal department, and if confirmed, I believe that one result of that effort will be greater consistency of legal positions across the Department. Common processes within the DHS legal department regarding (a) development of policies with a significant legal component; (b) positions taken in legislative proposals or litigation matters; and (c) interpretations of existing laws or regulation – all contribute toward greater alignment of legal positions. In addition, regular communications between and among the components – such as through conference calls, webinars, training conferences, and best-practice sharing opportunities – will further the goal of consistency without sacrificing speed and efficiency in decision-making.

III. Policy Questions

General Legal Issues

12. What role, if any, do you believe Presidential signing statements should play in the Department's interpretation and implementation of legislation?

In general, I believe that Presidential signing statements are highly relevant to the Department's interpretation and implementation of legislation. Presidential signing statements are one way for the President to "faithfully execute" the laws passed by

Congress. See, e.g., Bowsher v. Synar, 478 U.S. 714, 733 (1986) ("interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law"). Accordingly, to the extent a Presidential signing statement informs relevant Executive branch agencies on how the law should be construed or administered, responsible Executive branch officials should accord such interpretive statements great, if not determinative, weight.

A more controversial situation arises when a Presidential signing statement expresses the President's view of the constitutionality of all or parts of the law at issue, including whether he will refuse to enforce provisions found to be unconstitutional. This Administration recently issued a Memorandum for the Heads of Executive Departments and Agencies, dated March 9, 2009, authorizing the use of such signing statements in appropriately limited circumstances, such as when well-founded constitutional objections exist. The memorandum further articulates several principles that I believe will be helpful in guiding the Department's review of Presidential signing statements and their role in interpreting and implementing legislation.

DHS's Authorities

13. A number of the Homeland Security Presidential Directives (HSPDs) issued by President Bush implement or elaborate on the responsibilities given the Secretary of Homeland Security under the Homeland Security Act of 2002 (P.L. 107-296).

- a. Have you reviewed the existing HSPDs?

Yes, I am generally familiar with them.

- b. Are the roles and responsibilities of the Secretary of Homeland Security described by these HSPDs consistent with your view of the appropriate role of the Department of Homeland Security?

Secretary Napolitano has indicated that she intends to undertake a broader, interagency review of the HSPDs that relate to the DHS's roles and responsibilities. If confirmed, I intend to work closely with her and other senior DHS and Administration leadership on that review, as well as on the upcoming Quadrennial Homeland Security Review. In general, I believe it is critical for DHS to have adequate authority and sufficient resources to fulfill its Congressionally mandated missions and to achieve, in partnership with state, local, and tribal officials and the private sector, the paramount goal of ensuring a safe, secure, and resilient post-9/11 United States.

- c. What HSPDs, if any, would you recommend be modified or rescinded? What additional topics, if any, do you believe it would be useful for HSPDs or similar presidential directives to address?

If confirmed, my recommendations for any modifications to existing HSPDs or additional HSPDs will come after the appropriate reviews.

14. In many areas, the responsibilities of DHS intersect, and at times overlap, with those of other cabinet departments. In addition, in a number of areas, such as disaster planning and response, DHS has been given the responsibility to coordinate federal efforts across agencies. Do you believe that DHS has sufficient, and sufficiently clear, legal authorities for the Department to act effectively in the interagency context?

Given the breadth of responsibilities given to DHS by the Homeland Security Act of 2002, as amended, and by other authorities such as HSPDs, it is axiomatic that DHS must work in close coordination and cooperation with other cabinet departments and federal agencies. As such, I believe that DHS must have sufficient, and sufficiently clear, legal authorities to act effectively and productively in the interagency context. Based on my preliminary review, and based on pre-confirmation briefings I have received so far, I believe the Department's legal authorities are currently sufficient, and sufficiently clear, for it to act effectively and productively in the interagency context. If confirmed, however, I expect to learn first-hand how those legal authorities are actually interpreted and applied in interagency deliberations. If I were to conclude, based on that knowledge and experience or on changed circumstances, that they are insufficient, or insufficiently clear, then I would not hesitate to work diligently with other senior DHS and Administration officials – and with Congress (beginning with this Committee) as appropriate – to recommend ways to seek and obtain the appropriate additional authority or clarity.

Congressional Oversight

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

Congressional oversight – the review, monitoring, and supervision of federal agencies, programs, and policy implementation – is an important Congressional responsibility. Authority for such oversight not only derives from implied powers granted in the U.S. Constitution and from laws and House and Senate rules, but robust Congressional oversight is also an integral part of the checks and balances among our three branches of government.

Accordingly, other than a valid claim of executive privilege, I believe there are few if any bases on which the Department may be entitled to withhold information or documents from Congress. If confirmed, I therefore intend to cooperate fully and work closely with others in the Department to ensure that the Department is responsive to Congressional requests for information and that Congress has appropriate access to the information it needs to fulfill its legislative and oversight responsibilities. Of course, as a practical matter, comity and respect for a co-equal branch of government suggest that reasonable accommodations regarding the time, place, and manner of producing responsive

information may be appropriate. And, to the extent classified or otherwise sensitive information is produced, appropriate security measures should be taken to protect the information.

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

Given the importance of Congress's legislative and oversight responsibilities, it is difficult for me to imagine circumstances in which an official or employee of the Department may decline to attend or testify before a Congressional Committee. Even if, hypothetically, a dispute were to arise (e.g., if the Committee at issue were to lack jurisdiction, or if the mere appearance of the witness would materially compromise or prejudice an on-going law enforcement investigation or vital national security interests), it would be my expectation that an accommodation could be reached that would nevertheless satisfy the Committee's interests. In addition, in the rare event that a testifying Department official or employee is personally represented by legal counsel, then I would not of course be able to control that official or employee's decision to decline to respond to a particular question upon the advice of his or her counsel based on a good faith assertion of a personal Constitutional right.

17. What criteria should the Office of General Counsel use to decide whether and how to respond to requests from Congress for documents, information, or testimony?

As noted above, if confirmed, I intend to cooperate fully and work closely with others in the Department to ensure that the Department is responsive to Congressional requests for documents, information, and testimony and that Congress has appropriate access to the information it needs to fulfill its legislative and oversight responsibilities. The Office of the General Counsel's success in being as responsive as possible will naturally depend upon such factors as the breadth and specificity of the requests at issue; the degree to which responsive information exists and is accessible in a responsive format within a reasonable timeframe; the ability of requesters to prioritize what may be multiple competing requests; the need to accommodate unique circumstances involving classified information or truly privileged communications; and the capacity of the Office to respond to all requests in a prompt and coordinated manner.

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

Yes.

Government Accountability Office Access

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

Yes. The GAO plays an essential role in our system of government, and if confirmed I would encourage all DHS personnel to cooperate fully with GAO inspections, audits, and investigations.

20. GAO has taken the position that screening of documents by DHS counsel should be made on an exception basis, with most documents being provided directly to GAO without prior review or approval by counsel. Do you believe that there are circumstances when the Office of General Counsel should review document prior to providing them to GAO? If so, what are those circumstances?

Congress has given GAO broad statutory rights of access to a wide range of federal agency documents. See, e.g., 31 U.S.C. § 716(a) (requiring agencies to provide GAO with "information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency"). It is my understanding that a recent DHS management directive sets forth procedures intended to ensure that DHS responds to GAO requests in a timely and efficient manner. I further understand that that DHS has identified numerous categories of records that, when requested, may be produced to GAO on an expedited basis without further review. In certain narrow circumstances, however, I believe the Office of the General Counsel may have a legal or professional responsibility to review documents prior to providing them to GAO, for example, to ensure classified, privileged, or otherwise protected information is properly handled. Ultimately, I believe improving lines of communication between DHS and GAO in this area is the best way for the Office of the General Counsel to play a constructive role in facilitating GAO's work, because the Office of the General Counsel can thereby raise important legal considerations – and thus reach appropriate accommodations with GAO – earlier in the process and thus more efficiently.

21. Do you believe that it is appropriate for staff of the General Counsel's office to sit in on GAO interviews of DHS officials? If so, under what circumstances do you believe the General Counsel should be present at such interviews?

As noted above, there may be exceptional, and generally infrequent, circumstances where the Office of the General Counsel has a legal or professional obligation to ensure appropriate procedures, particularly for interviews involving classified, privileged, or otherwise protected information, are maintained. There may also be situations in which it is useful for the Office of the General Counsel to be familiar with the information communicated to GAO, not only to ensure that information is provided in the most efficient way possible, but also to assist GAO in gathering any additional information. It is my expectation that involvement by the Office of the General Counsel in such interviews should reflect full cooperation by DHS and have the purpose of facilitating

GAO's efforts to obtain complete and accurate information. Based on my current understanding, I believe it would be extremely rare for the General Counsel to be personally present during such interviews.

22. What do you believe DHS's policy should be with respect to providing pre-decisional information to oversight entities including GAO and Congressional oversight committees? What is your legal basis for that determination?

As noted above, I believe it is important for the Department to be responsive to Congressional and GAO requests, and if confirmed, I would work to facilitate the timely production of responsive information to Congressional oversight committees and GAO. With respect to pre-decisional and deliberative information, I presume the Department will comply with current Administration policies and long-standing separation-of-powers principles regarding the production of such information to Congress or GAO. See generally Congressional Requests for Confidential Executive Branch Information, 13 Op. Off. Legal Counsel 153 (1989). I also believe that, absent an assertion of executive privilege by the President, cf. 31 U.S.C. § 716(d)(1)(C) (generally giving GAO access to agency records unless the President or the Director of OMB certifies that "disclosure reasonably could be expected to impair substantially the operations of the Government"), it is almost always possible to provide Congress and GAO with the information requested through an appropriate accommodation.

23. Do you believe there are legitimate reasons to withhold documents from GAO? If so, what are those reasons? Please explain in detail the legal basis for your views.

As noted above, Congress has given GAO broad statutory rights of access to a wide range of federal agency documents. It is my understanding that this access is nonetheless subject to a few narrow statutory exceptions, such as if (a) the document relates to activities the President designates as foreign intelligence or counterintelligence activities; (b) the document is specifically exempted from disclosure to the Comptroller General by statute; or (c) the President or the Director of OMB certifies that disclosure of the document "reasonably could be expected to impair substantially the operations of the Government" and that the document could be withheld under either 5 U.S.C. § 552(b)(5) (certain deliberative process documents) or (b)(7) (certain law enforcement documents). See 31 U.S.C. § 716(d)(1). In general, however, I believe that in the vast majority of cases the Department and GAO can reach an accommodation to provide GAO with the information that it seeks. Cf. 31 U.S.C. § 716(e)(3) ("[t]his section does not authorize information to be withheld from Congress").

24. DHS's Management Directive Number 077-02 and Instruction Number 077-02-001, issued on June 30, 2008, establish a framework for the Department's interaction with GAO. Despite the attempt to streamline the process for being responsive to GAO and provide accountability for GAO requests, GAO indicates that the process has proven overly complicated and time consuming and hampers GAO's efforts to conduct necessary oversight. Specifically, the process requires GAO to put all of its requests in writing and requires Department employees to funnel all the requests through its liaison at both the

component and headquarters levels. It also requires the Department to track GAO requests and the completion of those requests. If confirmed, will you commit to reviewing this Management Directive and the corresponding Instruction to ensure a streamlined process that promotes GAO's access to information in a timely manner? Will you engage with GAO before implementing any new processes?

Yes and yes.

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

It is my understanding that overall management responsibility for DHS's relations with GAO now resides with the Under Secretary for Management. If confirmed, I will work with the Secretary, Deputy Secretary, and Under Secretary for Management on possible ways the processes for tracking and responding to GAO requests can be further improved and on ways for the Office of the General Counsel to play a constructive role in those processes. In addition, as noted above, a recent DHS management directive establishes a framework for streamlining the process of responding to GAO requests. If confirmed, I will encourage the headquarters and component legal departments to focus their efforts and resources to ensure that DHS adheres to the framework in a way that allows GAO to receive timely and reasonable access to requested information. If confirmed, I also intend, as noted above, to review the management directive and corresponding instruction and to work cooperatively with GAO and/or this Committee as appropriate to see if there are process or other improvements that would be mutually beneficial.

DHS Inspector General

26. What do you see as the Department's responsibilities to assist the Inspector General in carrying out audits and investigations? What do you see specifically as the General Counsel's role in this regard?

I share Secretary Napolitano's view that the Secretary, Deputy Secretary, and Inspector General (IG) must work cooperatively to improve the effectiveness and efficiency of DHS programs. In addition, the Department has a statutory responsibility to comply with the Inspector General Act and the provisions of the Homeland Security Act relevant to the IG. Therefore the Department has an important responsibility to assist the IG in carrying out audits and investigations. The General Counsel's role in that regard includes providing legal and policy advice to support and facilitate such assistance. Moreover, I understand that the Department, in compliance with the Inspector General Reform Act of 2008, has assigned separate counsel to the IG, and if confirmed, I intend to continue that practice and to work cooperatively with the IG's separate counsel to help support them in executing their responsibilities.

27. In April 2008, then-Secretary Chertoff issued a memorandum to all DHS employees, which outlined their responsibilities with respect to interactions with the Office of

Inspector General. The memo stated that all employees should fully cooperate with the Inspector General's Office and that Department employees should provide prompt access to requested materials and information. The memorandum states that the vast majority of the materials may be produced to the Inspector General's Office directly and immediately upon request, and that employees should consult the Office of General Counsel when the requested documents are classified, deliberative, or otherwise sensitive. Do you intend to recommend that Secretary Napolitano adopt the same approach to providing the Department's Inspector General with access to documents and employees?

Secretary Napolitano has noted that Secretary Chertoff's April 2008 memorandum sets forth some key principles with respect to employee coordination and cooperation with the Office of the Inspector General. She has committed to work with the IG to determine whether any additional measures are necessary. If confirmed, I likewise intend to work with the Secretary, IG, and other senior Department leadership to assess whether the existing approach should be continued. Although it is premature for me to provide details of any opinions or recommendations I might make to the Secretary in this area, she and I share the view that any changes would be guided by principles such as cooperation, prompt and complete production of requested documents, and timely responsiveness to requests for interviews.

Conflicts of Interest

28. The Office of the General Counsel has responsibility for helping to ensure DHS employees avoid conflicts of interest. What measures will you put in place to help identify and prevent potential conflicts of interest, or the appearance of such conflicts, among DHS employees?

As with all Executive branch agencies, DHS has appointed a Designated Agency Ethics Official (DAEO) to coordinate and manage the Department's ethics program, as required by U.S. Office of Government Ethics regulations. The DAEO's responsibilities include providing advice, counseling, and training to DHS employees relating to an employee's obligation to comply with the Standards of Ethical Conduct for Employees of the Executive Branch ("Standards") and related regulations and criminal statutes and sustaining a financial disclosure reporting program for an employee to avoid an actual conflict of interest or an appearance of a conflict. It is my understanding that the DAEO is currently housed organizationally in the Office of the General Counsel. If confirmed, I intend to work in close coordination with the DAEO to help identify and prevent potential conflicts of interest, or the appearance of such conflicts, among DHS employees. Specifically, if confirmed, I intend:

- To ensure that the DAEO has appropriate financial resources and personnel to accomplish his responsibilities;*
- To raise awareness of and oversee planning for and the provision of periodic and relevant training on the Standards and related criminal statutes, including the requirement to avoid the appearance of conflicts of interest, for DHS employees;*

- To ensure that I and my subordinates receive appropriate ethics training, file financial disclosure reports as required, and identify and respond appropriately to concerns about potential conflicts of interest; and
- To encourage a culture in which DHS employees understand the need to seek advice regarding compliance with the Standards and related statutes, to raise ethical concerns in a prompt and responsible manner, and to report allegations of waste, fraud, abuse, or corruption, through any of several available channels, without fear of retaliation.

Intelligence and Information-Sharing Issues

29. The National Applications Office (NAO) is a program within the Office of Intelligence and Analysis (I&A) that is intended to facilitate the use of intelligence community technical assets for domestic civil, homeland security, and law enforcement purposes, by federal, state and local customers. The NAO is not yet fully operational due at least in part, to privacy, civil liberties, and legal concerns, and Congress has reduced its funding for FY2009. In letters to Rep. Jane Harman and Rep. Norm Dicks on March 27, 2009, Secretary Napolitano indicated that she was reviewing the status of the NAO.
- a. If confirmed as General Counsel, what steps will you take to address the privacy, civil liberties, and legal concerns raised by the NAO while still ensuring that non-intelligence community customers are able to appropriately utilize intelligence community technical assets?

If confirmed, I expect to play a meaningful role advising the Secretary on legal issues arising from operation of the NAO. It is my understanding that DHS's Office for Civil Rights and Civil Liberties and its Chief Privacy Officer have reviewed the proposed operation of the NAO. I am committed to protecting the civil rights, civil liberties, and privacy rights of all Americans. If confirmed, I therefore plan to work with the Secretary, the Office for Civil Rights and Civil Liberties, the Chief Privacy Officer, and other appropriate senior DHS leadership to understand the operation of the NAO; review the prior analyses of privacy and civil liberties issues; and coordinate and make appropriate recommendations to ensure that the NAO is able to perform its intended and important functions consistent with and in compliance with applicable laws, including privacy and civil liberties standards.

- b. The DHS Office of Civil Rights and Civil Liberties (CRCL) issued a Civil Liberties Impact Assessment for the NAO on March 5, 2008. On July 25, 2008, the NAO Director issued a "National Applications Office Response Plan for Civil Liberties Impact Assessment" which outlined steps that were being taken to implement recommendations made by CRCL and indicated that the NAO intended to work with CRCL and the DHS Office of General Counsel to ensure that the recommendations in the Civil Liberties Impact Assessment were addressed.

If confirmed, will you commit to reviewing the status of the Department's

implementation of the recommendations in the Civil Liberties Impact Assessment and continue working with NAO and CRCL on these issues?

Yes.

30. State and local fusion centers are playing an increasingly important and valuable role in intelligence and information sharing. Fusion centers bring together federal, state and local agencies and regularly handle both law enforcement information and national intelligence. By bringing together officials from multiple levels of government and integrating different types of information, fusion centers are improving the nation's ability to prevent terrorism. However, this co-location and integration also creates potential new legal issues and concerns.

- a. Do you believe that there is sufficient legal and policy guidance for state and local fusion centers today? If not, what additional guidance is needed?

I have not analyzed the legal and policy guidance that currently exists for state and local fusion centers. If confirmed, I intend to review the existing guidance, assess whether clarifications or modifications are warranted, and work to clarify or modify the relevant guidance as appropriate.

- b. Pursuant to section 511 of the Implementing Recommendations of the 9/11 Commission Act of 2007, on December 11, 2008, DHS's Chief Privacy Officer and its Office for Civil Rights and Civil Liberties issued a Privacy Impact Assessment and a Civil Liberties Impact Assessment, respectively, for the Department of Homeland Security State, Local, and Regional Fusion Center Initiative. These assessments identified a number of potential impacts on privacy and civil liberties presented by the fusion center program, and recommended mitigation strategies to address the concerns.

- i. Do you agree with the assessments and the proposed mitigation strategies?

I have not reviewed in detail the above-referenced Privacy Impact Assessment and the Civil Liberties Impact Assessment. As noted above, I am committed to protecting the civil rights, civil liberties, and privacy rights of all Americans. If confirmed, I intend to oversee a review of the operation of the State, Local, and Regional Fusion Center Initiative and will pay particular attention to the prior privacy and civil liberties assessments and recommendations of proposed mitigation strategies. Working closely with DHS's Office for Civil Rights and Civil Liberties and its Chief Privacy Officer, as well as other senior DHS leadership, I will work to ensure that appropriate mitigation strategies are implemented and that any necessary modifications or enhancements to the initiative are made.

- ii. If confirmed, what role do you expect the Office of General Counsel to play in assessing and addressing potential privacy and civil liberties impacts, as well as other legal issues, associated with fusion centers?

As noted above, I expect the Office of the General Counsel to play an important role – in coordination with the Office for Civil Rights and Civil Liberties, the Chief Privacy Officer, and other senior DHS leadership – in assessing and addressing potential privacy and civil liberties impacts associated with state and local fusion centers.

31. A key mission of the Department is to provide state, local, and tribal law enforcement and private critical infrastructure owners with sufficient intelligence information to be able to guard against threats to the homeland. The Department faces a constant challenge in balancing the need to protect valuable intelligence sources and methods with the need to produce useful intelligence products at the lowest possible classification so that they can be disseminated as necessary. Although the Intelligence Community continues to undergo a cultural transformation toward a “need to share” principle, there remains a concern that some valuable information is “overclassified.” How will you work with the Office of Intelligence and Analysis to develop policies and procedures that encourage the appropriate classification of Department intelligence products?

I agree that the Department, like other federal departments and agencies, must balance the need to protect valuable intelligence sources and methods with the need to produce useful intelligence products at the lowest possible classification so that they can be disseminated as necessary. Indeed, under the Homeland Security Act, DHS is expected to share and facilitate the sharing of classified and unclassified intelligence directly with State, local, tribal, and private-sector entities in support of its missions. Under section 201(d)(21) of the Homeland Security Act, DHS's Office of Intelligence and Analysis (I&A) is required, when possible, to produce and contemporaneously disseminate classified intelligence reports and finished analytic products in an unclassified format. In addition, Executive Order 12,958 and its implementing directive, 32 C.F.R. part 2001, seek to limit over-classification and promote compliance with other authorities relating to the use, handling, and marking of classified information.

If confirmed, I will therefore work with the appropriate senior DHS leadership, I&A, and Intelligence Law Division attorneys to ensure that the relevant program personnel receive clear advice and counsel on their statutory and other obligations both to safeguard and to share relevant information in accordance with applicable standards. To the extent DHS needs approval from other executive agencies to declassify or downgrade classified information that is incorporated into or relied upon in its intelligence products, there may also be opportunities to collaborate with the appropriate stakeholders to streamline that approval process to enable DHS to fulfill its information-sharing responsibilities.

32. In May 2008 President Bush signed a memorandum on the Designation and Sharing of Controlled Unclassified Information (CUI) to standardize practices for sensitive but

unclassified information on a government-wide basis and to thereby facilitate information sharing. It is our understanding that the Obama Administration intends to continue to implement the CUI framework, although perhaps with modifications to the memorandum.

Section 27 of the May 2008 memorandum identifies four markings, all related to infrastructure protection, that would receive exceptions from the proposed CUI regime. Three of these excepted markings are designations used primarily by the Department and its partners in the private sector:

- Protected Critical Infrastructure Information (PCII), 6 CFR Part 2
- Sensitive Security Information (SSI), 49 CFR Parts 15 and 1520
- Chemical-Terrorism Vulnerability Information (CVI), 6 CFR Part 27

- a. To what extent do you believe these CUI "exceptions" should be integrated into the CUI framework, *e.g.*, by adopting the CUI standards for marking, handling, dissemination, and safeguarding?

I believe there is value in establishing simple, well-understood, and standardized practices for the treatment and classification of information. Doing so facilitates both the appropriate protection and sharing of information. Such standards must also be implemented in the context of applicable legal and regulatory requirements, including those that protect civil rights and privacy interests. To the extent the above-referenced CUI exceptions can logically be integrated into the CUI framework, consistent with applicable legal mandates and regulatory requirements, I will discuss such integration with the appropriate DHS and Administration officials and work to help simplify and rationalize this aspect of the CUI framework. To the extent specific regulatory provisions would need to be changed to allow these exceptions to be integrated, I would want to work with the appropriate officials to balance the interest in making those modifications with the impact any such changes would have on the obtaining, sharing, and protection of the information at issue and then determine the best path forward.

- b. If confirmed, will you commit to reviewing the regulations for these three markings to determine whether they may need to be modified to make them more consistent with the CUI framework?

Yes.

- c. If confirmed, what role do you see the Office of General Counsel playing in the evaluation and implementation of the new CUI framework at DHS?

If confirmed, I envision the Office of the General Counsel playing a significant role in providing general legal guidance and in the overall evaluation and implementation of the CUI framework at DHS. Much of the day-to-day legal advice and implementation may, by necessity, be done by the headquarters and component legal departments and

their client agencies. In addition, if confirmed, I expect to advise the Department's leadership on any necessary modifications or enhancements to the CUI framework or related legal or regulatory provisions involving the protection and sharing of information.

33. On April 3, 2008, the then-Under Secretary for Intelligence and Analysis and Associate General Counsel for Intelligence sent a memorandum to all I&A employees, detailees, and contractors entitled "Interim Intelligence Oversight Procedures for the Office of Intelligence and Analysis." Among other things, the memorandum provides guidance to I&A employees on the collection, retention, and dissemination of information about U.S. persons.

Are you familiar with this memorandum? If so, do you believe that this memorandum adequately and appropriately addresses the responsibilities of DHS I&A employees with respect to information about U.S. persons? If not, will you commit to reviewing this guidance and revising it as necessary?

Although I am not familiar with this memorandum, I understand that significant work remains in implementing recent changes to Executive Order 12,333, which sets forth a basic framework of principles for intelligence activities and oversight. If confirmed, I will work with the Secretary, the Office of Intelligence and Analysis, and other appropriate senior DHS leadership to ensure that this Executive Order is implemented in a way that allows the Department to accomplish its missions while also protecting the civil rights and civil liberties of U.S. persons.

Federal Emergency Management Agency

34. As a result of this Committee's investigation, findings and recommendation after Hurricane Katrina, Congress passed and President Bush signed the Post-Katrina Emergency Management Reform Act of 2006 (P.L. 109-295) in the Fall of 2006. This law comprehensively restructured and enhanced FEMA's role, resources and responsibilities within the Department and in relation to state and local governments. Given the far-reaching extent of this law, the full implementation of its various mandates and programs continues even today. If confirmed as General Counsel for the Department, will you have lawyers from the DHS headquarters Office of General Counsel or lawyers from FEMA's Office of Chief Counsel taking the lead on analyzing and advising on legal issues related to the implementation of the Post-Katrina Emergency Management and Reform Act of 2006 (P.L. 109-295)?

Full implementation of the Post-Katrina Emergency Management and Reform Act of 2006 (P.L. 109-295) is a key element to ensuring FEMA succeeds in achieving its statutory missions. I share Secretary Napolitano's commitment to strengthening FEMA further, and if confirmed, I envision lawyers from the headquarters legal departments working in close coordination with lawyers from FEMA's Office of Chief Counsel to analyze and advise on legal issues relating to the implementation of this important law. In particular, I believe that lawyers in FEMA's Office of Chief Counsel, because of their

more intimate familiarity with the relevant factual, legal, and policy contexts, should provide the day-to-day legal advice and guidance and should, on legal and policy matters of Department-wide interest or significance, make initial recommendations to the appropriate lawyers in the headquarters legal departments for discussion, consideration, and ultimately a joint determination of the best path forward.

Border Security

35. The Department plans to implement the Western Hemisphere Travel Initiative (WHTI) on June 1, 2009, requiring all travelers entering the United States at the land ports of entry to present a Passport or alternative approved WHTI-compliant document. For travelers that do not present a WHTI-compliant document, do Customs and Border Protection officers have the legal authority to allow these individuals to enter the country without requiring them to go through secondary screening if they are satisfied that they do not present a threat to national security?

Although I have not studied the relevant legal authorities in detail, I understand that the Western Hemisphere Travel Initiative (WHTI) final rule requires travelers to present a passport or other approved secure document denoting identity and citizenship for all land and sea travel into the United States, effective June 1, 2009. I also understand that, even after this requirement becomes effective, Customs and Border Protection officers retain authority to make appropriate individual exceptions. In those instances, a traveler without a WHTI-compliant document who claims U.S. citizenship may, for example, be required to undergo additional inspection and processing to satisfy the inspecting officer that the traveler is a U.S. citizen. To give a more comprehensive answer, I would have to undertake a more careful review and detailed analysis of the applicable legal authorities.

36. As part of the WHTI, DHS has entered into Memorandum of Agreements (MOAs) with a number of states to produce enhanced driver's licenses (EDLs) that would meet the WHTI requirements and could be used to cross the land border.
- a. DHS has stated in the past that EDLs would be REAL-ID compliant. What is your assessment of this claim?

As the question notes, enhanced driver's licenses (EDLs) are a way for states to produce a WHTI-compliant document that will facilitate a traveler's ability to cross the land border. Several states have reached agreements with DHS to issue EDLs in the near future. REAL-ID stems from a separate statutory mandate that requires States to adhere to certain standards for issuing identification documents that would be required for certain federal purposes (boarding federally regulated commercial aircraft, entering federal buildings; etc.). It is my understanding that DHS has worked with the states that are producing EDLs to ensure that their EDLs are developed to meet REAL-ID requirements. I also understand that there are fundamental differences between EDLs and REAL-ID-compliant forms of identification. For example, only U.S. citizens are eligible for EDLs, and EDLs must contain certain technological features (such as an RFID chip and a Machine Readable Zone) to facilitate border-crossing and verification, as well as certain

physical security features. Nevertheless, although I have not studied this issue in detail, my preliminary view is that the convergence of EDL and REAL-ID standards so that state-issued EDLs can meet REAL-ID compliance benchmarks over time may be a sensible and pragmatic solution to the pressing security threat that exists today from the proliferation of insecure and fraudulent identity documents.

- b. What kind of training are state DMV staff undergoing to be able to accurately determine someone's citizenship?

It is my understanding that state DMV staff will determine eligibility for an EDL by verifying the authenticity of documents submitted by the applicant and by interviewing each applicant to determine his or her identity and citizenship. It is my further understanding that (a) state DMV staff receive fraudulent document recognition training and additional investigative interview training to assess behaviors that may suggest an intent to commit fraud; (b) rather than adjudicating U.S. citizenship, DMV staff review certain categories of documents to verify U.S. citizenship; (c) states have quality assurance programs that generally include a second-level review of the applicant's documents by trained and experienced staff; and (d) applicants whose U.S. citizenship cannot be verified are not issued an EDL and instead are encouraged to obtain a passport or passport card from the State Department.

- c. What safeguards should be in place to ensure that EDLs are not issued to individuals with fraudulent breeder documents?

In addition to the training and other safeguards noted above, state law enforcement officials should provide assistance to DMV staff to determine the authenticity and validity of source documents, and state DMV staff should authenticate source documents through key physical security features and, over time, electronic authentication with issuing authorities.

37. Legislation in 2007 enhancing the security of the Visa Waiver Program (VWP) required VWP countries to enter into agreements with the United States "to share information regarding whether citizens and nationals of the country traveling the United States represent a threat to security."

- a. Which VWP countries have entered into these agreements?

It is my understanding that, as of December 30, 2008, 35 countries have been authorized to participate in the Visa Waiver Program (VWP). These countries are listed at 73 Fed. Reg. 79,595, 79,597 (2008); see also 8 C.F.R. 217.2(a). Because entry into information-sharing agreements is a requirement for VWP designation, see 8 U.S.C. § 1187(c)(2)(F), I presume that each of the eight countries designated in late 2008 has entered into such an agreement, but I have not independently verified that assertion. I understand that DHS continues to pursue such agreements with the other VWP countries.

- b. In your view, is there a deadline for compliance with this requirement?

Although I have not studied the relevant legal authorities in detail, there does not appear to be an express deadline for compliance with this requirement, see 8 U.S.C. § 1187(c)(2)(F).

- c. How can the Department enforce compliance with this requirement?

Because I have not studied the relevant legal authorities in detail, it would be premature for me to answer this question. I note, however, that the relevant statutory provisions set forth requirements for continued eligibility and, where appropriate and in consultation with the Secretary of State, termination of VWP countries. See, e.g., 8 U.S.C. § 1187(c)(5)(A) (requiring periodic evaluations not less than every two years); 8 U.S.C. § 1187(d) (authorizing the Secretary of Homeland Security, in consultation with the Secretary of State, to rescind any waiver or designation). One possible way, based on my very preliminary review, for the Department to enforce compliance with this requirement would be to notify non-compliant countries that their designations may be suspended or terminated if they do not comply with the requirement within a specified time period.

Critical Infrastructure

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

- a. What is your understanding regarding the circumstances under which information voluntarily submitted to DHS under the CIIA can be shared with other federal or state agencies? What control, if any, does the submitter of the information retain once the information is designated as protected critical infrastructure information?

The Critical Infrastructure Information Act of 2002 (CIIA) provides in relevant part that certain critical infrastructure information (CII) that is voluntarily submitted to a federal agency for certain authorized uses is generally protected from, among other things, disclosures and uses by federal personnel "for purposes other than the purposes" of the statute. See 6 U.S.C. § 133(a)(1)(D); see also § 133(a)(1)(E) (protecting uses by State or local government agencies "other than for the purpose of protecting critical infrastructure or protected systems"). This language indicates that protected CII may be shared with other federal or state agencies if the purpose of the sharing is to protect critical infrastructures or protected systems (or if the purpose is otherwise expressly permitted by the statute, e.g., in furtherance of an investigation or the prosecution of a criminal act).

Because this statutory scheme reflects a careful balancing of public and private interests, the degree to which voluntarily submitted information is protected must strike the right balance between limiting broad dissemination of the information, on

the one hand, and appropriate sharing for intended uses by authorized users, on the other. Insufficient protection creates a disincentive to submit the information, whereas over-protection restricts the ability to use or share the information – both such outcomes have the adverse impact of defeating the essential, intended statutory purpose, that of facilitating the protection of our critical infrastructure systems. It is my understanding that DHS permits a submitter to request that protected CII not be shared with specific agencies or entities, and that DHS attempts to honor those requests, but that DHS ultimately reserves the right to share the information with any authorized user, if circumstances require. This means that the submitter of protected CII must ultimately rely on the protections set forth in the CIIA (which include, for instance, penalties for the knowing disclosure of protected CII) and otherwise has relatively limited if any control over the information once it is submitted and designated as protected CII.

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

Without a fuller understanding of DHS's current policy and how it is currently working in practice, it would be premature for me to express an opinion in this area. If confirmed, however, I would be prepared to support the current policy to the extent it strikes the appropriate policy balances, advances the underlying purposes of the statutory scheme (protecting critical infrastructure and systems), and is administered in a fair and reasonable manner.

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

The CIIA specifically authorizes protected CII to be disclosed (a) to a federal, state, or local government agency "in furtherance of an investigation or the prosecution of a criminal act"; (b) to either House of Congress or any committee or subcommittee thereof with relevant jurisdiction; and (c) to the Comptroller General or his representative in the course of the performance of the duties of the GAO. See 6 U.S.C. § 133(a)(1)(D) & (E).

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

It is my understanding that DHS's Protected CII Program Office determines whether submissions of CII to DHS are accepted and receive the protections of the CIIA. As such, although the Office of the General Counsel provides legal advice and guidance to that Program Office, it does not necessarily validate every submission of CII under the CIIA.

- e. Are there legislative changes to the CIIA that you believe are necessary?

As noted above, I believe it would be premature for me to recommend any legislative changes to the CILA unless and until I have reviewed the operation of the statutory scheme and have had some experience with its application. If confirmed, I intend to work with the Secretary, other appropriate senior DHS leadership, and Congress (beginning with this Committee) as appropriate to determine whether, and if so what, specific improvements or refinements to the statutory scheme may be warranted.

39. Congress authorized the Department's chemical site security program, now known as the Chemical Facility Anti-Terrorism Standards (CFATS), as part of the Department of Homeland Security Appropriations Act, 2007 (P.L. 109-295). While the original authorization for the program expires this year, it appears that both Congress and Secretary Napolitano are committed to keeping the program going. The Office of General Counsel was heavily involved in drafting the original regulations for the CFATS program. What role do you expect your office to play regarding a reauthorization effort and what, if any, challenges do you foresee in this effort?

It is my understanding that the Department is in the midst of a key implementation phase of the Chemical Facility Anti-Terrorism Standards (CFATS) and that it has generally been making good progress in the implementation of the program. As the Secretary and the Deputy Secretary have noted, the Department needs to maintain its momentum in this program while ensuring that the Nation's high-risk chemical facilities are achieving measurable security improvements.

Given the importance of the CFATS program to the Department's mission, and thus the importance of extending legislative authorization for the program, I expect the Office of the General Counsel to play an essential role in supporting the reauthorization effort. If confirmed, I expect the Office of the General Counsel to work constructively with other appropriate senior DHS leadership, such as the Assistant Secretary for Policy, the Assistant Secretary for Infrastructure Protection, and the Office of Legislative Affairs, and with the Congress to achieve this goal. Some of the challenges in the reauthorization process include (a) the need for diligent effort and prompt coordination, given the relatively short timeframe for reauthorization (the current authorization is set to expire in the fall of 2009); (b) the extent to which any changes to the program are desirable or necessary at this time to strengthen the program and further advance its goals; and (c) the need to continue to coordinate with other relevant federal agencies as well as state and local stakeholders and to conduct outreach to the private sector – all while continuing to make steady progress in implementing the program.

40. In 1999, as part of your work at the Justice Department, you were involved in an effort by the Administration to restrict the dissemination of data about possible dangerous releases at chemical facilities under the Environment Protection Agency's Clean Air Act regulations. In testimony to the House Commerce Committee Subcommittee on Health and Environment on May 19, 1999, you discussed the need to balance "our commitment to reduce the risk of accidental release through public disclosure, on the one hand, and the need to minimize the risk of terrorist attack arising from broad electronic dissemination of such information, on the other." There is a similar tension with respect

to information regarding the chemical site security program (CFATS) at DHS. The authorizing language and subsequent regulations generally shields data about the program, including site vulnerability assessments and security plans, from public disclosure, although it does allow for some information sharing with certain state and local government officials possessing the necessary security clearances. Do you think that the legislation or regulations governing CFATS information should be changed?

As noted above, reauthorization of the CFATS program is an important priority for the Department generally and for the Office of the General Counsel specifically. Based on my prior experience in the public and private sectors, I have an appreciation for the competing issues regarding the protection and availability of information regarding chemical site security. If confirmed, I intend to be closely involved in the reauthorization effort, and as part of that effort will learn more about the program, the status of its current implementation, whether greater or lesser protection of chemical-terrorism vulnerability information would further advance the goals of the program, and the degree to which changes to the treatment of submitted information might disrupt, delay, or change the dynamics of on-going implementation efforts. Until that review is complete, it would be premature for me to offer an opinion or make recommendations regarding any changes to the legislation or regulations governing CFATS information.

Cyber Security

41. In January 2008, President Bush signed National Security Presidential Directive 54 / Homeland Security Presidential Directive 23 – a multi-agency, multi-year plan that laid out twelve steps to securing the federal government's cyber networks. Also known as the Comprehensive National Cyber security Initiative (CNCI), this plan represented a fundamental shift in how the federal government approached cyber security and gave DHS new responsibilities as well as a significant increase in funding and staffing to carry out these responsibilities. The CNCI also reaffirmed DHS's role of coordinating cyber security across all civilian federal agencies. However, DHS was not provided with the authority to compel coordination or compliance across the federal government.
 - a. Given the respective roles of the Office of Management and Budget, the Department of Defense, the National Security Agency and other agencies, what do you believe the role of DHS is with regard to cyber security?

I strongly share this Administration's view that cyber security is one of the most serious challenges that we face. It is imperative to the Nation's security that the U.S. Government operate and promote cutting-edge national cyber security measures to protect, defend, reduce vulnerabilities, and ensure the reliability of the electronic networks and information technology infrastructure on which our economy, communications, and essential government functions depend.

Although the Office of Management and Budget, the Department of Defense, the National Security Agency, and other agencies play critically important roles given their administrative, defense, intelligence, and other functions, it is my understanding

that DHS is the lead civilian agency for national cyber security efforts. That belief stems from the Secretary's unique responsibility and authority, among other things, (a) to lead the Nation's critical infrastructure protection, response, and recovery efforts; (b) to work closely with private-sector entities in the cyber, communications, and related sectors; (c) to assist and promote state, local, private-sector, academic, and other entities with cyber security measures; and (d) to promote the integration of federal cyber security efforts through the National Cybersecurity Center.

Although I am unfamiliar with the contents of NSPD-54/HSPD-23 or the Comprehensive National Cybersecurity Initiative (CNCI) (I do not believe they have been made public), my prior experience in the cyber security area will be key to helping ensure that DHS plays a strong and effective leadership role in the interagency process and in securing the ".gov" domain used by federal executive agencies. I am also aware that the Secretary has initiated a comprehensive review of the Department's role in this area in general and in the CNCI in particular. If confirmed before the completion of that review, I look forward to being closely involved in the review process, and regardless of timing, I will make it a top priority to ensure that the Department has sufficient legal authority, legal expertise, and legal resources to play a leadership role in this vital area. In addition, as the President's 60-day review of all federal cyber missions nears completion, I intend to play a key role in reviewing the findings from that review and continuing to support the Department's role as lead civilian agency for national cyber security efforts.

- b. Do you believe that DHS has sufficient legal authorities to effectively secure our federal government networks against ongoing cyber attacks?

As noted above, if confirmed I plan to work closely with the Secretary, the Deputy Secretary, and other appropriate senior DHS leadership to review the existing legal authorities relevant to securing our federal government networks. Until that review is complete, it would be premature for me to offer any opinions or make any recommendations regarding the sufficiency of such legal authorities. That said, I recognize the importance of clear roles, responsibilities, and lines of authority in this important area, and if I were to conclude that additional legal authority for DHS was necessary for it to accomplish its goals in this area, I would not hesitate to work with other senior DHS leadership and Congress (beginning with this Committee) as appropriate to make such recommendations.

42. Beyond DHS's responsibilities under CNCI, DHS also plays a role in securing the larger cyber infrastructure for the United States, the vast majority of which is controlled by private industry.

- a. Do you believe additional federal regulation or enhanced private sector cooperation is needed to ensure that private sector companies act to protect critical cyber infrastructure?

As noted above, I believe it would be premature for me to recommend whether additional federal regulation is needed until I have a better understanding of the current regulatory environment in this area, including review of any classified materials. In general, because the private sector owns and operates the vast majority of our information networks, it must by necessity play a central and essential role in protecting critical cyber infrastructure. The private sector is also an important partner in DHS's efforts to protect federal executive branch cyber systems. The U.S. Computer Emergency Readiness Team (US-CERT) is an excellent example within DHS of the kind of public-private collaboration that helps government and industry analyze and respond to cyber threats and vulnerabilities. For these reasons, enhanced private-sector cooperation on cyber security solutions and standards is uniformly to be welcomed, encouraged, and promoted. If confirmed, I therefore intend to work constructively with other appropriate senior DHS leadership and federal agency representatives to explore other potential ways to strengthen private-sector cooperation, coordination, collaboration, and engagement in this singularly important area.

- b. What role will the Office of General Counsel play in developing DHS policy with respect to cyber security in the private sector, specifically the pursuit of any additional regulatory authority?

If confirmed, I expect the Office of the General Counsel to play a significant role in providing legal advice and developing DHS policy with respect to cyber security in the private sector, particularly with respect to the recommendation of additional legal authority.

43. If confirmed as General Counsel, do you intend to review DHS's current cyber security operations – including the Einstein program – to ensure they comply with existing laws? If so, how would you go about conducting this review? What procedures would you put in place to monitor these operations going forward to ensure that they remain compliant with existing laws, including laws that limit domestic intelligence activity?

If confirmed, I would view an assessment of the Department's current cyber security operations for compliance with existing laws as part of my broader responsibility to ensure the Department's programs comply with applicable laws and regulations. Although I am not familiar with the details of the Einstein program, I am aware from published reports that it is a real-time intrusion detection system that monitors and analyzes Internet traffic into and out of federal computer networks and that one of its purposes is to allow DHS to detect and respond to anomalies (e.g., malicious code in e-mail attachments) and unusual network traffic patterns that may reflect the work of hackers or other intruders into federal computer networks. I also understand that a Privacy Impact Assessment was conducted on the program in 2008 and that the Office of the General Counsel has worked with the Department of Justice and other federal agencies to review the legal aspects of the program. If confirmed, I would seek to study the particulars of the Einstein program, drawing upon my background and experience in cyber and privacy issues, and ensure that its operation receives continued legal support

and attention, including periodic reviews and reports to take care that it remains compliant with existing laws.

44. The threat of intrusion on our government computers is growing and to combat this threat, the President is continuing to implement CNCI, first announced in January 2008. The CNCI envisions DHS as the federal agency coordinating efforts across civilian and intelligence agencies to secure our federal networks as well as the central point for coordinating work with the private sector and state and local governments. Coordinating this task necessarily raises questions about privacy and appropriate civilian oversight of a far-reaching governmental activity. Some have expressed concern that DHS has not actually been given the resources and authority to fulfill this mission while intelligence agencies such as the NSA are being given too great a role for this domestic mission. What will you do as General Counsel to ensure that the CNCI is carried out in accordance with relevant laws that limit intelligence activity domestically?

As noted above, I believe that it is important for DHS to be the lead civilian agency for national cyber security efforts, not only because of DHS's leadership role in critical infrastructure protection, but also because the vast majority of our cyber networks and systems are owned and operated by private or non-federal entities. If confirmed, I intend to be closely engaged in the CNCI and its operation, and I will draw upon my knowledge and experience with privacy and civil liberties issues to learn as much as possible about the CNCI. I will also support DHS's National Protection and Programs Directorate's work to lead this crucial effort to protect federal systems and networks, working with senior DHS leadership and others to ensure that DHS has the resources and authority to accomplish its mission in this area and that the CNCI is carried out in accordance with applicable laws, including those that limit intelligence activity domestically.

Civil Liberties and Privacy

45. Both your public and private sector experience includes involvement with privacy issues. Please describe your privacy work, and highlight experience that you think will be particularly relevant to privacy concerns you would face as DHS General Counsel.

Since law school and before, I have maintained a significant professional interest in the intersection of law, technology and policy in general, and in privacy and data protection in particular. Examples of my work in the privacy area, particularly those that are relevant to privacy issues I would face if confirmed as DHS General Counsel, include:

- *As Deputy Associate Attorney General at the Department of Justice (DOJ) from 1997 to 2000, I played an active and leading role for DOJ in legal issues and policy development in the area of e-commerce and privacy, especially with respect to harmonizing law enforcement interests. During this time I worked with the Computer Crimes and Intellectual Property Section of DOJ's Criminal Division (as well as other DOJ components such as the Deputy Attorney General's Office, the Civil Division, the Office of Policy Development, the Office of Legislative Affairs, and others), represented DOJ in the Administration's E-*

Commerce Working Group, and was involved in discussions regarding the protection of patient privacy (under the then-new Health Insurance Portability and Accountability Act (HIPAA)) and implementation of the US-EU Safe Harbor framework (which provides a mechanism for U.S. companies to comply with European Union data protection requirements). I also worked closely during this time with the Administration's Chief Counselor for Privacy in OMB. My experiences coordinating and developing privacy policy among DOJ's components, in numerous interagency processes, and in a global context will be exceptionally relevant and helpful if I am confirmed as DHS General Counsel.

- *From 2000 to 2003, I served as General Electric's first Senior Counsel, E-Commerce and Information Technology and later Chief Privacy Leader and Senior Counsel, Information Technology. During this time I led the development of GE's global privacy, data protection, and information security policies and processes, participated in numerous privacy professional organizations, and spoke on the topic of privacy and data protection before numerous audiences. I also gained particular expertise and was intimately involved in the protection of consumer, patient, and employee privacy and in cyber security issues. I learned the importance of analyzing and addressing privacy issues early in the development of a new process, product, or program, so that privacy compliance and protections can be designed into the new process, product, or program. My private-sector experience – particularly in areas such as legal and regulatory compliance, information sharing, public-private partnerships, and cross-border data transfers – will be invaluable if I am confirmed as DHS General Counsel.*
- *As noted above, I have been active in numerous privacy professional organizations, such as the International Association of Privacy Professionals and the Conference Board's Chief Privacy Officer Council. Perhaps my most significant professional association involvement in this area has been with the American Bar Association's Section of Science and Technology, where I co-chaired the e-Privacy Committee, was an active participant in the Privacy and Computer Crime Committee, and served as Section Chair in 2004-2005. These experiences have given me substantive legal expertise and exposure to a range of privacy best-practices and approaches, enabling me not only to accelerate my engagement in this area at DHS, but also to have a broader context for understanding and stronger credibility when addressing privacy issues at DHS.*
- *Also, even during my experiences as a general counsel or chief legal officer (with GE Vendor Financial Services in 2004-2005 and later with Cardinal Health in 2005-present), I maintained my interest in privacy and data protection issues. I learned how to manage and integrate privacy issues into the broader work of the organization and gained a greater appreciation for the role privacy issues play in a large, complex organization. I believe that I will also draw upon these management experiences if I am confirmed as General Counsel of DHS.*

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

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

If confirmed, I will look forward to a close, cooperative, and constructive relationship with the Chief Privacy Officer and the Officer for Civil Rights and Civil Liberties. Those offices and the Office of the General Counsel share a mutual mission to ensure that the privacy interests, civil rights, and civil liberties of those who interact with the Department are respected and protected.

- b. How should the Office of General Counsel work with and support the missions of these two offices?

If confirmed, I will continue to ensure that the Office of the General Counsel provides the legal advice and serves necessary to support these two important offices. Indeed, it is the responsibility of all attorneys in the Department to play a positive role in ensuring that privacy and civil rights and liberties are protected.

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

Given my background and experience in this area, if confirmed I envision playing an active and constructive role in overseeing DHS's compliance with privacy laws. If confirmed, I intend to work closely with the Chief Privacy Officer and to encourage all attorneys in the Department to be aware of and report or resolve appropriately any concerns they may encounter regarding privacy and civil rights and liberties.

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

Yes.

- e. Can you identify areas where you believe DHS needs to take additional steps in order to ensure the protection of privacy and fundamental liberties?

It would be premature to me to express an opinion or make any recommendations on any additional steps in this area until I have had a chance to review the current protections that exist.

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

- a. Do you interpret Section 222 of the Homeland Security Act as requiring that the Department protect personal privacy above and beyond the requirements of the Privacy Act and the E-Government Act of 2002?

Section 222 of the Homeland Security Act of 2002 requires the Secretary to appoint a Privacy Officer to be primarily responsible for privacy policy, including ensuring that the Department's use of technologies sustain privacy protections; ensuring full compliance with fair information practices (as set out in the Privacy Act of 1974); evaluating legislative and regulatory proposals involving personal information; conducting a privacy impact assessment of the Department's proposed rules; and preparing an annual report to Congress. It appears to me, based on a preliminary review, that these provisions may impose privacy protections beyond those of the Privacy Act and the E-Government Act of 2002.

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

I believe that the Department, working through the Privacy Office and with the advice of the Office of the General Counsel, should carefully interpret and thoughtfully apply its mandate to ensure that technologies do not erode privacy protections. As new technologies are developed – particularly technologies that have the potential to erode privacy protections – the Department must consider and be sensitive to, among other things, the actual and theoretical capabilities of the new technology; compliance with Fair Information Practice Principles; the potential for the new technology to work in concert with other technologies to erode privacy protections; unintended consequences of the new technology on privacy; public perceptions of the new technology's impact in privacy; and changing public conceptions of privacy.

In short, the Privacy Office's privacy impact assessments should be meaningful and searching. They should reflect technological depth and sophistication; rigorous analysis of relevant legal requirements and standards; appreciation of how the technology actually operates and potentially could operate in practice; and sensitivity to evolving societal norms. To the extent privacy impact assessments are made public, their transparency provides an additional safeguard for privacy protection.

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

As noted above, I believe the DHS Office of the General Counsel can play a constructive role in advising the Privacy Officer and other senior DHS leadership on

the privacy implications of information-sharing efforts and efforts involving the use of commercial data.

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

It is my understanding that the Privacy Act of 1974 does not specifically address government use of commercial databases containing personal information. That said, there are ways for government use of commercial databases containing personal information to be analyzed for its impact on privacy. For example, if such use results in a Privacy Act System of Records, then that System of Records will be covered by the Privacy Act. In addition, the Privacy Office will conduct a privacy impact assessment if a DHS program or system incorporates commercial data from a third-party data aggregator. Without a more detailed review of the relevant legal authorities, it would be premature for me to conclude whether the Privacy Act's requirements are adequate to cover these new uses of commercial databases. Given the rapidly and dramatically changing nature of the technology and these new uses, however, I would not rule out the possibility that our privacy laws need to be updated.

49. Data mining – pattern-based analyses of electronic databases to identify predictive patterns or anomalies – has become more prevalent across the federal government. Used effectively, data mining has the potential to be a powerful tool for analyzing vast amounts of information and making connections that might hitherto have gone unnoticed. At the same time, its use raises significant privacy and civil liberties concerns that must be fully addressed before a new data mining program is approved and becomes operational. What policies and procedures will you put in place to ensure that all Department data mining programs comply with statutory and constitutional guidelines?

As noted above, the Privacy Office's privacy impact assessments should be rigorous and searching. If confirmed, I intend to work closely and cooperatively with the Privacy Officer to ensure that the Department's use of data mining programs is subjected to thorough analysis and scrutiny for compliance with privacy and other requirements. I will also encourage relevant attorneys in the Office of the General Counsel and their component clients to be engaged as early as possible on proposed uses of new technologies such as data mining. Doing so not only allows privacy and other legal considerations to be discussed and resolved before the program is implemented, but also enables privacy compliance and protections to be designed into the new program if possible.

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

As I noted in my response to Question 7 above, the DHS General Counsel, working through his or her staff, helps ensure the Department complies with applicable laws and regulations, including compliance with laws protecting civil liberties and privacy. It is therefore beyond the scope of the General Counsel's core responsibilities to scrutinize the accuracy of the data from data brokers that DHS may use for anti-terror programs, background checks, or other purposes. It makes more sense for the relevant program staff and other component personnel to review and implement mechanisms to ensure the accuracy of personal information obtained from data brokers. In addition, the Privacy Office reviews and analyzes the Department's use of data brokers as part of its privacy impact assessment process.

In the course of providing advice on legal restrictions and limits on the use of certain data, however, the Office of the General Counsel may be able to work with the Privacy Office and the relevant program staff to develop appropriate data quality standards. In addition, to the extent that systemic or widespread data inaccuracies are discovered, the General Counsel should promptly engage with the relevant DHS component leadership and lawyers to assess the scope of the problem, determine its impact on the operation of the program, and recommend and guide the implementation of an appropriate solution.

Freedom of Information Act

51. The Freedom of Information Act (FOIA) plays a critical role in ensuring the integrity of our government and the vitality of our democracy. As the Supreme Court held in NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978), "the basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." The Act therefore provides the public with a right of access to federal agency records, unless the records fall within a statutory exception or exclusion. If confirmed, what will you do to ensure that the Department and all of its component agencies properly and efficiently comply with FOIA?

I share the President's view that "A democracy requires accountability, and accountability requires transparency." Memorandum for the Heads of Executive Departments and Agencies re: Freedom of Information Act (Jan. 21, 2009). This memorandum specifically directs all agencies to adopt a presumption under FOIA in favor of disclosure. Although the Department's Privacy Office has direct and primary responsibility for managing the Department's FOIA processes, if confirmed I intend to ensure that the Office of the General Counsel assists the Privacy Office and the Department in complying with that directive and that it provides timely and sound legal advice and support to promote the efficient and appropriate handling of FOIA requests.

52. A recent GAO report found that, although DHS has taken steps to reduce the number of pending FOIA requests, the Department still has the largest backlog of overdue FOIA requests in the federal government. If confirmed, what actions will you take to assist the Privacy Office to further reduce the backlog of FOIA requests at DHS?

I am aware of the recent GAO report entitled "Freedom of Information Act: DHS Has Taken Steps to Enhance Its Program, but Opportunities Exist to Improve Efficiency and Cost-Effectiveness." If confirmed, I believe the Office of the General Counsel can be proactive in assisting the Privacy Office in further streamlining its processes, helping implement recommendations set forth the GAO report, and providing supplemental support in the headquarters and component legal departments to help further reduce DHS's backlog of FOIA requests.

Human Capital Management

53. One of the principal challenges facing the Department is personnel management. As a relatively new agency, the Department must continue to enhance the integration of the various components into a cohesive department. What do you believe should be the role of the General Counsel in addressing these challenges, and what specifically do you intend to do in this area if confirmed?

I believe the Department's General Counsel can play a constructive role in addressing the Department's personnel management challenges. I strongly share the Secretary's vision of a more cohesive, integrated, "one DHS." Specifically, as I noted in my response to Question 7 above, I believe the General Counsel can help create a more unified Department by coordinating cross-functional and cross-component efforts, streamlining program implementation, reducing bureaucratic hurdles, and forging Department-wide solutions to shared challenges. In addition, as I indicated in my response to Question 9 above, if confirmed, I intend to communicate a clear strategic vision for the DHS legal department; promote integration of the headquarters and component legal departments into "one DHS" with a common set of core priorities and processes; and recruit, develop, and retain outstanding legal talent at all levels of the organization.

54. How would you describe your management style? What in your past experience demonstrates your approach to personnel management?

I believe my management style is to be collaborative, informal, principles- and purpose-driven, inclusive, respectful, and fair. Above all, I believe a manager needs to take his or her leadership role seriously, which means a manager and leader must articulate a clear vision of where the team is going, a compelling purpose for why the team is going there, and in doing so inspire the team to trust, align, and engage. I have generally adopted a strengths-based approach to performance improvement: The best way to inspire performance is to help people get really good at their strengths. I also believe that it is crucial to lead by example and to actively demonstrate core beliefs and values; that people are more important than things; that it is important to have a sense of humor and to mentor and nurture your colleagues and staff; that work can be fun; that actions speak louder than words; and that living a balanced life and a life of integrity are essential.

Many aspects of my past experience demonstrate my approach to personnel management. From the time I was in private practice, to when I previously served in government, to my

current role as a manager and leader in a Fortune 20 global company, I have emphasized the importance of setting clear expectations; communicating frequently (including actively listening to my team and to my clients); building strong personal relationships at all levels; mentoring, training, and succession planning; providing candid performance reviews and constructive feedback; promoting diversity and inclusion; and treating everyone fairly and with respect.

For example, in my current role as Chief Legal Officer of Cardinal Health, my direct reports and I have weekly conference calls and quarterly in-person meetings. The entire legal department has monthly conference calls, to ensure department-wide alignment on priorities and practices, as well as best-practice sharing, and we meet in-person on an annual basis to delve more deeply into issues of common interest, while also providing opportunities to build personal relationships. Every year I work with my direct reports to establish department-wide goals, and at the end of the year I rate our progress in achieving those goals. I also spend considerable time providing career guidance and feedback to my staff, as well as mentoring those inside and outside the legal department. I regularly travel to meet with the legal staff located outside of headquarters, to hear their concerns and their ideas.

If confirmed, I intend to bring these and other management practices, to the extent appropriate, to the Department.

55. What actions in your past experience demonstrate your style and approach in dealings between management and employee representatives? If confirmed, what steps will you take to improve labor-management relations at DHS?

Although I have not had direct experience with labor-management relations issues, when I was with GE and now with Cardinal Health, I had indirect exposure to such issues – at GE, in the context of developing employee privacy policies and procedures, and at Cardinal Health, in connection with organizing activities at several of the company's facilities. In all my dealings, my approach has been and continues to be characterized by collaboration to achieve common goals, mutual respect, and constructive communication. If confirmed, I would work with the appropriate DHS leadership and other stakeholders to understand the employment issues unique to DHS's various operating environments. Based on such a baseline understanding, I would work with others to engage the relevant stakeholders and to oversee the provision of legal advice and support to harmonize employee rights and protections with component missions and operational environments.

56. Do you believe that protection of the right of employees to organize and bargain collectively generally contributes to the Department's mission? What do you envision to be the role of unions and other employee organizations at DHS?

In general, I believe that protection of collective bargaining rights can help ensure federal agencies are run as effectively as possible and are able to focus on their missions. I do not have specific, predetermined views on the role of unions and other employee

organizations at DHS. I understand that Secretary Napolitano has asked the Office of the General Counsel to examine the scope of her legal authority to grant collective bargaining rights to Transportation Security Administration employees, but I have not been made privy to the results of that review.

57. DHS has faced significant challenges with recruitment and retention of employees.

a. If confirmed as General Counsel, what steps will you take to recruit and retain top-quality attorneys for the Office of General Counsel and component legal offices?

If confirmed, I believe there are a number of steps that can be taken to recruit and retain top-quality attorneys for the headquarters and component legal departments. These measure include, but are not limited to, providing meaningful opportunities for learning, challenges, and professional growth and advancement; articulating a clear vision and mission and building a strong culture and tradition that supports the vision and mission and rewards excellence; ensuring attorneys have the tools and resources to do their jobs effectively and efficiently; holding managers accountable for talent management; outreach to diverse attorney populations; offering competitive compensation and benefits; and providing clear and constructive feedback.

In addition, the General Counsel's Honors Program serves as the cornerstone for entry-level attorney hiring by the Department. I believe that over time the Honors Program will contribute appreciably to improved recruitment and retention of outstanding legal talent for the Office of the General Counsel.

b. The Office of the General Counsel provides advice to the Secretary and Department leadership and to acquisition personnel to ensure that DHS's contracting activities comply with legal requirements. DHS is among the largest federal agencies in terms of contracting, obligating approximately \$14 billion in FY 2008 for goods and services. If confirmed, what will you do to attract, hire, and retain qualified attorneys with an expertise in federal contracting and procurement?

I recognize the importance of maintaining procurement integrity and ensuring compliance with procurement laws and regulations. It is therefore essential for the Office of the General Counsel to be staffed with attorneys with strong expertise in federal contracting and procurement law. In addition to the measures outlined above with respect to recruiting and retaining top-notch legal talent generally, if confirmed I will study the underlying supply of and demand for federal contracting and procurement lawyers, identify best practices for attracting, hiring, and retaining the best attorneys who practice or intend to practice in these areas, and implement as appropriate such best practices.

58. In a number of rulemaking proceedings conducted by DHS or its component agencies in recent years, at least some of the work has been delegated to private contractors, including in some cases the actual drafting of the regulations.

- a. Do you believe it is appropriate for contractors to develop or draft government regulations? Why or why not?

Although I have not studied this issue in detail, it is my understanding that contractors may not engage in "inherently governmental functions" and that determining the content and application of agency regulations likely constitutes an "inherently governmental function." I therefore do not believe it would be appropriate for contractors to determine agency policy by developing or drafting regulations. That said, to the extent (a) contractors are involved in ancillary technical activities, such as collecting and summarizing public comments or assisting with quantifying the costs and benefits of a particular rule; (b) their work is performed under the direction and control of government employees and is subject to substantive review, editing, and approval by government employees; and (c) their work otherwise complies with applicable regulations and policies, such as OMB Circular A-76, then I believe such services may be viewed as non-inherently governmental and hence appropriate.

- b. If confirmed, what steps will you take to ensure that contractors involved in rulemaking proceedings are not engaging in inherently governmental functions?

If confirmed, I will oversee efforts within the Office of the General Counsel to work with the Chief Procurement Officer or component rulemaking offices, as appropriate, to ensure that contractors involved in rulemaking proceedings are not engaged in inherently governmental functions. Secretary Napolitano recently initiated a Department-wide review of DHS's use of contractors, and if confirmed, I will work with the Secretary, DHS's Chief Human Capital Officer, and other senior DHS leadership to ensure that DHS has its own ability to perform core functions with government employees. On the specific issue of contractors involved in rulemaking proceedings, to the extent the Office of the General Counsel is responsible for supporting such activities, I will also ensure, if confirmed, adequate legal staffing resources are devoted to those efforts and will recommend increasing capacity and supplementing resources as necessary to avoid improper reliance on contractors.

- c. What actions will you take to mitigate the risk that government decisions may be influenced by, rather than independent from, the judgments of contractors involved in rulemaking proceedings?

In addition to the steps outlined above, if confirmed I will endeavor to mitigate any risk that government decisions may be unduly influenced by the judgments of contractors involved in rulemaking proceedings by ensuring that the Office of the General Counsel continues (a) to advise DHS rulemaking components of the limits of acceptable use of contractors in rulemaking proceedings; (b) to assess whether a sufficient number of qualified government employees are assigned to supervise contractor activities; (c) to periodically verify whether such independent supervision is in fact occurring; (d) to monitor contract requirements to detect whether they have

changed, expanded, or are drafted so liberally as to allow contractor services to become inherently governmental; (e) to exercise management oversight when a component contracts for services that are close to being inherently governmental; and (f) to establish robust conflicts of interest safeguards and training, both at the organizational and individual contractor levels.

IV. Relations with Congress

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

Yes.

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

Yes.

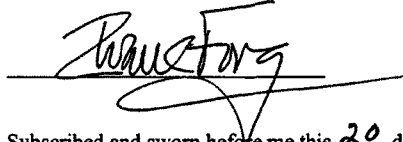
V. Assistance

61. Are these answers your own? Have you consulted with DHS or any interested parties? If so, please indicate the individuals or entities with whom you have consulted, and the nature of the assistance they have provided.

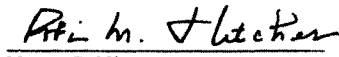
Yes. Because responding to these questions required a level of specificity and detail about which I did not have first-hand knowledge, and in an effort to be as responsive as possible to the Committee in the time available, I have participated in normal pre-confirmation consultations with DHS and Office of the General Counsel staff. These consultations were used to inform my knowledge regarding the background, current operations, and potential policies for the Department. In all cases, however, these answers are my own and are based on my current understanding and consideration of the information provided to me.

AFFIDAVIT

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



Subscribed and sworn before me this 20 day of April, 2009.


Notary Public

Robin M. Fletcher
Notary Public, District of Columbia
My Commission Expires 8-14-2009

Senator Joseph I. Lieberman
Questions for the Record
Pre-Hearing Questions for Ivan K. Fong
General Counsel, Department of Homeland Security
April 3, 2009

1. Under the "Support Anti-Terrorism by Fostering Effective Technologies Act," or SAFETY Act (P.L. 107-296 Subtitle G), the Secretary may designate "qualified anti-terrorism technologies" to qualify for legal liability protections. The Act is administered by DHS's Science and Technology Directorate. What role do you think the Office of the General Counsel should play in the SAFETY Act application process?

The Office of the General Counsel should play a significant advisory and supportive role in the SAFETY Act application process. It is my understanding that management and programmatic responsibility for the SAFETY Act application process currently resides with the Under Secretary for Science and Technology and his Office of SAFETY Act Implementation (OSAI). In addition, I understand that the Office of the General Counsel currently supports the SAFETY Act application process in three primary ways:

- *Lawyers in the Office of the General Counsel's Technology Programs Law Division perform a careful review of OSAI's recommended records of decision for SAFETY Act applications, including OSAI's technical evaluation, economic evaluation, and description of the technology. The lawyers endeavor to ensure, among other things, that the record fully supports OSAI's recommendation; that OSAI's analysis is based on the applicable regulatory criteria; that any additional conditions in the recommendation are supported by law, regulation, or policy; and that the description of the technology clearly defines the scope of the technology proposed to be protected.*
- *The lawyers also provide broad programmatic legal support to the SAFETY Act program. They do so by, among other tasks, interpreting the SAFETY Act and its regulations to guide OSAI's review and the Under Secretary's decisions; analyzing the interplay between the SAFETY Act and other laws and regulations; drafting legal analyses to inform choices between policy alternatives; and developing DHS directives to support maximum use of the SAFETY Act.*
- *The lawyers also provide training and support to acquisition personnel across the Department to maximize awareness and use of the SAFETY Act in the Department's procurements. For example, lawyers have recently drafted a directive to clarify the Department's policy on the use of the SAFETY Act in procurements; they also recently held a "train the trainers" session to promote broader outreach to acquisition personnel; and they have helped contracting officers identify opportunities to use the pre-procurement qualification designation notice as early in the acquisition planning stage as possible.*

2. In the SAFETY Act, a Qualified Anti-Terrorism Technology is defined as follows:

"For purposes of this subtitle, the term "qualified anti-terrorism technology" means any product, equipment, service (including support services), device, or technology (including information technology) designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, that is designated as such by the Secretary."

- a. It is clear from this definition that the original purpose of the SAFETY Act was for products, equipment, services, devices or technologies with a specific purpose related to terrorism. Some people contend, based on a review of SAFETY Act designations to date, that the Department of Homeland Security ("DHS" or "the Department") is applying the SAFETY Act more broadly than the law allows by granting liability protections to companies providing services with broad purposes (video surveillance systems, for example). Do you believe that the Act has been implemented in a manner consistent with its original purpose?

Based on my preliminary review, I believe the SAFETY Act has generally been implemented in a manner consistent with its original purpose. It is my understanding that about 280 anti-terrorism products and services – reflecting a broad range of anti-terrorism technologies developed by a wide range of companies, large and small – have received SAFETY Act protection. To make a more definitive determination whether the Act has been implemented in a manner consistent with its original purpose, a comprehensive economic study would have to be done on the Act's impact on the development and deployment of anti-terrorism technologies, including an analysis of technologies that would not have been developed or deployed without the SAFETY Act's protections and the related impact of the Terrorism Risk Insurance Act. In addition, the precise contours of the SAFETY Act's protections remain untested. Further judicial analysis and interpretation of its statutory and regulatory provisions would shed light on issues such as the scope of certain definitions in the Act, the strength of the Act's liability protections, and the application of the government contractor defense. It remains to be seen whether increased certainty around the Act's protections and greater administrative speed and clarity might encourage even more vendors to seek the Act's protections and thereby even further advance the Act's ultimate goals.

- b. In December, the Department designated and certified the National Football League's "NFL Best Practices for Stadium Security" as an "approved product" under the SAFETY Act. The SAFETY Act website states: "The Technology is a set of guidelines for stadium security management designed to deter and defend against terrorist attacks at sports stadiums. It includes standards for non-game day operations, game day operations, and threat assessments and emergency plans. The Technology also includes the hiring, vetting, and training of personnel used to provide the services." Do you believe that "best practices" should be considered a "technology," the use of which should qualify a company for the broad liability protections of the

SAFETY Act? Do you believe that hiring practices should be considered a "technology" for purposes of the SAFETY Act?

*As noted above, consistent with its broad legislative purpose, the SAFETY Act defines the term "qualified anti-terrorism technology" expansively to include "any product, equipment, service (including support services), device, or technology (including information technology)" (emphasis added). See also 71 Fed. Reg. 33,147, 33,148 (2006) (noting that the SAFETY Act "gives the Secretary broad discretion in determining whether to designate a particular technology as a Qualified Anti-Terrorism Technology"). The final rule also makes clear that "Technology" includes services such as "[d]esign services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security." *Id.* at 33,160 (to be codified at 6 C.F.R. § 25.2).*

Based on a preliminary analysis, and without saying whether I would reach the same conclusion, I believe it was within the discretion of the then-Under Secretary for Science and Technology to conclude that these definitions are broad enough to include the "NFL Best Practices for Stadium Security" referenced above. Because I am not privy to the details of this particular application, I cannot opine on whether the proposed technology meets the statutory criteria listed in section 862(b) of the Act. That said, I believe that certain best practices and hiring standards can be "effective in facilitating the defense against acts of terrorism," SAFETY Act § 862(b)(7); that best practices such as the use of six sigma and other process-improvement tools have been adopted in many industries to increase operational excellence and improve consistency of service; and that ensuring appropriate hiring and training standards is an essential component of operational excellence and consistency of service.

**Senator Mary Landrieu
Questions for the Record
Pre-Hearing Questions for Ivan K. Fong
General Counsel, Department of Homeland Security
April 3, 2009**

1. What experience have you had in your professional career with Congressional oversight functions, either in terms of performance or compliance?

I have had some experience in my professional career with Congressional oversight functions. In particular, when I was with the Department of Justice from 1997 to 2000, I testified before Congressional subcommittees on a number of legal and policy topics, from chemical safety and security to online pharmacies and electronic signatures. I also assisted the Department of Justice with responses to several written Congressional oversight requests. I believe that Congressional oversight is an important Congressional responsibility, and if confirmed I intend to cooperate fully and work closely with others in the Department to ensure that the Department provides the information that Congress needs to fulfill its legislative and oversight responsibilities.

2. Do you believe that as Department of Homeland Security (DHS) General Counsel, you would have the right to refuse Congressional requests for information that you deem beyond its jurisdictional scope?

As noted above and in my responses in the Committee's pre-hearing questionnaire, I believe that Congressional oversight – the review, monitoring, and supervision of federal agencies, programs, and policy implementation – is an important Congressional responsibility. Authority for such oversight not only derives from implied powers granted in the U.S. Constitution and from laws and House and Senate rules, but robust Congressional oversight is also an integral part of the checks and balances among our three branches of government.

Accordingly, other than a valid claim of executive privilege, I believe there are few if any bases on which the Department may be entitled to withhold information or documents from Congress. If confirmed, I therefore intend to cooperate fully and work closely with others in the Department to ensure that the Department is responsive to Congressional requests for information and that Congress has appropriate access to the information it needs to fulfill its legislative and oversight responsibilities. Of course, as a practical matter, comity and respect for a co-equal branch of government suggest that reasonable accommodations regarding the time, place, and manner of producing responsive information may be appropriate. And, to the extent classified or otherwise sensitive information is produced, appropriate security measures should be taken to protect the information.

3. The potential for our offshore oil and gas resources in the Gulf of Mexico and elsewhere to be harmed by a terrorist attack is too troubling to contemplate. The Bureau of Customs and Border Protection (CBP) is the principal agency responsible for enforcement of U.S. cabotage laws, which ensure that vessels carrying cargo or passengers or towing objects between points in the U.S., are built in America, crewed by Americans, and owned by Americans. In recent years, CBP has consistently interpreted these laws in a manner that allows foreign vessels and foreign nationals to do work that should be done by U.S.-flagged vessels. It is important that CBP take a fresh look at these laws and interpret them correctly, then work closely with the U.S. maritime industry to aggressively enforce them. How would DHS propose to examine past rulings in this area and bring enforcement of U.S. cabotage laws in line with changes in industry practices?

This question requires close analysis of an elaborate and highly technical set of legal provisions, in an area of the law with which I do not have extensive experience. Based on a preliminary review, however, I believe the underlying legal question involves interpreting the term "merchandise" in the Jones Act, 46 U.S.C. § 55102 ("a vessel may not provide any part of the transportation of merchandise by water ... between points in the United States to which the coastwise laws apply ... unless the vessel ... is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade"), and determining whether that definition includes the "equipment of a vessel," where the equipment is integral to a vessel designed for a particular purpose. See, e.g., HQ 112218 (July 22, 1992) (equipment used to remove broken tools from a well shaft and perform well cleaning and other tasks is vessel equipment because that equipment is necessary to the operation of the vessel); see also HQ 114298 (July 7, 1998).

If confirmed, I would work with the appropriate legal staff of Customs and Border Protection (CBP), which has responsibility for interpreting the Jones Act, to understand these issues more fully and to provide such advice as may be necessary to guide a proper resolution of the matter. I understand that CBP recently revoked a recent ruling on this subject, HQ H046137 (Feb. 20, 2009), and indicated that it would examine its past rulings in this area to determine whether those rulings should be revoked or modified. (I note in passing that there is a process for CBP to revoke or modify its prior rulings, see 19 U.S.C. § 1625(e), and if confirmed I would work to ensure those processes were followed.) In general, my approach would be to examine the plain language and statutory structure of the relevant legislative text, and if the text and structure were ambiguous, I would then examine the legislative history and underlying policy considerations to help interpret the text. Ultimately, of course, Congress is also free to clarify the statutory language and purpose with appropriate amendments to the relevant provisions.

4. What steps would you take to improve and increase collection of anti-dumping and countervailing duties that foreign entities owe to the United States?

The collection of anti-dumping and countervailing duties (AD/CVD) is essential to ensure a level playing field for U.S. companies injured by unfair trade practices. Although the Department of Commerce is responsible for conducting AD/CVD investigations to determine whether and to what degree merchandise either is being sold at unfair prices in the United States or benefits from unfair subsidies, Customs and Border Protection (CBP) is responsible for enforcing the AD/CVD law and for collecting the AD/CVD assessed against applicable imports pursuant to the Department of Commerce's instructions.

It is my understanding that CBP's ability to fulfill its statutory responsibility to collect AD/CVD is made more difficult by, among other things, (a) the United States' retrospective AD/CVD system, which requires CBP to issue AD/CVD bills one or more years after an entry has occurred to importers who may be unwilling or unable to pay any increase in duties; and (b) companies that may circumvent the provisions of the AD/CVD law to avoid paying AD/CVD. Therefore, if confirmed I would work with the appropriate CBP lawyers and others to understand ways to improve and increase collection of AD/CVD, including review of a March 2008 GAO report and its recommendations on this important topic. Recognizing that significant changes to policy would require the cooperation of various offices both inside and outside CBP, I would work with the relevant offices to provide legal guidance on the implementation of those or other recommendations, including recommendations for possible legislative changes to our AD/CVD system.

5. What is your view of the Robert T. Stafford Disaster Relief and Emergency Assistance Act's strengths and weaknesses as a statutory framework for disaster assistance? Would you recommend changes to previous patterns of legal interpretation of that Act, and if so, what changes would you recommend? Do you believe FEMA's current regulations and policies support the basic purpose of the Act and mission of the federal government in terms of supporting state and local response and recovery?

Although I am generally familiar with the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121 et seq., it has many intricate components, and I would want to conduct a more thorough review of its provisions, operation, and implementation before expressing an opinion on its strengths and weaknesses as a statutory framework for disaster assistance. In general, as you know, the Stafford Act sets forth a complex statutory scheme that, among other things, (a) authorizes the President to issue major disaster and emergency declarations to States under certain conditions; (b) when such declarations are issued, triggers authority and access by the Federal Emergency Management Agency (FEMA) to the Disaster Relief Fund to provide direct and financial assistance to render aid, emergency services, and rehabilitation assistance; and (c) authorizes FEMA to coordinate the administration of all disaster relief.

I am aware that prior legal interpretations of the Stafford Act have been perceived by some as being constrained by limitations in the legislative text or by operational and practical difficulties as a result of the context in which those interpretations have been applied. I also understand that FEMA is undertaking a broad review of its regulations to assess whether it has the maximum authority to carry out its important responsibilities under the Stafford Act. If confirmed, I will work constructively with FEMA's legal staff and other senior Department leadership to oversee that review, and if I were to conclude that additional legal authority for FEMA or DHS were necessary to accomplish the basic purpose of the Act and mission of the federal government, I would not hesitate to work with other DHS and Administration leadership and with Congress (beginning with this Committee) as appropriate to make such recommendations.

6. After Katrina, there were at least two legal interpretations that drastically reduced housing options. One was that FEMA counsel determined that rental repair was legally barred by Stafford Act provisions limiting permanent construction. The second was that emergency rental shelter assistance under the Stafford Act was limited to six months. The Subcommittee on Disaster Recovery's investigators were told that the second interpretation was made by Bush administration DHS lawyers and that FEMA lawyers disagreed.

- a. Do you agree or disagree with these two legal interpretations?

I have not had a sufficient opportunity to conduct a thorough review of the relevant statutory and regulatory provisions, and because I believe these are issues that require closer scrutiny, I am not now in a position to agree or disagree with the two legal interpretations. Such a review would require a careful examination of the relevant statutory text and structure, including the degree to which Congress delegated to the President discretion to make these sorts of determinations, followed by review of the relevant legislative history and purpose, as well as any underlying policy considerations. If confirmed, I would be happy to study these matters in more detail and, upon request, provide an opinion on these interpretations.

- b. What would you recommend doing if you concluded that legal interpretations prevented housing options which would provide housing to people in need following a disaster?

If confirmed, and if I were to conclude that a legal interpretation prevented housing options that would provide housing to people in need following a disaster, I would first endeavor to determine whether that legal interpretation was the best legal interpretation, taking into consideration the statutory text and structure and, if appropriate, the legislative history, purpose, and policies underlying the relevant statutory or regulatory provisions. If, after such a more searching review, I concluded that the relevant legal provisions could

not be interpreted to provide the needed housing options, and if I believed that providing the housing options was sound policy and consistent with the Administration's views, then I would consult with appropriate DHS and other Administration officials (e.g., those from the Department of Housing and Urban Development) to explore whether there may be other legal authorities or avenues for the federal government to provide the needed relief. Finally, if there were no other viable avenues under existing law or regulation, I would work with the appropriate DHS and other federal agency leadership and with Congress (beginning with this Committee) as appropriate to recommend regulatory or legislative changes that would help provide the needed relief.

Senator Susan Collins
Questions for the Record
Pre-Hearing Questions for Ivan K. Fong to be
General Counsel, Department of Homeland Security
April 3, 2009

1. Last December, the Department of Justice issued final regulations that require the Department of Homeland Security ("DHS" or "the Department") to collect DNA samples from illegal aliens who are being processed for removal from the United States. These samples will be then forwarded to the FBI, which will analyze them and include the analyses in the National DNA Index System where they can be compared with crime-scene evidence. If confirmed, will you work closely with the Department of Justice to ensure that the Department of Homeland Security fully implements these regulations and at the same time complies with any applicable privacy and civil liberties protections?

Yes, if confirmed, I will work with the appropriate senior DHS leadership and work to engage with the appropriate Department of Justice officials to ensure that these regulations are implemented appropriately and in compliance with applicable privacy and civil liberties protections.

2. Under the "Support Anti-Terrorism by Fostering Effective Technologies Act," or SAFETY Act (P.L. 107-296), the Secretary may designate "qualified anti-terrorism technologies" to qualify for legal liability protections.
 - a. What role do you think the Office of the General Counsel should play in the SAFETY Act application process and how many lawyers should be involved?

The Office of the General Counsel should play a significant advisory and supportive role in the SAFETY Act application process. It is my understanding that management and programmatic responsibility for the SAFETY Act application process currently resides with the Under Secretary for Science and Technology and his Office of SAFETY Act Implementation (OSAI). In addition, I understand that the Office of the General Counsel currently supports the SAFETY Act application process in three primary ways:

- *Lawyers in the Office of the General Counsel's Technology Programs Law Division perform a careful review of OSAI's recommended records of decision for SAFETY Act applications, including OSAI's technical evaluation, economic evaluation, and description of the technology. The lawyers endeavor to ensure, among other things, that the record fully supports OSAI's recommendation; that OSAI's analysis is based on the applicable regulatory criteria; that any additional conditions in the recommendation are supported by law, regulation, or policy; and that the description of the technology clearly defines the scope of the technology proposed to be protected.*

- *The lawyers also provide broad programmatic legal support to the SAFETY Act program. They do so by, among other tasks, interpreting the SAFETY Act and its regulations to guide OSAI's review and the Under Secretary's decisions; analyzing the interplay between the SAFETY Act and other laws and regulations; drafting legal analyses to inform choices between policy alternatives; and developing DHS directives to support maximum use of the SAFETY Act.*
- *The lawyers also provide training and support to acquisition personnel across the Department to maximize awareness and use of the SAFETY Act in the Department's procurements. For example, lawyers have recently drafted a directive to clarify the Department's policy on the use of the SAFETY Act in procurements; they also recently held a "train the trainers" session to promote broader outreach to acquisition personnel; and they have helped contracting officers identify opportunities to use the pre-procurement qualification designation notice as early in the acquisition planning stage as possible.*

I currently do not have a set view on the right number of lawyers who should be involved in the SAFETY Act application process. I believe that the lawyers who are involved should have a thorough familiarity with the statute and its regulations, excellent drafting skills, strong technical backgrounds, and experience with government contracts and business insurance policies. It is my impression that the current level of Office of the General Counsel staffing support for the application process is adequate, and indeed I believe the overall implementation of the program has been generally regarded as successful, in part because of the substantial legal support it has received. If confirmed, I expect to monitor these and other staffing levels to ensure that the legal work continues to be done as effectively and efficiently as possible.

- b. Do you believe any legislative or regulatory changes to the SAFETY Act are needed?

Without a more comprehensive review of how the SAFETY Act is currently administered and whether it is accomplishing its original purpose, it is difficult for me to express a definitive opinion on the need for legislative or regulatory changes. Based on my preliminary understanding, however, it does not appear that significant legislative or regulatory changes to the SAFETY Act are currently necessary. It appears that the statute is generally operating well – at least in the almost three years since DHS promulgated its final rule and posted a SAFETY Act application kit on its website – and that it is furthering its original purpose, which is to encourage the creation, development, and use of anti-terrorism technologies by providing certain protections to manufacturers and sellers of those technologies. Nevertheless, I suspect there are likely to be aspects of the regulatory process that could be streamlined, clarified, or otherwise improved.

If, based on further experience and study it appears that legislative or regulatory changes would improve the program, then I would, if confirmed, work with the appropriate senior DHS leadership and Congress (beginning with this Committee) to develop and recommend appropriate amendments.

- c. What bearing should a SAFETY Act designation have on procurement decisions made throughout DHS?

In January 2009, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council adopted a final rule that integrates the SAFETY Act into the federal acquisition process. By encouraging federal agencies to assess whether technology being procured is appropriate for SAFETY Act protection, and by encouraging potential vendors to seek SAFETY Act protections for their life-saving technologies, the new policy is a positive development for the government and for industry and will help further the important purpose of the SAFETY Act. Although the final rule makes clear that federal agencies may not mandate SAFETY Act protections (for decisions to apply should ultimately be left to the vendor), the rule should drive more agencies to consider the SAFETY Act earlier in their anti-terrorism-related procurement processes and ultimately induce more vendors to seek SAFETY Act designations or certifications.

The final rule, which became effective in February 2009, is not limited to DHS's procurement decisions; rather, it applies to procurement decisions throughout the federal government. Thus, the impact of SAFETY Act designation on DHS's procurement decisions depends in large part on the extent to which those procurement decisions involve anti-terrorism technologies. In general, I believe it makes sense for DHS to be an example to other federal agencies for promoting early consideration of the SAFETY Act's application to a particular procurement and in encouraging vendors to pursue SAFETY Act protections.

- d. The SAFETY Act was enacted to help encourage both the development and adoption of products, equipment, services, devices and technologies with the purpose of preventing and mitigating acts of terrorism. Since its enactment, many items have received a SAFETY Act certification and many more private and public sector entities have incorporated these items into their operations. Do you believe that the Act has been implemented in a manner consistent with its original purpose?

Based on my preliminary review, I believe the SAFETY Act has generally been implemented in a manner consistent with its original purpose. It is my understanding that about 280 anti-terrorism products and services – reflecting a broad range of anti-terrorism technologies developed by a wide range of companies, large and small – have received SAFETY Act protection. To make a more definitive determination whether the Act has been implemented in a manner consistent with its original purpose, a comprehensive economic study would have to be done on the Act's impact on the development and deployment of anti-

terrorism technologies, including an analysis of technologies that would not have been developed or deployed without the SAFETY Act's protections and the related impact of the Terrorism Risk Insurance Act. In addition, the precise contours of the SAFETY Act's protections remain untested. Further judicial analysis and interpretation of its statutory and regulatory provisions would shed light on issues such as the scope of certain definitions in the Act, the strength of the Act's liability protections, and the application of the government contractor defense. It remains to be seen whether increased certainty around the Act's protections and greater administrative speed and clarity might encourage even more vendors to seek the Act's protections and thereby even further advance the Act's ultimate goals.

- e. The purpose of the SAFETY Act is to provide liability protections for products, equipment, services, devices, or technologies that are designed, developed, modified, or procured with a specific purpose related to terrorism. Do you believe that a product or service that serves multiple purposes, if only one purpose is the prevention of terrorism, is eligible to receive a SAFETY Act designation?

Section 865(1) of the SAFETY Act defines a "Qualified Anti-Terrorism Technology" to be a technology designed, developed, modified, or procured for the "specific purpose" of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause. Based on my preliminary assessment, I believe that if one specific purpose of a technology (including products and services) is to prevent, detect, identify, or deter acts of terrorism or limit the harm such acts might otherwise cause, then even if the technology may have multiple other purposes, it should meet the SAFETY Act's definition of a Qualified Anti-Terrorism Technology. The Department addressed this issue and reached a similar result in its Interim Rule at 68 Fed. Reg. 59,684, 59,659 (2003) ("Congress did not intend for 'specific purpose' to mean 'exclusive purpose'").

The one gloss I would add to the Department's interpretation is that if the one "specific purpose" is trivial, insignificant, or insubstantial, then it should not qualify as a "specific purpose" within the meaning of the SAFETY Act. In other words, to be eligible for a SAFETY Act designation, a technology must have at least one "specific purpose" that is not trivially, insignificantly, or insubstantially related to preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause.

- f. Many of the private sector entities that have benefited from the SAFETY Act are trans-national organization. What actions do you see that the Office of the General Counsel can take to assist the Department in encouraging other nations to adopt similar liability protection regimes?

The Office of the General Counsel can assist the Department in encouraging other nations to adopt similar liability protection regimes by conducting active

outreach efforts to the governments and industry associations of those other nations. Such outreach efforts, in coordination with the Department of State and the U.S. Trade Representative, will help broaden awareness of the benefits of the SAFETY Act, thereby potentially stimulating other countries to adopt their own SAFETY Acts.

3. Last year, prompted by a congressional mandate, the Department committed to building approximately 670 miles of pedestrian fencing and vehicle barriers along the southwest border.

- a. Is it a legal requirement of Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended by the Fiscal Year 2008 Consolidated Appropriations Act, that the Department complete at least 700 miles of reinforced fencing along the southwest border? Please explain your reasoning.

I have conducted a preliminary review of the relevant statutory provisions and have concluded that this is an important question that requires closer scrutiny. In particular, I believe that I do not currently have enough information about the context, history, and evolution of the relevant provisions. If confirmed, I will study these matters carefully and, if appropriate, work with the appropriate senior DHS leadership and with Congress (beginning with this Committee) to make any recommendations for changes.

- b. Should vehicle barriers be considered "reinforced fencing" for the purpose of meeting the statutory mandate? Please explain your reasoning.

I have conducted a preliminary review of the relevant statutory provisions and have concluded that this is an important question that requires closer scrutiny. In particular, I believe that I do not currently have enough information about the context, history, and evolution of the relevant provisions. If confirmed, I will study these matters carefully and, if appropriate, work with the appropriate senior DHS leadership and with Congress (beginning with this Committee) to make any recommendations for changes.



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

March 16, 2009

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

Dear Mr. Chairman:

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

We have reviewed the report and have also obtained advice from the Department of Homeland Security concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is a letter dated March 13, 2009, from Mr. Fong to the agency's ethics official, outlining the steps Mr. Fong will take to avoid conflicts of interest. Unless a specific date has been agreed to, the nominee must fully comply within three months of his confirmation date with any action he agreed to take in his ethics agreement.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert I. Cusick".

Robert I. Cusick
Director

Enclosures REDACTED

Senator Susan M. Collins
Additional Questions for the Record
Nomination Hearing of Ivan K. Fong
April 30, 2009

1. Section 103 of the Homeland Security Act (HSA) of 2002 authorizes the appointment, by and with the advice and consent of the Senate, of "not more than 12 Assistant Secretaries." According to the Department of Homeland Security's website, there are currently 12 Assistant Secretaries, many of whom have not been Senate confirmed. Congress created some of them, such as the Assistant Secretaries for Infrastructure Protection and State and Local Law Enforcement, in other sections of the HSA. But, since 2003, the Department has also administratively elevated many non-Assistant Secretary positions authorized in the HSA to the level of Assistant Secretary. For example, the Department recently announced the appointment of Alan Bersin to serve as Assistant Secretary for International Affairs. Section 879 of the HSA, however, establishes the Office of International Affairs to be headed by a Director.

- a. With respect to the current Assistant Secretaries within the Department who have not been confirmed by the Senate, under what authority or authorities is the President or the Secretary allowed to appoint them?

I have not had access to the relevant files that may contain the authorities relied upon for prior appointments of Assistant Secretaries within the Department who have not been subject to the Senate confirmation process. As the question notes, however, the Homeland Security Act provides express authority to appoint certain Assistant Secretaries without Senate confirmation. In addition, I am aware that 5 U.S.C. §§ 301-302 and 6 U.S.C. § 112 provide flexibility to the Secretary concerning the Department's administration and that the Appointments Clause of the U.S. Constitution permits Congress to vest the appointment of "inferior Officers" in the President or "the Heads of Departments" without the advice and consent of the Senate, U.S. Const. art. II, § 2, cl. 2. If confirmed, I will work with the staff of the Office of General Counsel and others in the Department – and this Committee as appropriate – to assess the authority under which the President or the Secretary may appoint Assistant Secretaries without Senate confirmation.

- b. How do you interpret the numerical limitation on Assistant Secretaries contained in section 103 of the HSA? Do you believe that section 103 allows the President or Secretary to appoint an unlimited number of non-Senate-confirmed Assistant Secretaries?

Section 103 of the Homeland Security Act limits the number of Assistant Secretaries appointed by the President by and with the advice and consent of the Senate. To the extent the President or Secretary relies on other legal authority to appoint other Assistant Secretaries, who serve as inferior officers and are not submitted to the Senate for its advice and consent, it would appear that the numerical limitation contained in section 103 would not apply to those appointments. Because that

conclusion raises a question about the purpose, scope, and intent of section 103, if confirmed I would work with the staff of the Office of General Counsel and others in the Department – and this Committee as appropriate – to determine whether additional legislative clarity in this area may be necessary or helpful.

- c. What are the limitations on the ability of the President or Secretary to provide a non-Senate-confirmed official with the responsibilities that have been assigned to a Senate-confirmed Assistant Secretary in statute?

Although I have not had an opportunity to study this area of the law in great detail, I am aware of an April 2007 opinion issued by the Department of Justice's Office of Legal Counsel on the subject of "Officers of the United States within the Meaning of the Appointments Clause." That opinion appears to distinguish between Senate-confirmed officers, on the one hand, and non-Senate-confirmed inferior officers, on the other, concluding that the Appointments Clause limits the responsibilities of the latter. In general, non-Senate-confirmed inferior officers may not exercise delegated sovereign authority and must work under the direction and supervision of Senate-confirmed officers. If confirmed, I will review this opinion and other relevant authorities and work with the staff of the Office of General Counsel to understand how those limitations may apply to non-Senate-confirmed Assistant Secretaries in the Department.

2. Section 872 of the Homeland Security Act of 2002 gives the Secretary of Homeland Security the authority to reorganize functions and organizational units within the Department of Homeland Security (Department), subject to specific limits. Specifically, section 872 authorizes the Secretary to: (1) allocate or reallocate functions among the officers of the Department; and (2) establish, consolidate, alter, or discontinue organizational units within the Department. In carrying out the reorganization authority, the Secretary may not abolish any agency, entity, organizational unit, program, or function expressly established by the HSA or another statute. In July 2005, former Homeland Security Secretary Chertoff announced a major reorganization of the Department, known as 2SR, which, among other things, created a Directorate of Policy, an Office of Operations Coordination, and a Chief Medical Officer, and consolidated the preparedness activities and programs of the Federal Emergency Management Agency and other components of the Department into a new Directorate for Preparedness. Moreover, in implementing the reforms of the Post Katrina Emergency Management Reform Act of 2006, which reversed many of the changes made by 2SR, Secretary Chertoff used his section 872 authority to create a new National Protection and Programs Directorate. Because of the controversy surrounding Secretary Chertoff's use of his section 872 authority in these and other instances, Congress prohibited the Department's ability to reorganize itself in the FY 2008 and 2009 DHS appropriations laws. Given the fact that the Department is still in its infancy, what is your view on the Secretary's need for section 872 authority? What ability, if any, do you believe the Secretary possesses to make changes to the Department absent the ability to use her section 872 authority?

Although I have not had an opportunity to analyze the relevant statutory provisions in detail, it is my understanding that section 529 of the Department of Homeland Security Appropriations Act, 2009 (P.L. 110-329) precludes the exercise of section 872 authority. If confirmed, I would defer to the Secretary's views regarding the need for any further reorganization of the Department, although I am not aware of any significant reorganization plans, and if asked I would carefully review the limitations imposed by the FY2009 Appropriations Act on the Secretary's authority to make changes to the Department's organizational structure. If the Secretary had specific organizational changes she would like to make, I believe they would be most effectively made in consultation and cooperation with Congressional appropriators and authorizers (obviously focusing on this Committee).

3. I led an effort by Congress to give DHS the authority to regulate the security of our nation's high-risk chemical facilities. Under this new authority, DHS created the Chemical Facility Anti-Terrorism Standards (CFATS) program, which uses risk-based performance standards to regulate covered facilities. Over the past three years, DHS has spent \$145 million to develop the CFATS program. In addition, it is estimated that the private sector has spent at least \$190 million to date on CFATS compliance activities. However, the program's authority will sunset this fall. As DHS is only in a middle phase of its implementation, do you believe substantial changes at this time would slow implementation and the accomplishment of the full security benefit envisioned in the original legislation authorizing this program?
Yes. As I noted in my response to question 39 in my Pre-Hearing Questionnaire, it is my understanding that the Department is in the midst of a key implementation phase of the Chemical Facility Anti-Terrorism Standards (CFATS) and that it has generally been making good progress in the implementation of the program. As the Secretary and the Deputy Secretary have noted, the Department needs to maintain its momentum in this program while ensuring that the Nation's high-risk chemical facilities are achieving measurable security improvements. Substantial legislative changes to the program would require DHS to develop and implement the changes, diverting the Department's resources and attention from its ongoing efforts to implement its existing regulations. In addition, substantial legislative changes could have the unintended consequence of discouraging existing high-risk facilities from investing the resources and effort needed to comply with the current rules. For these reasons, I agree that substantial changes to the CFATS program at this time are likely to risk slowing implementation of the program and accomplishment of the full security benefits envisioned in the original legislation.
4. One of the most pressing challenges that the Department will face in the coming years is securing our information technology systems from cyber attacks. While the Department currently plays a leading role in cybersecurity – through both the National Cyber Security Center and the National Cyber Security Division – the many federal agencies with cybersecurity responsibilities remain uncoordinated and the lines of authority are unclear. While some suggest that an office within the Executive Office of the President would be the most effective way to coordinate cybersecurity efforts across the federal government,

I believe that in addition to lacking resources to take on this substantial mission, such an office would not be subject to sufficient congressional oversight.

If the Department were given the requisite legal authorities – such as budget authority, the ability to red team federal systems, and the ability to coordinate IT security regulation across different sectors – do you believe that it can effectively serve as the lead civilian agency for national cybersecurity efforts?

As I noted in my response to question 41 in my Pre-Hearing Questionnaire, if confirmed before the completion of the Secretary's review of the Department's role, authorities, and capabilities in the area of cybersecurity, I look forward to being closely involved in that review process, and regardless of timing, I will make it a top priority to ensure that the Department has sufficient legal authority, legal expertise, and legal resources to play a leadership role in this vital area. In addition, as release of the President's 60-day review of all federal cyber missions nears completion, I intend to play a key role in reviewing the findings from that review and continuing to support the Department's role as lead civilian agency for national cybersecurity efforts. Although it is difficult for me to definitively assess at this time whether the Department is fully capable of effectively serving as lead civilian agency for national cybersecurity efforts, I believe that the Department currently has a strong foundation in place, and if confirmed I expect to learn more about its approach, strategy, and capabilities in this area. Given its unique mission and responsibilities, e.g., to protect the Nation's critical infrastructure, and to the extent required legal authorities and adequate resources are provided, I believe the Department should certainly be given every opportunity to show that it is capable of effectively serving as the lead civilian agency for national cybersecurity efforts.

5. Recently, the Department has come under fire for the release of an intelligence assessment concerning the threat of right-wing extremism in the United States. Unfortunately, the poor wording and inadequate sourcing of the report undermined any intelligence value that it may have had and offended the many brave men and women who have served with distinction in our nation's armed forces who should be honored as heroes, not regarded with suspicion. What is most troubling is that much of this furor could have been avoided had those who prepared the report heeded the advice of the Office of Civil Rights and Civil Liberties, which had raised concerns that the definition of right-wing extremism was overly broad and did not distinguish between violent, criminal activity and the lawful exercise of First Amendment rights.

This Committee has worked diligently to empower the Privacy Office and the Office of Civil Rights and Civil Liberties at DHS, so it is disturbing to hear that one of these offices was ignored – especially when its input would clearly have been beneficial. If, as General Counsel, it came to your attention that a component of the Department was set to release a product or initiate a program even when the Office of Civil Rights and Civil Liberties had non-concurred, what would you do? In addition, will you insist that the Office of General Counsel be given the opportunity to complete its review of similar assessments before they are released?

I have not reviewed, and hence cannot speak to, the specific process followed (or not followed) in the release of the intelligence assessment referenced above. I understand that, under current procedures, the Office of General Counsel works with and reviews reports to be issued by the Office of Intelligence and Analysis (I&A) whenever I&A undertakes new initiatives or whenever any I&A initiative may affect constitutionally protected activities. If confirmed, I will review those procedures and ensure that the lawyers who support I&A continue to be appropriately engaged with the work of that office and that they know to raise any concerns they may have to me or my senior leadership team. Additionally, if, as General Counsel, it came to my attention that a component of the Department was set to release a product or initiate a program over the non-concurrence of the Office of Civil Rights and Civil Liberties, I would endeavor to raise the issue promptly with the component and/or its leadership, to ensure that the component was aware of the non-concurrence and to work with both the component and the Office of Civil Rights and Civil Liberties to reach a mutually satisfactory resolution.

**Senator George V. Voinovich
Additional Questions for the Record
Nomination Hearing of Ivan K. Fong
April 30, 2009**

1. Mr. Fong, at Cardinal Health, you oversee about 60 attorneys. How has that experience equipped you to oversee more than 1750 attorneys and coordinate the work of all of those attorneys, including those at DHS headquarters and those in DHS components?

I have gained valuable leadership experiences in my years at both General Electric and Cardinal Health, and I believe those experiences are directly applicable to my ability to oversee a large legal department such as DHS's. At General Electric, a company known for its leadership and management training, I participated in several leadership development courses, including the company's capstone executive leadership course – a 3-week full-time class taught by internal and external experts for the company's highest potential future officers and senior executives. Similarly, at Cardinal Health, I have benefited from personalized 1-on-1 executive coaching as well as regular 360-degree feedback from the CEO, my peers, and my direct reports.

I believe these experiences equip me well to overseeing more than 1750 attorneys and coordinating their work. Regardless of the size of the team, I have learned the importance of articulating a clear vision of where the team is going, a compelling purpose for why the team is going there, and in doing so inspiring the team to trust, align, and engage. Regardless of the size of the team, I also believe that it is crucial to lead by example; to actively demonstrate core beliefs and values; to set clear expectations; to communicate frequently (including actively listening to my team and to my clients); to build strong personal relationships at all levels; and to treat everyone fairly and with respect at all times.

To ensure coordination, as Chief Legal Officer of Cardinal Health, my direct reports and I have weekly conference calls and quarterly in-person meetings. The entire legal department has monthly conference calls, to ensure department-wide alignment on priorities and practice as well as best-practice sharing, and we meet in-person on an annual basis to delve more deeply into issues of common interest, while also providing opportunities to build personal relationships. Every year I work with my direct reports to establish department-wide goals, and at the end of the year I rate our progress in achieving those goals. I also spend considerable time providing career guidance and feedback to my staff, as well as mentoring those inside and outside the legal department. I regularly travel to meet with the legal staff located outside of headquarters, to hear their concerns and their ideas. If confirmed, I believe these and similar practices will significantly help me oversee and coordinate the work of the headquarters and component lawyers in the Department.

2. Over the past several years, the Departments of State and Homeland Security have worked hard to implement the Western Hemisphere Travel Initiative as recommended by the 9/11 Commission. As part of those efforts, the State Department has developed the

United States passport card, which is adjudicated to the exact same standards as the passport book and allows United States citizens to enter United States land and sea ports-of-entry from Canada, Mexico, the Caribbean and Bermuda. Do you believe there is a legal basis for requiring passport cards to meet International Civil Aviation Organization standards in order for such cards to be utilized for air travel between the United States and each of Mexico, Canada, Bermuda and the Caribbean?

As the question notes, the State Department has developed the passport card as an alternative form of passport for entry into the United States. It is my understanding that the State Department has determined that passport cards are not intended to be a globally interoperable travel identity document. As such, although I have not examined the relevant legal authorities in detail, it is my understanding that the State Department has decided that passport cards need not be designed to meet International Civil Aviation Organization (ICAO) standards. Cf. 8 U.S.C. § 1732(c) (requiring certification that passports meet ICAO standards); 65 Fed. Reg. 18,384 (Apr. 3, 2008) (joint rule by DHS and the State Department indicating that foreign passports accepted for admission into the U.S. must meet ICAO standards). Whether there is a legal basis for requiring passport cards to meet such standards will require an examination of this statutory provision to determine whether the use of the term "passports" also includes "passport cards." Based on its determination regarding passport cards, it appears that the State Department believes that there is no legal requirement for such cards to meet ICAO standards.

3. Last year, DHS issued a Notice of Proposed Rulemaking regarding US-VISIT exit procedures that would require commercial air and vessel carriers to oversee the collection of foreign visitors' biometric data as those individuals depart the United States. Do you believe the collection of such information is an inherently governmental function?

I have not had an opportunity to carefully review the Department's 2008 proposed rule regarding United States Visitor and Immigrant Status Indicator Technology (US-VISIT) exit procedures, 73 Fed. Reg. 22,065 (Apr. 24, 2008). If confirmed, I expect to become more familiar with the proposed rule and its requirements. I understand, however, that the proposed rule would require commercial air and vessel carriers to collect certain biometric data (fingerprints) from departing aliens and to transmit them to DHS (Customs and Border Protection) within a specified time period. There appears to be ample statutory authority for the proposed US-VISIT exit system. See 73 Fed. Reg. 22,065, 22,067-69 (citing, among other authorities, section 711 of the 9/11 Recommendations Act, 8 U.S.C. § 1187(i)).

Although the Department has not yet responded to public comments on its proposed rule, I am aware that there is an issue regarding whether these requirements constitute an "inherently governmental function." I note that the "inherently governmental function" standard is a federal contracting concept under the Federal Activities Inventory Reform Act (FAIR Act), 31 U.S.C. § 501 note, that bars the government from contracting to third-party functions that are inherently governmental. Here, it appears that DHS's proposed rule is not an attempt to "outsource" a governmental function – rather, it

would be a regulatory requirement imposed on air and sea vessel carriers similar to other regulatory requirements under which they already operate. See, e.g., 8 U.S.C. § 1221(c) (requiring commercial vessels or aircraft to collect certain passenger manifest information). If the "inherently governmental function" standard were deemed to apply to the proposed requirements, I would want to study the matter more closely, but my preliminary assessment is that the collection and transmittal of the biometric data at issue is more ministerial in nature than an exercise of non-delegable governmental police powers and thus would not rise to the level of an "inherently governmental function."

4. As part of the *Implementing Recommendations of the 9-11 Commission Act of 2007*, Congress tied the Secretary of Homeland Security's authority to allow countries into the Visa Waiver Program with visa refusal rates exceeding 3 percent to the creation of an air exit system that can verify the departure of 97 percent of foreign nationals who leave the U.S. through airports. Specifically, if such an air exit system is not in place by this June, the Secretary's waiver authority will be suspended. Do you interpret this provision as temporarily suspending the Secretary's waiver authority, such that the Secretary will again have such authority as soon as the requisite air exit system is in place?

The Visa Waiver Program (VWP) allows visitors from participating countries to travel to the U.S. for business or pleasure for 90 days or less without first obtaining a visa. As the question notes, in the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Recommendations Act), Congress granted the Secretary of Homeland Security authority, in consultation with the Secretary of State, to admit a country into the VWP even if its non-immigrant visa refusal rate was between three and ten percent, if certain other conditions are met. See Immigration and Nationality Act § 217(c)(8), 8 U.S.C. § 1187(c)(8). One of the conditions to exercising that waiver authority is a requirement that the Secretary of Homeland Security certify to Congress that an air exit system is in place that can verify the departure of not less than 97 percent of foreign nationals who depart through U.S. airports. I understand that Secretary Chertoff made such a certification in November 2008. If, however, the Secretary has not notified Congress by June 30, 2009 that the air exit system fully satisfies certain biometric requirements, then the 9/11 Recommendations Act imposes a temporary suspension of waiver authority. Because that suspension lasts "until such time as the Secretary makes such notification," 8 U.S.C. § 1187(c)(8)(A)(iii), I believe the Secretary will regain her waiver authority (if it is suspended) if and when she notifies Congress that the requisite air exit system is in place.

Opening Statement
Timothy W. Manning, Nominee
Deputy Administrator (National Preparedness), FEMA
United States Senate
Committee on Homeland Security and Governmental Affairs
April 29, 2009, 10:00 a.m., 342 Dirksen Senate Office Building

Good morning Mr. Chairman, Ranking Member Collins, and Members of the Committee. My name is Tim Manning. Thank you for allowing me to be here this morning as the nominee for Deputy Administrator of the Federal Emergency Management Agency for National Preparedness. I'd like to thank Senator Bingaman for his kind introduction, I have worked with Senator Bingaman for many years helping New Mexicans, and I'm honored to have him here with me today. I am also honored to be joined today by my friends and colleagues, partners from national associations as well as a number of individuals that have helped me throughout my career. But most importantly, I am pleased to be joined by my family: my brother Dan and my parents Terry and Lynn Manning. They have given a lifetime of public service and dedication to their community, and instilled that responsibility in my brother and me. It is only with their encouragement and support, and that of my wife, Sarah and my daughter, Katy that I am able to be here today.

Mr. Chairman, I am, of course, humbled by the President's nomination and I am honored and pleased to be here today to address your questions. I have had, through my time as the Director and Secretary of Homeland Security and Emergency Management for the State of New Mexico, the opportunity to serve the Governor and people of my State, and I am honored to be afforded the opportunity to serve my country.

Over the past eight years, from the tragic events of 2001, through the devastating hurricanes of 2005, and the raging wildfires and floods over the past two years, the nation has been through a string of trying times. These events have shown us the selfless courage of our first responders, our fellow citizens, and the resilience of our national fabric. They have also shown us the weaknesses in our system of disaster preparedness, response, and recovery. The American people have come together to address these weaknesses, and we are a stronger nation for it. One of the most crucial pieces of this reform was legislation from this committee, the Post Katrina Emergency Management Reform Act, the most important development in emergency management since the enactment of the Stafford Act. The Post Katrina Emergency Management Reform Act charts a future for emergency management, and sets a goal for a broad-based framework to protect the American people through a comprehensive and integrated program of prevention and mitigation of, preparedness for, response to, and recovery from natural disasters, acts of terrorism, accidents, and all other hazards regardless of their cause, and I am eager, if confirmed, to be a part of its full implementation.

I have been, throughout my career, fortunate to have had the opportunity to serve my community both as an emergency responder as well as an emergency manager. I have served as a volunteer firefighter and lieutenant, emergency medical technician, rescue mountaineer, and hazardous materials specialist, before being afforded the opportunity to serve the State of New Mexico as the chief of disaster operations, the State Director of Emergency Management, and most recently the Secretary of the New Mexico Department of Homeland Security and Emergency Management. I have been honored by my peers to be selected to serve in the leadership of national organizations. My academic

career has provided me the opportunity to gain an understanding of the underlying processes of natural disasters and terrorism; and to bring that knowledge to bear in the development of doctrine and policy.

In these roles I have lived the needs of the responders on the street and I have faced the challenges posed by the leadership of local government response agencies. I understand the responsibilities placed on elected officials. I have lived through all aspects of preparedness and response policy, and I have a deep respect for all those who endeavor to serve their community and build the national resilience.

Mr. Chairman, I believe a strong and resilient nation can only be built on a solid foundation of preparedness. I believe that through strong partnerships; between cities, counties, States and territories, tribal governments, the federal government, the private sector, and American people, this is achievable. Through a collaborative, joint process of doctrine development and implementation across all levels of government, and the furtherance of community resilience and readiness, we can overcome the missteps of the past, and the mistrust between partners that has developed in places. We can, working together, identify true measures of preparedness that can inform Congress and the Executive of the state of the nation, and the steps that remain to be taken. Let there be no doubt that this is an ongoing effort. We can build a national preparedness system that is flexible and adaptive to all threats and hazards, and a higher level of readiness is achievable. But there will be no end to these efforts. Plans must be updated, concepts and doctrine must be modified to reflect lessons learned, and education must continue.

Emergency management and homeland security are fields in which no one level of government can succeed going it alone. No one agency has the solution. The whole of

government is required, and a close integration between agencies at the Federal, State, tribal, and local level is required to be successful. FEMA must leverage and blend the efforts of its partners across the full spectrum of emergency management, homeland security, homeland defense, and national security to further the national preparedness. Preparedness cannot be thought of as a distinct and separate step in emergency management; it transcends prevention, protection, response, and recovery. At all points along the arc of the protection of the American people, there is a need for education, training, planning, evaluation, and learning.

I also believe that a close working relationship with Congress and this Committee is essential. I recognize the Committee's expertise, and I will cooperate fully with the Committee as it executes its important oversight functions. I also look forward to the Committee's assistance with and support for indentifying ways to make the preparedness work of FEMA more effective and efficient.

Mr. Chairman, Ranking Member Collins, members of the committee, thank you for allowing me to be here today. I have been given an opportunity by the President to serve my community and my country in developing a stronger nation. If confirmed, I look forward to working to further the implementation of the Post Katrina Emergency Management Reform Act. I look forward to carrying out the directives of the President, and to more fully prepare the Nation to withstand severe events, respond to and recover from natural disasters that may occur, and protect against acts of terrorism. I respectfully ask for your recommendation to confirm my nomination as Deputy Administrator of the Federal Emergency Management Agency for National Preparedness. Thank you, and I would be happy to answer any questions you may have.

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES**A. BIOGRAPHICAL INFORMATION**

1. **Name:** (Include any former names used.)
 - Timothy W. Manning
2. **Position to which nominated:**
 - Deputy Administrator – National Preparedness, FEMA, DHS
3. **Date of nomination:**
 - April 2, 2009
4. **Address:** (List current place of residence and office addresses.)
 - Home: REDACTED
 - Office: Department of Homeland Security and Emergency Management, State of New Mexico, 130 South Capitol Ave., Santa Fe, NM, 87501
5. **Date and place of birth:**
 - March 21, 1970
 - Harvey, Illinois
6. **Marital status:** (Include maiden name of wife or husband's name.)
 - Married to Sarah Caroline Manning (Maiden name: Daub)
7. **Names and ages of children:**
 - REDACTED
8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.
 - Eastern Illinois University, 1988-1993, BS Geology (1993)
 - Naval Postgraduate School, 2006-2007, Executive Leadership Program (2007)
 - University of Saint Andrews, 2008 – present, MLitt candidate, Terrorism Studies (candidate)
9. **Employment record:** List all jobs held since college and any relevant or significant jobs held prior to that time, including the title or description of job, name of employer, location of work, and dates of employment. (Please use separate attachment, if necessary.)
 - July 2007 to present
 - Homeland Security Advisor to the Governor, Cabinet Member, and Director of the Department of Homeland Security and Emergency Management, State of New Mexico
 - 2006 to present

- Center for Homeland Defense and Security, Naval Postgraduate School, Monterey, California,
 - Senior Instructor (2008-present)
 - Guest Lecturer (2006-2008)
 - January 2005-July 2007
 - Director, Governor's Office of Homeland Security and Homeland Security Advisor to the Governor, State of New Mexico
 - January 2005-July 2007
 - Deputy Cabinet Secretary, Department of Public Safety, State of New Mexico
 - May 2003-January 2005
 - Director, Office of Emergency Management, Department of Public Safety, State of New Mexico
 - January 2002-May 2003
 - Chief, Response and Recovery Bureau - Emergency Operations Center
Director, Office of Emergency Services and Security, Department of Public Safety, State of New Mexico
 - July 2001 – January 2002
 - Hazardous Materials Coordinator, Department of Public Safety, State of New Mexico
 - April 1994 – July 2001
 - Hydrogeologist, John Shomaker & Associates, Inc., Albuquerque, New Mexico
- 10. Government experience: List any advisory, consultative, honorary or other part-time service or positions with federal, State, or local governments, other than those listed above.**
- 2008 to present. Intelligence Community's Interagency Threat Assessment and Coordination Group (ITACG) Advisory Council - National Governors Association Representative.
 - 2008 to present. Member, Office of the Director of National Intelligence (ODNI) Law Enforcement and Homeland Security Partner's Group.
 - 2008 to present. DHS-FEMA Regional Advisory Committee, FEMA Region VI
 - 2007 to present. Border Governors Conference; Security Table & Emergency Management Table Member
 - 2007 to present. Chief Justice of the Supreme Court's appointee, Statewide Court Security Committee

- 2007 to present. Guest Lecturer, Naval Postgraduate School, Monterey, CA.
 - 2007 to present. Appointed member, New Mexico E911 Coordinating Committee
 - 2007 Executive Steering Committee for the National Response Plan/Framework, DHS-FEMA
 - 2007 Governor's Committee on Campus Security
 - 2007 to present. State, Local, Tribal, and Territorial Infrastructure Protection Advisory Committee to the U.S. Department of Homeland Security
 - 2006 to present. Chairman, New Mexico Intrastate Mutual Aid Committee
 - 2005 to present. Chairman, State Emergency Response Commission – State of New Mexico
 - 2005-2008 Chairman, New Mexico Homeland Security Advisory Committee
 - 2005 to present. Commissioner, New Mexico Military Base Planning Commission
 - 2005 to present. Appointed member, New Mexico Governor's Drought Emergency Taskforce
 - 2005 to Present. Appointed member, New Mexico Refined Products Council
 - 2002 – 2005 Member, State of New Mexico, Emergency Medical Services Advisory Committee
 - 2001 Chairman, Mountain Rescue Association - Rocky Mountain Region
 - 2000 Vice Chairman, Mountain Rescue Association - Rocky Mountain Region
 - 1996 - 2004 Rescue Mountaineer, Rescue Operations Leader, President, Albuquerque Mountain Rescue.
 - 1994 - 2003 Firefighter – Lieutenant Volunteer, Bernalillo County Fire Department, New Mexico (1994-1999); Firefighter, Village of Tijeras Fire Department (2001-2003)
11. **Business relationships: List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.**

- None

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

- National Governors Association
 - 2008 – present, Executive Board – Governor's Homeland Security Advisors Council and Chair of the Intelligence Committee
 - 2008, Chair, National Election Security Committee (NGA-NEMA-NASS-NASEO)
 - 2007 – present, Governor's Homeland Security Advisors Council
- Emergency Management Accreditation Program (EMAP) Commission
 - 2008 – present, Chairman
 - 2006, Standards Committee
- National Emergency Management Association
 - 2008 – present, Regional Vice President
 - 2007 – present, Chairman, Homeland Security Committee
 - 2006, Chairman, Response and Recovery Committee
 - 2005, Regional Vice President
 - 2003 – present, Member
- National Homeland Security Consortium
 - 2007 – present, Co-Chairman,
 - 2003 – present, member
- Western States Seismic Policy Commission
 - 2004, Board of Directors – Director at Large

13. **Political affiliations and activities:**

- (a) **List all offices with a political party which you have held or any public office for which you have been a candidate.**
- None
- (b) **List all memberships and offices held in and services rendered to any political party or election committee during the last 10 years.**
- I served in an ad hoc volunteer capacity advising the Obama for America 2008 presidential campaign on homeland security, emergency management, and terrorism policy.
 - I assisted as an ad hoc volunteer advising the Bill Richardson for President 2008, and Richardson for Governor 2006 campaigns on homeland security, terrorism, and emergency management policy.

- (c) **Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more during the past 5 years.**
- Obama for President 2008; \$145
 - Richardson for President 2008; \$2,000
 - Richardson for Governor 2006: \$1,000
 - New Mexico Combined House Candidates (joint fundraiser) 2008: \$50
14. **Honors and awards: List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.**
- 2006 Commendation for Service and Leadership, Bernalillo County Commission.
 - 2003 Distinguished Service Commendation; Bernalillo County Fire and Rescue.
 - 2002 Award for Development and Achievement in Emergency Management, NM. Emergency Management Association.
 - 1995 Chief's Commendation; Bernalillo County Fire Department District 3.
15. **Published writings: Provide the Committee with two copies of any books, articles, reports, or other published materials which you have written.**
- Manning, T. (2008). Emergency Management and Disaster Assistance in the United States, and the Ramifications of the Evolution of Homeland Security. *Inside the Minds: the Changing Landscape of Natural Disaster Relief*. Aspatore Books.
 - Manning, T. (2000). Rescue System Mechanics, Interim Report. *Proceedings of the International Technical Rescue Symposium*, 2000, Tucson, Arizona.
 - Manning, T. (1999). Analysis and Lessons of a "Worst Case Scenario." *Proceedings of the International Technical Rescue Symposium*, 1999, Fort Collins, Colorado.
16. **Speeches:**
- (a) **Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated. Provide copies of any testimony to Congress, or to any other legislative or administrative body.**
- Manning, T. (2007). Readiness in the Post-Katrina and Post 9/11 World: an Evaluation of the New National Response Framework. Testimony Before the House Transportation, and Infrastructure Subcommittee on Economic Development, Public Buildings, and Emergency Management. United States House of Representatives. September 11, 2007.

The following remarks were extemporaneous remarks, with no prepared copy, and no transcription.

- Annual New Mexico Emergency Management Association meeting keynote/welcome (2004, 2005, 2007 and September 22, 2008).
- Annual New Mexico Homeland Security conference (November 16 2005, October 24 2006, October 15 2007).

(b) Provide a list of all speeches and testimony you have delivered in the past 10 years, except for those the text of which you are providing to the Committee. Please provide a short description of the speech or testimony, its date of delivery, and the audience to whom you delivered it.

- See above.

17. Selection:

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

I believe I was nominated based on my broad experience in emergency management and homeland security, and my ability to develop diverse coalitions and collaboration toward new and innovative policies. My career has spanned the breadth of opportunities, from emergency responder, through State-level coordinating director, and in the academic study of natural disasters, homeland security, homeland defense, and terrorism. My experience as a firefighter, emergency medical technician, and rescue mountaineer gives me the ground-level experience to understand the needs of responders and the impact of national policy on local government's responders.

As a volunteer line-level officer in the fire service, I experienced the difficulty of maintaining the professional training needs of the majority of firefighters in the US, who spend the majority of their hours away from work at the firehouse training and protecting their neighbors. As the president of a statewide non-profit mountain search and rescue organization, I experienced the long and grueling hours of searching for downed aircraft, missing hikers, or fallen mountain climbers – all on a shoe-string budget and at personal expense.

In my time with New Mexico's emergency management agency, I spent countless hours working within an operations center supporting a local community through a disaster and working with communities, both large urban areas and small rural villages, to build their own response capacity through preparedness programs. As the State Director of emergency management, I've served the Governor in protecting the citizens of his state, and worked in partnership with the federal government to achieve these goals. As a Deputy Cabinet Secretary in the Department of Public Safety, I worked closely with our sister division, the New Mexico State Police, to formulate statewide law enforcement policy and support criminal justice. As the

Director of Homeland Security, I continued to work closely with law enforcement, building the capacity to respond to terrorist attacks and complex incidents by expanding the number of special tactical and bomb response team and giving them the equipment and training they needed to be able to respond to 21st century threats. In all of my roles, I have experienced the challenges of being at odds with partners when the methods of achieving shared goals differ, and the pride of achieving a difficult objective with unusual partners in unexpected ways.

My background and experience as a geologist provides an understanding of the processes of natural disasters; geology is, in essence, the science of natural disasters. This background has given me a deeper understanding of the threats and risks we face from natural disasters and extreme events, helping to inform realistic and appropriate preparedness doctrine and policies. Similarly, my academic background in homeland defense and security and terrorism gained through my time studying, and now teaching, at the Center for Homeland Defense and Security at the Naval Postgraduate School, and my current work at the Center for the Study of Terrorism and Political Violence at the University of St. Andrews, provides me a deeper understanding of the processes of terrorism and those individuals and groups who attack innocent civilians.

I have spent much effort working at the national level on shared collaborative policy development in emergency and disaster preparedness, response, and recovery. My work has focused on bridging the gap between terrorism prevention and all-hazards preparedness for terrorism and natural disasters. Throughout my career, I have built consensus among broad stakeholders, and developed collaborative policy recommendations and operations implementation of non-federal national initiatives. I feel the President selected me to assist in furthering national emergency management and homeland security policy based around consensus and collaboration with partners throughout all levels of government and the private sector.

In my service as an officer and committee chair of the National Emergency Management Association, Governor's Homeland Security Advisor's Council, Emergency Management Accreditation Program Commission, and National Homeland Security Consortium, I have become intimately aware of the concerns of my colleagues around the country; the State and local emergency managers, firefighters, police chiefs, public works directors, mayors, county managers, and governors. I have a proven record of bringing my firsthand understanding of concerns of all of the emergency management and homeland security constituencies to bear on issues.

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

I believe my background and experience is very closely and directly tied to the demands of this position. I currently serve the State of New Mexico as the Director of the New Mexico Department of Homeland Security and Emergency Management, in which capacity I also hold the position known in the Robert T. Stafford Disaster Relief Act as the "State Director of Emergency Management" and Homeland Security Advisor to Governor Bill Richardson. I was named the Department's first Director by Governor Richardson in 2007, and served prior to that as Director of the Governor's Office of Homeland Security in 2005, and as the State Director of

Emergency Management since early 2003. I also served for a time in a "dual hatted" position within the New Mexico Department of Public Safety as a Deputy Cabinet Secretary. In these capacities, I have worked closely with the Department of Homeland Security, FEMA, and the emergency management and homeland security agencies throughout the country. In New Mexico, I directed and managed the State's intelligence and anti-terrorism programs, disaster and emergency preparedness, mitigation, response, and recovery efforts.

Prior to my time at the State Cabinet level, I had a diverse background in emergency services. I worked in a number of positions in the State's emergency management agency, entering as the hazardous materials response program coordinator in the emergency operations center, and eventually becoming the Chief of the Emergency Operations Bureau. I have also held many field-level emergency response positions, including firefighter, EMT, rescue mountaineer, and hazardous materials specialist. I worked for a number of years as a hydrogeologist on geologic investigations, environmental cleanup and restoration, and water resource projects.

In addition to my professional position, I serve in leadership positions within the field on a number of national boards and commissions, including Co-Chair of the National Homeland Security Consortium, Chairman of the National Emergency Management Association's Homeland Security Committee, and Chair of the Emergency Management Accreditation Program (EMAP) Commission, an international emergency management standards-setting and accreditation body. I have also previously served as the Chairman of the Response and Recovery Committee and regional vice president of NEMA, and continue to serve on many other boards and commissions within the State of New Mexico, such as Chair of the State's Emergency Response Commission and the Intrastate Mutual Aid Commission.

I believe my academic background is also directly pertinent to the position. I received a Bachelors of Science in Geology from Eastern Illinois University, I am a graduate of the Executive Program at the Center for Homeland Defense and Security of the Naval Postgraduate School, and I am currently researching terrorism and political violence towards a Master of Letters from the University of St. Andrews, Scotland. I continue to help advance my profession by serving as a guest lecturer and subject matter expert at the Center for Homeland defense and Security at the Naval Postgraduate School in Monterey California.

B. EMPLOYMENT RELATIONSHIPS

1. **Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?**
 - Yes
2. **Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.**
 - No

3. **Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization, or to start employment with any other entity?**
 - No
4. **Has anybody made a commitment to employ your services in any capacity after you leave government service?**
 - No
5. **If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?**
 - Yes
6. **Have you ever been asked by an employer to leave a job or otherwise left a job on a non-voluntary basis? If so, please explain.**
 - No

C. POTENTIAL CONFLICTS OF INTEREST

1. **Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.**
 - In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Homeland Security's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Department's designated agency ethics official and that has been provided to this Committee. I am not aware of any other potential conflicts of interest.
2. **Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity.**
 - From 2004 to 2008, in the course of my duties as an employee of the New Mexico State government, I have, pursuant to New Mexico State Law, registered as a lobbyist with the New Mexico Secretary of State's Office to work with the New Mexico State Legislature on behalf of the agency and the executive branch on proposed and pending legislation. In this capacity I have provided expert witness testimony in support and opposition of

proposed legislation and worked with, and provided testimony to, committees of the New Mexico Legislature, including the Senate Finance, Public Affairs, Judiciary, Corporations and Transportation Committees; House Finance and Appropriations, Government and Urban Affairs, Judiciary, Transportation and Public Works, Health and Government Affairs, Labor, Consumer and Public Affairs, Capitol Outlay, and Business and Industry Committees; Bicameral interim Legislative Finance, Information Technology Oversight, and Indian Affairs Committees and provided expert witness testimony on the floor of the House of Representatives during final passage debate. In the course of these duties I have drafted language for introduction and amendments for introduced legislation. In all cases, no prepared remarks were submitted or used.

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

D. LEGAL MATTERS

1. **Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.**
 - No
2. **Have you ever been investigated, arrested, charged or convicted (including pleas of guilty or nolo contendere) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, other than a minor traffic offense? If so, provide details.**
 - No
3. **Have you or any business of which you are or were an officer, director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.**
 - No
4. **For responses to question 3, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.**
 - N/A

5. **Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.**
- I believe that my resume and the information in this questionnaire provide the relevant information about my background. I would be happy to work with the Committee if any additional information is desired.

E. FINANCIAL DATAREDACTED

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

**U.S. Senate Committee on Homeland Security and Governmental Affairs
Pre-hearing Questionnaire
For the Nomination of Timothy W. Manning to be
Deputy Administrator, Federal Emergency Management Agency
at the Department of Homeland Security**

I. Nomination Process and Conflicts of Interest

1. Why do you believe the President nominated you to serve as the Deputy Administrator for the Federal Emergency Management Agency (FEMA) responsible for national preparedness?

I believe I was nominated based on my broad experience in emergency management and homeland security, and my ability to develop diverse coalitions and collaboration toward new and innovative policies. My career has spanned the breadth of opportunities, from emergency responder, through State-level coordinating director, and in the academic study of natural disasters, homeland security, homeland defense, and terrorism. My experience as a firefighter, emergency medical technician, and rescue mountaineer gives me the ground-level experience to understand the needs of responders and the impact of national policy on local government's responders.

As a volunteer line-level officer in the fire service, I experienced the difficulty of maintaining the professional training needs of the majority of firefighters in the US, who spend the majority of their hours away from work at the firehouse training and protecting their neighbors. As the president of a statewide non-profit mountain search and rescue organization, I experienced the long and grueling hours of searching for downed aircraft, missing hikers, or fallen mountain climbers – all on a shoe-string budget and at personal expense.

In my time with New Mexico's emergency management agency, I spent countless hours working within an operations center supporting a local community through a disaster and working with communities, both large urban areas and small rural villages, to build their own response capacity through preparedness programs. As the State Director of emergency management, I've served the Governor in protecting the citizens of his state, and worked in partnership with the federal government to achieve these goals. As a Deputy Cabinet Secretary in the Department of Public Safety, I worked closely with our sister division, the New Mexico State Police, to formulate statewide law enforcement policy and support criminal justice. As the Director of Homeland Security, I continued to work closely with law enforcement, building the capacity to respond to terrorist attacks and complex incidents by expanding the number of special tactical and bomb response team and giving them the equipment and training they needed to be able to respond to 21st century threats. In all of my roles, I have experienced the challenges of being at odds with partners when the methods of achieving shared goals differ, and the pride of achieving a difficult objective with unusual partners in unexpected ways.

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In my service as an officer and committee chair of the National Emergency Management Association, Governor's Homeland Security Advisor's Council, Emergency Management Accreditation Program Commission, and National Homeland Security Consortium, I have become intimately aware of the concerns of my colleagues around the country; the State and local emergency managers, firefighters, police chiefs, public works directors, mayors, county managers, and governors. I have a proven record of bringing my firsthand understanding of concerns of all of the emergency management and homeland security constituencies to bear on issues.

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

No.

3. What specific background and experience affirmatively qualifies you to be FEMA Deputy Administrator responsible for national preparedness?

I believe my background and experience is very closely and directly tied to the demands of this position. I currently serve the State of New Mexico as the Director of the New Mexico Department of Homeland Security and Emergency Management, in which capacity I also hold the position known in the Robert T. Stafford Disaster Relief Act as the "State Director of Emergency Management" and Homeland Security Advisor to Governor Bill Richardson. I was named the Department's first Director by Governor Richardson in 2007, and served prior to that as Director of the Governor's Office of Homeland Security in 2005, and as the State Director of Emergency Management since

early 2003. I also served for a time in a "dual hatted" position within the New Mexico Department of Public Safety as a Deputy Cabinet Secretary. In these capacities, I have worked closely with the Department of Homeland Security, FEMA, and the emergency management and homeland security agencies throughout the country. In New Mexico, I directed and managed the State's intelligence and anti-terrorism programs, disaster and emergency preparedness, mitigation, response, and recovery efforts.

Prior to my time at the State Cabinet level, I had a diverse background in emergency services. I worked in a number of positions in the State's emergency management agency, entering as the hazardous materials response program coordinator in the emergency operations center, and eventually becoming the Chief of the Emergency Operations Bureau. I have also held many field-level emergency response positions, including firefighter, EMT, rescue mountaineer, and hazardous materials specialist. I worked for a number of years as a hydrogeologist on geologic investigations, environmental cleanup and restoration, and water resource projects.

In addition to my professional position, I serve in leadership positions within the field on a number of national boards and commissions, including Co-Chair of the National Homeland Security Consortium, Chairman of the National Emergency Management Association's Homeland Security Committee, and Chair of the Emergency Management Accreditation Program (EMAP) Commission, an international emergency management standards-setting and accreditation body. I have also previously served as the Chairman of the Response and Recovery Committee and regional vice president of NEMA, and continue to serve on many other boards and commissions within the State of New Mexico, such as Chair of the State's Emergency Response Commission and the Intrastate Mutual Aid Commission.

I believe my academic background is also directly pertinent to the position. I received a Bachelors of Science in Geology from Eastern Illinois University, I am a graduate of the Executive Program at the Center for Homeland Defense and Security of the Naval Postgraduate School, and I am currently researching terrorism and political violence towards a Master of Letters from the University of St. Andrews, Scotland. I continue to help advance my profession by serving as a guest lecturer and subject matter expert at the Center for Homeland Defense and Security at the Naval Postgraduate School in Monterey California.

4. Have you made any commitments with respect to the policies and principles you will attempt to implement as a Deputy Administrator for FEMA? If so, what are they, and to whom were the commitments made?

No.
5. If confirmed, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures and/or criteria that you will use to carry out such a recusal or disqualification.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Homeland Security's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Department's designated agency ethics official and that has been provided to this Committee.

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

No.

II. Background of the Nominee

7. Please describe your role and responsibility in preparing for and responding to disasters in your capacity as Director of the New Mexico Department of Homeland Security and Emergency Management.

As the Director of the New Mexico Department of Homeland Security and Emergency Management (DHSEM), I have maintained the primary responsibility for the oversight of all of the State's preparedness for, response to, recovery from, mitigation and prevention of disasters and emergencies regardless of cause. In the course of my tenure, I was able to develop a more capable and agile program, with new disaster mobilization facilities and equipment, and a substantial increase in permanent professional disaster assistance and preparedness staff to support local governments, additional statutory authorities and capability for information sharing and terrorism prevention, and a greatly enhanced statewide response capacity.

With regard to DHSEM's preparedness activities, I have overseen the cabinet agency charged by law and the direction of the Governor with the development and maintenance of the State's emergency response plan, disaster recovery program, disaster and counterterrorism training and exercise program. We have implemented the National Incident Management System, being one of the first states to mandate the universal adoption of the Incident command system, years ahead of the HSPD 5 mandate. We have maintained a system of planning, training, exercise/operations, evaluation, and improvement throughout my time with the agency. In addition to our direct mission activities, my department has worked in conjunction with partners such as the New Mexico Law Enforcement Academy, State Firefighters Training Academy, Emergency Medical Services Academy, as well as other programs, to provide specialized and advanced training for response to and recovery from disasters. In conjunction with the New Mexico National Guard, we developed a specialized advance joint training for law enforcement tactical teams and national guardsmen for response to terrorism acts and school attacks.

I have maintained within my responsibility on behalf of the Governor the oversight of all the disaster response and recovery in New Mexico. In this capacity, I have overseen five presidentially declared disasters (DR-1783, DR-1690, DR-1659, DR-3229, DR-1514), 41 gubernatorial declared emergencies and disasters for floods, fires, winter storms, landslides, terrorist threats and border security, a large number of federally declared wildfires and countless more non-declared fires. In addition to the declared emergencies and disasters, I have overseen and managed numerous other incidents of lesser magnitude on a more frequent basis.

In the course of my duties as the director in New Mexico, I have had the opportunity to also further national preparedness of the community and even disaster response through membership on a number of professional associations and government advisory groups. Through my roles with the National Emergency Management Association, I have been closely involved in the development and implementation of the Emergency Management Assistance Compact (EMAC), a system of interstate mutual aid. New Mexico was serving as the lead State (a rotating volunteer designation for management and direction of the compact) during Hurricane Katrina in which capacity we oversaw the mobilization of over 70,000 personnel to Louisiana, one huge success story from a troubled response.

I have also served for the past three years on the Emergency Management Accreditation Program (EMAP) Commission, first on the technical committee, and for the past two years as Commission Chair. EMAP's mission centers around the development of program standards for government's emergency management programs, and the furtherance of more accountable, professional, and capable emergency management programs.

In my service as the Chair of NEMA's Homeland Security Committee, and serving on the Director of National Intelligence's Homeland Security and Law Enforcement Partner's Group, the Interagency Threat Assessment Coordination Group Advisory Board, and the Information and Intelligence Committee Chair of the National Governor's Association – Governor's Homeland Security Advisor's Council, I helped bridge the divide between traditional emergency management preparedness and response and terrorism prevention. And as a long time member and cochair for the past two years of the National Homeland Security Consortium, I help bring together diverse groups of partners to work toward a common goal of collaboration in homeland security and emergency management.

8. Please describe any other experiences you have had in emergency management and homeland security.

I believe the proceeding answers sufficiently summarize my experience with emergency management and homeland security.

III. Role and Responsibilities of the Deputy Administrator of National Preparedness

9. Why do you wish to serve as Deputy Administrator for National Preparedness?

I have spent my entire career working toward the protection of my community and the advancement of response capacity in whichever agency I was working at the time. And through a steady increase in responsibilities, from line firefighter through to the Cabinet Secretary of Homeland Security and Emergency Management for the State of New Mexico, I have been afforded the opportunity to serve my community in a broader and more comprehensive way. Additionally, my varied background experiences have shown me the power of integrating the various response disciplines, and involving non-traditional partners such as public works departments and engineering firms, in response to complex incidents. The opportunity to serve as the Deputy Administrator of FEMA for National Preparedness provides the opportunity to serve my community, and the nation, by attempting to build a capacity for prevention and response built on integrated and collaborative training, education, planning, and exercising and to provide the American people the support and protection they expect and deserve.

10. What do you see as the principal mission(s) of the National Preparedness Directorate?

I believe the principle mission of the National Preparedness Directorate should be the cross-cutting development of a national fabric of prepared and resilient communities, governmental agencies, non governmental organizations and a private sector capable of an efficient response to any threat or emergency that may threaten their community and the ability to protect their citizens, and the ability to recover from any adverse events that may occur. I believe that a prepared nation is one in which the spectrum of prevention, protection, response and recovery, from community member, neighbors, local governments, non profit and non governmental voluntary agencies, to State and the federal government, is one that is nimble, creative, responsible, innovative and capable enough to react to whatever threat may occur.

11. Do you envision any changes in the missions of the National Preparedness Directorate from its current role within FEMA?

If confirmed, I look forward to working with the Administrator of FEMA, the Secretary of Homeland Security, and the Administration to closely examine both the state of preparedness throughout the nation and the mission and capability of FEMA and the Department, and address that need.

12. What do you see as the National Preparedness Directorate's principal strengths and weaknesses in its ability to accomplish those mission(s)?

I believe one of NPD's key strengths is its broad expertise and activities across the prevention, protection, response, mitigation, and recovery mission areas, and across all hazard scenarios. NPD has built strong relationships with other Federal departments

and agencies, as well as many different types of stakeholders among the State, tribal, local, and non-governmental and private sector communities.

One weakness of NPD has been the frequency of reorganizations and mission changes that it has experienced over the past 7 years. Each change has resulted in adjustments to staffing, goals and processes. While the movement of preparedness back to FEMA was a good one that will no doubt improve its effectiveness, some time will likely be required for NPD to settle and achieve optimal operating status.

13. If confirmed, what would be your top priorities? What do you hope to have accomplished at the end of your tenure?

Similar to the priorities exhibited by Secretary Napolitano, I anticipate an increase in collaboration, not merely consultation, with State, local, tribal, and private sector stakeholders during the development of preparedness programs and policies. It is my priority to implement a customer-focused approach to all of our programs, one that addresses the multitude of risks and needs across the nation. It is also my priority to improve the level of coordination among the many preparedness programs that exist, including the identification of opportunities to reduce burdens upon State and local governments and achieve efficiencies.

At the end of my tenure I hope to achieve a unified system that links various preparedness activities together through effective planning, equipping, training, exercising and assessments.

IV. Policy Questions

14. In the wake of the failed response to Hurricane Katrina, the Committee conducted a far-reaching investigation and issued a resulting report entitled, "Hurricane Katrina: A Nation Still Unprepared." In its investigation, the Committee found that FEMA was unprepared – and never had been prepared – for a catastrophic event. In addition to a lack of basic capabilities and resources at FEMA, the Committee found other key failures by the Department of Homeland Security ("DHS" or "the Department") as a whole and its leadership, such as a failure to timely employ the substantial resources of the components of DHS, the lack of effective communication between the then-Secretary of Homeland Security and the then-Director of FEMA, and the lack of situational awareness both at FEMA and DHS. The Committee recommended replacing FEMA with a new, stronger, more robust federal preparedness and response agency. In September 2006, Congress passed the Post-Katrina Emergency Management Reform Act of 2006 ("Post-Katrina Act") to do just that.

The Post-Katrina Act, which implemented many of the recommendations from the Committee's investigation, created a new FEMA – with responsibilities, missions, capabilities, and resources far exceeding those of FEMA at the time of Hurricane Katrina. The Post-Katrina Act also requires the President to appoint a qualified individual as

FEMA Administrator, clarifies that the FEMA Administrator shall serve as the President's and Homeland Security Secretary's principal advisor on emergency management issues, elevates the FEMA Administrator to the level of Deputy Secretary of the Department, permits the President to elevate the FEMA Administrator to cabinet level status during disasters, and preserves FEMA as a distinct entity within the Department.

In testimony before the Committee in April 2008, DHS Inspector General (IG) Skinner concluded that FEMA was better prepared for a catastrophe now than it was in 2005 and found that in the nine areas reviewed by the IG's Office, FEMA had made moderate progress in five areas, modest progress in three areas, and limited progress in only one area. In other recent testimony before Congress, IG Skinner credited the Post-Katrina Act, in part, for his conclusion that FEMA was stronger now than it has ever been. In a report released on December 8, 2008, the Government Accountability Office (GAO) similarly found that DHS and FEMA had taken action to implement many of the Post-Katrina Act's requirements.

- a. If confirmed, what will you do to ensure the new, enhanced FEMA, as envisioned by the Post-Katrina Act, continues to be strengthened?

If confirmed, I commit to work with the Administrator, the Secretary, and the Administration to examine the strength of FEMA and any ways in which the agency's abilities to perform its mission may be enhanced. As a State emergency management director, I am very familiar with and believe in the need for a strong FEMA and I know that a strong FEMA is an integral step towards a strong and resilient nation.

- b. Many of the requirements of the Post-Katrina Act have not been fully implemented and some deadlines have been missed. If confirmed, will you commit to ensuring that these remaining requirements are met and fully implemented as soon as possible?

Yes, if confirmed I will commit to work towards swift action on the outstanding provisions as soon as may be possible with the available resources.

- c. What management challenges do you believe you will face in implementing the Post-Katrina Act? What will you do to address those challenges?

During my tenure in New Mexico, I have been part of changing organizations, most recently the formation of a unified cabinet-level Department of Homeland Security and Emergency Management. My experience in building and leading new and changing organizations in New Mexico has given me experience and insight into the dynamics of innovation in government organization and operations. My experience has shown me that along with the opportunity for enhancing and strengthening an agency, there also exists the chance for decreased morale and efficiency stemming from uncertainty and confusion. Additionally, new bureaucratic rivalries can easily develop as units and people vie for new, or protect existing, resources and authorities. If confirmed, I look forward to working with the administration to build and solidify the appropriate structure necessary to provide effective national

preparedness across all components and levels of government, and help develop a strong and healthy FEMA.

15. In passing the Post-Katrina Act, Congress decided to strengthen FEMA within DHS rather than remove it from the Department. The Post-Katrina Act recognizes that the kinds of catastrophic disasters for which the nation must prepare require resources far beyond what FEMA can effectively marshal standing alone, and the federal preparations for and response to Hurricanes Ike and Gustav earlier this year suggests that the Post-Katrina Act's goal of giving FEMA the tools to be able to effectively coordinate DHS's substantial assets has been met: in Hurricanes Ike and Gustav, the new FEMA successfully drew on resources from other components of the Department, such as the U.S. Coast Guard, U.S. Immigration and Customs Enforcement, Transportation Security Administration, and U.S. Customs and Border Protection, to support its response. The coordination in Hurricanes Ike and Gustav stands in sharp contrast to the response to Hurricane Katrina in which the Department's considerable law enforcement and communications assets went largely unused in the days leading up to and immediately following landfall.

In addition to the expanded resources that DHS contributes to FEMA's response capabilities, FEMA is an essential part of DHS. Through its new grants authority and preparedness activities as well as through its newly strengthened regional offices, FEMA serves as one of the principal conduits through which the Department interacts with state and local officials. Most significantly, of course, FEMA houses most of the Department's response capabilities, which are integral to the mission of the Department.

The DHS IG recently testified that FEMA is stronger now than it ever had been in its history as a result of its placement inside DHS, the implementation of the Post-Katrina Act, and other improvements made as a result of the lessons learned from Hurricane Katrina. The DHS IG's office also released a February 2009 report concluding that the removal of FEMA from DHS would be a mistake.

- a. Do you believe it would be counterproductive to pull FEMA out of DHS, particularly in light of the fact that some have called for FEMA to be removed from the Department?

I believe a strong, efficient, and capable FEMA is needed to provide the American people the protection and support they deserve. If confirmed, I commit to work closely with the agency, the Secretary, and the Administration to determine the most appropriate structure for the federal emergency management mission and I commit to work with congressional stakeholders and key constituents regarding whatever policy is decided upon.

- b. Based on your experience in New Mexico, where the functions of Homeland Security and Emergency Management were consolidated into a single department during your tenure, do you believe that the advantages of that organizational structure are analogous to the advantages of the current position of FEMA within DHS?

I believe that an effective and comprehensive government response to emergencies and disasters is best accomplished by whatever structure provides the least conflict, duplication, and tension in the development of a response framework. In New Mexico, we crafted a system of procedures and laws and a distribution of power and responsibility that allowed for an integrated homeland security and emergency management agency that augments our partner agencies and supports local governments.

16. From your experience as Homeland Security and Emergency Management Director in New Mexico, what were your greatest expectations from FEMA in performing its mission of assisting states in enhancing their ability to prepare for and respond to disasters? Would you recommend any improvements, and if so, please describe. If confirmed, what will you do to implement those improvements?

My greatest expectation of FEMA was that in response to a request for assistance, the relationship be one of integrated support; working closely in partnership to protect and respond to the needs of our citizens and support of the constitutional responsibility of the Governor. As a State Director, too often in recent years the mission of FEMA has tended toward a perceived oversight authority and liability prevention before all else. Preparedness programs have turned from flexible, collaborative capacity-building programs to process-focused, directive measurement tools. Past preparedness policy changes have had the ironic effect of decreasing preparedness in the US, as the lone emergency managers working in most communities have to spend more time responding to data calls. If confirmed, I hope to work with the other directorates, the Administrator, the Secretary, the Administration, and Congress to reduce the procedural requirements placed on the state and local emergency management office, while still collecting the necessary information to measure the state of preparedness.

17. The Post-Katrina Act required FEMA to credential its employees and surge personnel. If confirmed, when do you anticipate FEMA will meet this requirement? Does FEMA have the resources needed to meet this requirement?

It is my understanding that FEMA has begun to develop an accrediting program for its employees and surge personnel. Based upon briefings I have received from FEMA staff, I believe FEMA will progress towards the following in the coming years:

- *Develop 23 cadre-specific Credentialing Plans by job title.*
- *Train Cadre Managers and support staff on these new cadre-specific Credentialing Plans, the migration software used to transfer employees to the new Credentialing framework, and the actual implementation process.*
- *Migrate the existing Disaster Reserve Workforce to the specific Credentialing Plan. Migration compares each employee's record to the newly derived credentialing standards; proficiency and typing of the credential assigned will be in accordance with these standards.*

- *Establish a bi-level governance structure made up of subject matter experts from the field and Agency program staffs which will serve as national credentialing authorities in each cadre.*
- *Enforce Credentialing standards to drive consistent levels of performance and proficiency across the Agency.*
- *Use these Agency-wide Credentialing Plans to generate training plans for each cadre as well as for individual employees.*
- *Identify gaps in training curriculum and prepare multi-year plan for development of training courses.*

If confirmed, I will assess and review the Directorate's resource needs to determine if adequate resources exist to meet this requirement.

18. One of the most important objectives of the Post-Katrina Act was to strengthen FEMA's regional offices. What do you believe FEMA regional offices should be doing on preparedness issues? What improvements or enhancements should be made to FEMA regional office activities to strengthen our nation's preparedness? If confirmed, how will you work through the FEMA regional offices to improve our nation's preparedness?

I believe FEMA and NPD have made significant strides to move many of its programs and resources, including the new Federal Preparedness Coordinators (FPCs), out to the regions. That said, I believe there is still work that remains to transfer additional functions and roles from NPD headquarters to the regions. Coming from a state, I see the value of the regions serving as the single interface for states on preparedness activities. If confirmed, I will continue to strengthen the region's ability to prepare their respective states.

19. The Post-Katrina Act, which was passed to address the failed response to Hurricane Katrina, strengthens and reforms FEMA and, among other things, reorganizes aspects of the Department to enable it to more effectively fulfill its emergency management mission. This includes rejoining the preparedness and response functions within FEMA. Although work has started in this area, additional work is necessary to ensure preparedness is fully integrated into FEMA.

- a. If confirmed, how will you carry out Congressional intent to integrate preparedness into FEMA?

The Post-Katrina Emergency Management Reform Act called for both a programmatic and organizational integration of preparedness programs into FEMA. Therefore, work needs to be done to address both the management issues associated with such an organizational shift, as well as to address the program and policy integration that is needed.

Organizationally, I will work to ensure that the human resource, information technology, facility, and other support structures are in-line with FEMA processes,

and I aim to take advantage of opportunities to reduce duplicative activities and reduce costs.

Programmatically, a great deal of integration has taken place at Headquarters and at the Regions. I am pleased with the increased utilization of the Regional Offices to help manage activities traditionally performed only at Headquarters, the joint planning efforts that have taken place by the Preparedness and Disaster Operations Directorates, and the joint recovery strategy efforts taking place in the Preparedness and Disaster Assistance Directorates, to name a few. Also, the other FEMA directorates are now more involved in the national preparedness training, exercise, and policy processes than ever before.

If confirmed, I plan to build on these existing successes and I envision greater integration in the areas of planning, doctrine development, capability measures, and assessments. For example, significant synergies exist between the National Preparedness and Mitigation Directorates, especially in the areas of hazard mitigation planning, risk analysis, risk reduction, and after action reviews. Also, the National Preparedness Directorate possesses expertise in doctrine, policy development, technical assistance, training, and exercises that can be increasingly utilized by the Disaster Operations, Disaster Assistance, Mitigation, Logistics Management, and other offices – both during disasters and in the steady-state.

FEMA and DHS cannot succeed in their missions without building the capacity to define, measure, analyze, and report the Nation's level of preparedness. Therefore, the Deputy Administrator must bridge the gap between the Preparedness Directorate and all of FEMA's other components, providing a clear strategy for NPD's development and demonstration of how that strategy will provide direct, added value to FEMA's operations, mitigation, and recovery elements, as well as the rest of DHS. Preparedness must prove the case for why its peer directorates and agencies have a vested interest in the success of the Preparedness Directorate.

- b. What measures will you take to ensure that preparedness functions you will oversee will be properly integrated into FEMA? What difficulties do you anticipate in fully integrating the preparedness functions with FEMA, and how would you address them?

First and foremost, NPD must fully utilize and be incorporated within FEMA's intra-agency management and support processes. This includes website and portal maintenance, regional coordination, and IT support. While I am not fully aware of all management issues yet, I assume that there are some legacy contracts, leases, and other matters that still exist that should be addressed.

Regarding programmatic integration, I expect the Regional Office National Preparedness Divisions to have a clear understanding and role in the cross section of preparedness program activities. Preparedness policies and guidance should reflect the subject matter expertise of the relative FEMA program offices and all

preparedness activities should be designed to provide value for the operational needs of the Agency and its preparedness stakeholders.

The major challenges that may exist include the ability to maintain effective coordination given the physical separation of National Preparedness staff (located at different facilities due to space constraints) from FEMA Headquarters. Another challenge will be to synchronize NPD goals and practices derived from its long-term, strategic preparedness perspective compared to the near-term, tactical goals and requirements of other operational offices with preparedness responsibilities.

- c. Will you commit to regularly meeting with and working with other components and offices within FEMA to improve integration of preparedness into FEMA?

Yes. Coming from a state, I appreciate the need to integrate these activities throughout FEMA and will commit to working with the other components to better integrate preparedness activities into FEMA.

Personnel Management

20. What is your approach to managing staff, and how has it developed in your previous management experiences?

My management style has developed through my experience as one of pragmatism and flexibility. I prefer to give broad and goal-oriented direction, and rely on the professionals within the agency to achieve those goals. I do, however, prefer to remain closely involved with the implementation and aware of all facets of the operations with which I am entrusted. I do not shy away from getting involved in performing the mission, and working personally at whatever level necessary to meet our objectives, and feel strongly that I be willing and able to perform any task I ask of an employee. In my time as the agency head in New Mexico, I have worked within the taskforces to revise our plan, taught classes and developed new curriculum, worked shifts in the emergency operations center and crunched budget worksheets when resources were few, deadlines approached, and staff was overwhelmed. I believe that, within the boundaries of accountability, allowing people to work at the level they are capable of, take risks, find creative solutions, and be innovative is an important way to develop future leaders.

I believe in collaborative problem solving and a close working relationship between management and labor, and I believe that a satisfied workforce is required for a successful agency. Through my time in management, I have worked hard to bring a good working environment to my agencies, increasing pay and incentives, establishing an education tuition reimbursement program, and modifying agency policies to be more employee-friendly. I believe in erring on the side of the employee and supporting them wherever possible. I also believe however, in strict and firm accountability; I do not support or brook abuse of the system or the agency, and believe that labor should be held to account to performance standards. In my time in executive management, I have held my senior and mid level managers accountable for the operations within their sphere,

and do not allow for buck-passing, and I expect and support them in their management of their divisions. If confirmed, I hope to work with FEMA management to build morale, develop a satisfied and motivated workforce, and at the same time, establish an accountable, mission focused workforce.

21. What actions in your past executive experiences demonstrate your style and approach in the area of labor-management relations?

New Mexico State government is fairly new to organized labor; collective bargaining was introduced by Governor Richardson in 2003. Labor within the New Mexico Department of Homeland Security and Emergency Management, while subject to collective bargaining, is not organized. I have, however, worked within a labor-management relationship throughout my career, from my first job as a union electrician, throughout my time in the fire service worked closely with colleagues in the International Association of Firefighters, and my time in the New Mexico Department of Public Safety working with the New Mexico State Police Association. During my time as an agency head, I have tried to build an open and transparent relationship with labor, and enacted policies for the employees consistent with or more advantageous to those negotiated by the State employee union. I have worked from both sides of the table, and have a deep respect for labor, and the needs of executive management.

22. FEMA has suffered very high vacancy rates, often for positions of critical importance. This Committee's investigation on the preparation for and response to Hurricane Katrina found that vacancies in FEMA hurt the nation's ability to respond to that catastrophic event. A significant number of vacancies still exist in the National Preparedness Directorate. If confirmed, what will you do to ensure that vacant positions in the National Preparedness Directorate are filled?

I am aware of the fact that the Directorate has made substantial strides in filling vacancies that existed when it arrived at FEMA, as well as filling new positions that have been added in the last couple of years. That being said, its current vacancy rate of 16% is unacceptable to me.

Vacancy rates can be reduced in two ways: By reducing the hiring cycle time and by improving retention. If confirmed, I will review every step of the current hiring process and identify impediments to filling these vacancies. I will ensure that the line managers are actively involved in fulfilling their responsibilities in hiring as well as coordinate with others in the Agency who can have an impact on reducing the hiring cycle time.

If confirmed, I will also look closely at the factors that might impact peoples' decisions to stay in the National Preparedness Directorate or not, such as clarity of purpose, the performance management system, individual development plans, and recent employee survey results, and make course corrections as appropriate.

23. What do you believe FEMA can do to recruit and hire the personnel that it needs?

I have learned from the Human Capital Division that FEMA has already established the goal of achieving a 90% fill-rate out of the 4,457 funded Permanent Full-Time positions for Fiscal Year 2009. To accomplish this goal, FEMA's FY09 Hiring Concept of Operations (Hiring CONOPS) includes (but is not limited to): the establishment of automated hiring processes, open and continuous vacancy announcements, and increased use of recruitment, relocation and retention bonuses.

I have been assured that FEMA's Human Capital Division will continue this focused hiring strategy through FY09. The strategy entails optimized hiring processes that are currently in place to maintain the drive towards 90% strength.

Employee retention is also a critical staffing challenge faced by the Agency and by the Federal Government at large. FEMA's Human Capital Division has already implemented a retention management strategy that identifies motivators, creates incentives, and capitalizes on employee commitment based on Agency commitment to the employee.

24. What do you see as FEMA's role in providing the training, structure, incentives, and accountability to its employees in order for them to work effectively?

I believe the strengths and talents of the FEMA workforce should be identified, augmented, and fully developed to ensure that the right people are in the right place at the right time to make a difference for the Agency and the people it serves. Occupational competencies are the foundation for recruitment and staffing, candidate assessment and selection, career and workforce planning, employee training and development, promotion and placement, performance management, position classification and compensation, and other human capital functions. Integrating human capital systems and processes around these competencies can yield better management decisions, cost efficiencies, easier and more effective training of employees, and better Return-on-Investment (ROI) of organizations' human capital management practices.

Lead program managers in the National Preparedness Directorate should work closely with the Human Capital Division to establish the method and mechanisms for development of appropriate certification and credentialing processes and related occupational core competencies. A system of incentives (e.g., advancement, bonuses etc.) and disincentives should be designed to encourage the consistent and timely pursuit of appropriate certification and credentialing. The teaming of NPD program officials with HCD in the development of credentialing and certification processes/programs will ensure that competency gaps will be addressed while simultaneously building the human capital infrastructure.

The heart of an employee learning and development program is the formal adoption of an Individual Development Plan for each employee, and the development of coaching and mentoring skills for first-line supervisors. Annually, each employee and supervisor in the National Preparedness Directorate should review the employee's progress to date and

refresh the IDP to establish more challenging goals and incorporate new learning objectives. The training opportunities and developmental activities should be multi-dimensional. They should encompass self-study courses, individual programmed instruction, attendance at the Emergency Management Institute, completion of university courses and commercially available training, and other sources. Employees should be encouraged to accept responsibility for achievement of their own training and development goals while supervisors are held accountable for identifying and offering opportunities for employees to meet goals they have set for themselves.

25. This Committee's investigation of Hurricane Katrina found that training of various teams within FEMA was sorely lacking. For example, the Emergency Response Teams (ERTs) at FEMA rarely trained or exercised together. If confirmed, what do you envision as your role for ensuring that personnel within the Department receive adequate and meaningful training and exercising? How will you ensure that FEMA's ERTs are prepared?

It is my understanding from briefings that I have received that immediately following Hurricane Katrina, NPD, through its Emergency Management Institute (EMI), engaged in reviewing disaster work force training and have engaged in a strategy of defining positions and performance requirements for FEMA's career staff, reservist/Disaster Assistance Employees (DAEs), and Cadre of On-call Response Employees (COREs). As a result of these efforts, I understand there are now over 250 specific response and recovery positions that deploy to disasters as part of the FEMA team. Each of these positions for the Emergency Operations Centers (EOCs) and Joint Field Offices (JFOs) have position specific task books developed, and the effort to credential all FEMA response personnel in their specific positions is now started.

I am also told that other position specific training is identified and underway for the Incident Management Assistance Teams (IMATs), the National Response Coordination Center (NRCC) and the Regional Response Coordination Centers (RRCCs). If confirmed, I will ensure the continued coordination between NPD and FEMA's Disaster Workforce Divisions who is responsible for the deployable workers.

If confirmed, I will work to revise the existing disaster workforce training and develop new courses and exercises aligned to the specific tasks the response teams and functional staff is to accomplish. Each position will have a career progression from basic, intermediate, to advanced levels commensurate with the workforce needs of the agency. This will allow for the appropriate recruitment, training, exercising, and advancement of personnel to ensure that the workforce is prepared when called upon to support FEMA's disaster response and recovery mission.

There has been progress made in the training and exercise curriculum for the Emergency Response Teams and other disaster workforce members. However, there is much work to be done to reach and an end state of having a fully prepared workforce. If confirmed, I will work to help the agency reach the required level of preparedness.

26. FEMA, and the National Preparedness Directorate in particular, have relied heavily on contractors to execute their missions. While contracting out can be an effective means of performing the department's activities, it is critical that the government have sufficient staff on board with the appropriate skills to establish policy, maintain a strong institutional memory, and to effectively manage acquisitions and contract oversight in order to ensure quality, economy, and timeliness. What are your views on the future of contracting within the Directorate?

I believe that there are many areas where for various reasons, contract support is important, but there are many core functions that require performance by permanent and accountable government personnel. I am adamant, of course, that contractors do not perform inherently governmental functions. If confirmed, I will closely examine the operations of the Directorate and the needs of the Agency and the community, and work with the Agency and Department leadership, and the Administration to structure the Directorate in the most efficient and effective manner.

27. The Post-Katrina Act calls for the FEMA Administrator to develop a strategic human capital plan to share and improve the agency's workforce. The plan is to address several areas, including a workforce gap analysis, an action plan for addressing the gaps in critical skills and competencies, and details on surge capacity and training. This law also calls for the FEMA Administrator to provide career paths and the education, training, experience, and assignments necessary for career progression.

- a. If you were advising the FEMA Administrator, what specific steps, areas of coverage and criteria do you believe are needed in conducting the workforce gap analysis and action plan for the National Preparedness Directorate?

I believe NPD should form a partnership with FEMA's Human Capital Division to determine the proper size of its workforce. Assessments of business processes, analyses of mission requirements, and workload analyses should be conducted to accurately project the future size of the workforce. NPD should examine its own role in support of and in contribution to the FEMA Strategic Plan. If confirmed, I will work to move forward this partnership.

- b. What specific policies, programs, and resource allocations are necessary to achieve the expected career paths for the employees of the National Preparedness Directorate?

I understand that FEMA has made significant strides over the past year in establishing programs and policies to strengthen its workforce and develop career paths for FEMA employees. I also understand FEMA has implemented a program designed to improve employee retention by strengthening management, developing employees by focusing on their strengths, and improving FEMA as a place to work. If confirmed, I will work with FEMA's leadership to ensure these initiatives are results-focused and are part of FEMA's human capital strategy to recruit, develop and retain the talent FEMA needs to be successful.

- c. What staff competencies do you see as key in creating and maintaining the viability of a National Preparedness System?

The development of a nation-wide cadre of educated, competent, professional emergency managers and government officials is a critical need in the development of a national preparedness system. The recognition that emergency management is a profession in its own right, albeit a small and specialized one, with its own knowledge, skills, and abilities, separate from (though complimentary to) other emergency response and government professions. Not unlike the difference between the skills and abilities of a law enforcement officer and a firefighter, we must identify and build a recognizable professional emergency manager. A strong system of higher education, professional education, training, and community involvement is needed to grow a competent and strong workforce for the future.

National Preparedness System

28. What is your assessment of our nation's preparedness today, both at the federal level and at the state, local, and tribal government level? What are your most important priorities in improving our nation's preparedness and what measures will you take to implement these priorities?

Since September 11, 2001, the nation's level of preparedness has continuously and systematically improved through enhanced usage of mutual aid, common incident command system processes and terminologies, capability investments, and information sharing and collaboration. The investment of billions of dollars in planning, equipment, personnel, training, and exercises has resulted in tangible improvements in the collective national capacity to prevent, protect against, respond to, mitigate against, and recover from all hazards. Some measures of national preparedness, such as National Incident Management System (NIMS) assessments show steady improvement. Evaluation of After Action Reports from exercises conducted at the National, State, and local levels show increasing levels of performance on the fundamental capabilities required for national preparedness.

I believe we need to do more as a Nation to build scalable capabilities for the most severe, though less probable, emergencies. There are still shortfalls in our ability to accurately ascertain quantitatively the nation's level of preparedness given the risks and characteristics that are unique to each State or region. I am aware of programs underway that will be fielded beginning this Fall that are targeted at eliminating that shortfall, such as work on the Comprehensive Assessment System required by PKEMRA.

I am aware that FEMA has instituted a significant effort to streamline bureaucratic processes to more efficiently manage its programs and lessen administrative burdens on State and local governments. If confirmed, I will ensure these efforts deliver on that commitment.

29. Please explain your vision for national preparedness generally. What, in your judgment, are the broad national preparedness priorities and what will you do to achieve them?

Federal national preparedness policies and activities should be customer-focused with common sense applications and flexibility to meet the unique risks and needs of State, local and Tribal governments, the private sector, and citizenry. A truly all-hazards approach should be capable of applying to the full range of communities across the nation, acknowledging that disaster can strike anywhere.

The eight national priorities stated in the National Preparedness Guidelines (2007), including the achievement of interoperable communications and expanding regional collaboration, are a good start for national priorities as they have applications to communities across the country and cut across missions and disciplines. I will consider a revision of the National Priorities based upon recent risk assessments, levels in national capability, and an analysis of the most important gaps that need to be filled.

30. How do you see preparedness integrating with the four other homeland security missions of prevention, protection, response, and recovery?

Preparedness has evolved appropriately to be the enhancement of capabilities across the mission areas, which include mitigation, and for all hazards. FEMA manages or coordinates a great number of federal preparedness programs and activities (e.g., training, exercises). This is appropriate as it is also responsible for coordinating the federal response under the NRF. However, FEMA is not the subject matter expert on most mission areas and must depend upon the appropriate department or agencies with primary responsibilities to guide how preparedness programs are performed. Therefore, FEMA must play a strong coordinating role, incorporating mission or discipline-specific policies and guidance during the performance of its preparedness activities, and including subject matter experts at all levels of government.

31. The Post-Katrina Act requires that the President establish a national preparedness goal and national preparedness system and complete, revise, and update, as necessary, the goal to ensure the nation's ability to prevent, respond to, recover from, and mitigate against disasters of all kinds. The goal must be consistent with the National Incident Management System (NIMS) and the National Response Framework (NRF). The President, through FEMA, is to establish a National Preparedness System that will enable the nation to meet the goal. The goal is intended to define capabilities and related measures for all-hazards preparedness, response, and recovery. Federal funding is intended to be used to help state, local and tribal governments achieve the goal's target capabilities – based on 15 planning scenarios – and many national priorities, such as regional approaches. Although FEMA's *Federal Preparedness Report*, issued January 2009, provides updates on the status of each stage of the preparedness cycle, the National Preparedness Directorate has not yet developed a strategic plan for the national preparedness system which describes how it will implement the system, measure progress, address risks, and coordinate with stakeholders.

- a. Will you commit to developing a strategic plan for the national preparedness system?

Yes.

- b. Based on your state experience, what changes, if any, would you suggest in defining the National Preparedness Goal?

While federal leadership is needed in the establishment of a national preparedness goal, the implementation of such a goal takes place largely outside the federal sphere, at the State and local levels of government and from within the private sector. True collaborative assessment of the goal done in partnership with State and local governments and other partners is needed for nation-wide buy in and ownership of the goal, and a goal that is a shared vision for national preparedness.

- c. What approach should be used in deciding whether and how to invest finite resources in specific capabilities for a catastrophic disaster?

A combination of risk management and capability-based planning approaches is appropriate for resource allocation decisions. Performing risk assessments and the application of investments to best reduce risks will help ensure that the limited resources with the greatest return on investment are acquired. Similarly, assessing the community's all-hazards capabilities and understanding its shortfalls will help inform the application of resources towards the most dire needs regardless of the type of catastrophe and help ensure that a community is prepared for the greatest variety of hazards that may arise.

The first step is to assess the degree to which particular jurisdictions have achieved particular capabilities through self-assessments. These capability measures should then be crossed with relevant Emergency Support Functions and National Planning Scenarios. Finally, risk should be applied to this framework. This aggregation would allow us to identify not only how much capability has been achieved, but which capabilities become more critical to specific jurisdictions under particular circumstances and risks, allowing for a more efficient allocation of limited resources.

- d. What policies, procedures, or other mechanisms are needed to better leverage capabilities that can be shared across jurisdictions or agencies? What barriers must be overcome in their adoption?

The expansion of regional collaboration should continue to serve as a national priority reflected in our grant guidance, exercise evaluations, assessments, and other activities. Great strides have been made in the regular use of mutual aid through the Emergency Management Assistance Compact (EMAC) and other regional vehicles. One key accomplishment that has aided the frequency and efficiency of resource sharing is the development of NIMS Resource Types, incident management doctrine, and mission packages that are defined and understood across the country. Increased investments in the identification of resource types and incident management guidance should help promote the practice of resource sharing across the spectrum of mission areas – not just incident management.

Barriers to resource sharing often occur during times of uncertainty of the scope and scale of an incident that may, or may not, require other jurisdictions to retain resources for their own use. This barrier can be diminished in two ways: (1) improving the modeling, simulation, and information sharing needed to ascertain the nature of risks we face; and (2) raising the nation's level of capability to a level that will make it easier for jurisdictions to lend resources amongst each other without harmfully diminishing their own public safety and security mission.

32. In leading national preparedness efforts in accordance with the Post-Katrina Act and HSPD-8, FEMA has significant responsibilities in integrating and synchronizing the efforts of numerous federal agencies. The federal government, however, has not yet reached a truly effective level of coordinated operation across the incident management spectrum.

- a. What do you foresee as the greatest challenges to fulfilling your responsibilities in leading interagency preparedness efforts?

I believe the greatest challenge remains the many competing priorities that FEMA partner agencies face in preparing to respond to disaster and emergencies. On the other hand, FEMA generally receives excellent cooperation from other Federal departments and agencies. FEMA nurtures this cooperation through exercises and regular meetings with key interagency response officials in venues such as the Emergency Support Function Leaders Group. The interconnecting roles and responsibilities of the various departments and agencies under the NRF are being better articulated today than ever before due to the progress that has been made in implementing the Integrated Planning System (IPS). IPS requires our partners to produce detailed operational plans to synchronize their efforts with FEMA's overall concept of operation plans. I intend to support these efforts and to make the process of leading interagency preparedness efforts the highest priority for NPD.

- b. In your view, should any authorities be modified to better enable FEMA to leverage the capabilities of other departments and agencies in preparing for and responding to disasters and catastrophic incidents?

My experience working with my colleagues on the gulf coast and in regional earthquake planning has shown me that while the Stafford act is appropriate for most disasters if implemented effectively, there may be additional resources and authorities required in response to a catastrophic disasters. If confirmed, I intend to work with Administration, DHS, and FEMA leadership to determine what, if any, authorities should be modified in this area.

33. The Federal Preparedness Report of January 2009 notes that the stage of evaluation and improvement is the least mature element of the National Preparedness Cycle. FEMA has

not fully developed its methods for collecting and analyzing data across the national preparedness system, and determining appropriate corrective actions.

- a. What will you do to ensure that this phase of the Preparedness Cycle is developed quickly and completely, incorporating inputs from and recommendations for agencies across the federal government as well as state and local governments?

If confirmed, I will ensure NPD undertakes a comprehensive effort to collect, synthesize, analyze and report on preparedness data from all available preparedness data sources. Through the Comprehensive Assessment System (CAS) working group we have collected planning, organizational, exercise, training, and equipment capabilities-based data from FEMA NPD, GPD, and Disaster Operations and are in the process of broadening this effort to incorporate preparedness data from across the Federal Interagency. We have obtained State and local preparedness data through the past State Preparedness Reports and will continue to collect this data for analysis and reporting through the SPR survey tool currently under development and being deployed this coming fall. We are combining six congressionally mandated reporting requirements under one common analytical framework to create the first National Preparedness Report.

- b. What obstacles do you see to the expeditious and comprehensive development of the evaluation and improvement phases, and what will you do to overcome these obstacles?

If confirmed, I will evaluate the internal processes that are necessary to gather, evaluate and analyze necessary data from federal partner agencies and look forward to consulting with this Committee on any recommendations I may have to improve the process.

34. Many, if not most, preparedness efforts require regional or even multi-state efforts: communications interoperability, security for regional and interstate transit systems, and evacuation planning are three obvious examples. If confirmed, what specific steps would you take to encourage regional and multi-state planning and preparedness?

Disasters and emergency do not respect political boundaries, and regional planning and preparedness is critical to building effective response systems. Our preparedness efforts must be outcome based, and encourage regional constructs of multiple states, cities, and counties. In my work in New Mexico, I have worked with all 54 States and territories to develop a nation wide interstate response system in EMAC, I have worked with my neighbors on the southwest border to integrate border security planning and operations, worked with those states and the six northern Mexican states and the Republic of Mexico to build a binominal response planning and response system, and the other states within FEMA region 6 to build a sheltering and evacuation plan for hurricanes on the Gulf coast. If confirmed, I will continue to encourage the development of multijurisdictional planning through work started in FEMA, and attempt to identify new areas where the support and encouragement of FEMA and its programs can help.

Planning

35. The Post-Katrina Act gave FEMA the authority to develop the National Planning Scenarios as a basis for incident management planning. The fifteen current scenarios, including natural and man-made disasters, have been developed based on those incidents of the greatest threat, vulnerability, and consequence, and are currently grouped into eight sets.

- a. Do you believe that the existing scenarios are the appropriate scenarios to serve as a basis for developing national preparedness, given the current threats that face the nation?

No. The scenarios are too limiting and too specialized to be useful in building a prepared nation. For example, the single most common and expensive disaster experienced in the US is flooding, a scenario not listed in the 15. Hazard and threat based scenarios can be useful for vetting planning assumptions, but in a human resource-short planning environment like the emergency management system, a flexible planning construct focusing on the commonalities of the response to different disaster types can be much more useful. I am aware that NPD enlisted the aid of the Homeland Security Institute to analyze how the portfolio of planning scenarios might be expanded and protocols for the characterization and inclusion of new scenarios.

- b. What process is in place at FEMA to look ahead in order to revise the scenarios so that new and emerging threats are considered in the planning process?

Several federal departments and offices, including the states, have an interest in the National Planning Scenarios. FEMA is currently beginning a process for analyzing the existing suite of national planning scenarios and coordinating with other departments and agencies to determine their goals, objectives, and purpose, which would drive any revision or refinement process. Any efforts taken to assess or revise the scenarios should be performed in accordance to a rigorous and transparent process that may be repeated for future updates. Also, the revision process should include participation from entities across many different homeland security missions and disciplines in order to capture all new and emerging threats.

36. This Committee has repeatedly identified interagency planning for catastrophic incidents – including, for example, a nuclear or bioterrorism event – as a critical gap in preparedness. According to a FEMA briefing to this Committee on the implementation of HSPD 8 Annex I, FEMA will develop a Concept Plan for each of the eight sets of National Planning Scenarios, and each of the relevant Federal departments and agencies will be responsible for developing detailed operations plans for their own roles in carrying out the Concept Plan. However, it is not clear how the departments' and agencies' operations plans will be evaluated. The Committee is concerned that without a singular official or agency with operational responsibilities charged with coordinating and evaluating these plans to ensure consistency and compatibility, it will be impossible to achieve a coordinated and integrated response to a catastrophic incident.

- a. What do you think would be the most effective process for ensuring integration of each of these department and agency plans?

Coordinated planning must be exactly that; coordinated. The establishment of distributed integrated planning still most likely requires centralized deconfliction and vetting, and unified exercising. I understand there is an initiative under way to identify the way in which the interagency integration will be conducted in this Administration, and if confirmed, I will work with the Administration to further this integration.

- b. Who do you believe should have the responsibility and authority to evaluate each of the plans and, if necessary, compel departments and agencies to redraft insufficient or overlapping plans? Are the sufficient authorities in place for this to occur effectively?

It is my understanding that the newly developed Integrated Planning System will provide a mechanism to share operations plans and assist Federal departments and agencies in ensuring the completeness of their plans. The best tool for evaluating plans and procedures – short of real-world events – is an exercise. I believe the National Exercise Program provides a forum for assessing the feasibility of operations plans. As the plans developed under IPS are approved and promulgated, they can be effectively tested through this program. If confirmed, I will ensure our exercise program provides a rigorous test of our plans and that corrective actions are closely and continuously monitored until completed.

- c. What do you think is the proper role for FEMA in the integrated planning system, particularly with regard to the operational plans, and would you make any changes to its current role?

I believe FEMA should maintain a central role in the strategic and operational planning environment. If confirmed, I will ensure that planning is done in such a way as to provide coordinated operational concepts that are synchronized with the planning assumptions used by State and local governments.

37. What lessons did you learn as the NEMA Representative to the committee overseeing revisions to FEMA's National Response Plan, now called the National Response Framework? How will you apply those lessons in coordinating FEMA's future efforts to revise the National Response Framework and other key preparedness documents with state and local emergency management officials?

The establishment of a nation-wide system of planning for the coordination of a response to a disaster or emergency is the centerpiece of preparedness. A framework of planning is essential for plans and response and recovery policies and procedures that interconnect. The most important thing in the development of such a framework or plan is collaboration with those who will implement and build the framework. The development

of a federal response plan, that is a plan for how the federal government will respond to an incident within its jurisdictional sphere or in support of a Governor can be done within the federal interagency with consultation of stakeholders to vet the concepts. A National framework for how all plans come together, and setting policy and concepts that lie with the Governors requires a level of collaborative planning we have not undertaken. If confirmed, I commit to working with the very diverse group of government officers and partners in the interagency and at all levels of government to build a true collaborative system for national, interstate planning and preparedness.

38. The Department of Defense (DoD) will play a critical role in responding to a catastrophic incident. This past year, the Commission on the National Guard and Reserves criticized DoD for not having fully adopted civil support as a primary mission, and as a result the nation is insufficiently prepared. However, the Commission attributed some of the fault to DHS for failing to inform the DoD of which capabilities it will be expected to provide in response to a catastrophe, in the form of requirements that can then be used to drive the programming and budgeting process.

- a. What role should the National Preparedness Directorate have in generating requirements for other departments and agencies based on the planning process for the National Planning Scenarios?

NPD should lead the consultative and collaborative efforts that create the required, and appropriate, strategic guidance statements, strategic plans, and concept plans (CONPLANS) for each National Planning Scenario. As these plans are developed, requirements will be generated that can be provided for resolution to all departments and agencies, including DoD. This consultation and collaboration will require, and therefore ensure, the full creative participation of DoD and all other relevant departments and agencies from the outset of the process.

- b. What will you do to better enable FEMA and the National Preparedness Directorate to fulfill this role?

The two constraining factors here are time and planners. The only means of generating what is required for the set number of scenarios in a set period of time is by having a sufficient number of qualified personnel. As I mentioned above, the prime imperative is therefore to develop, as swiftly as possible, the requisite number and caliber of emergency planners to manage these processes.

39. States and local governments have faced similar challenges in developing the necessary plans to respond to catastrophic incidents, as documented in DHS's *Nationwide Plan Review*. FEMA, in collaboration with the Office of the Assistant Secretary of Defense for Homeland Defense and the National Guard Bureau, has initiated a pilot project to provide assistance to state governments in developing plans for the National Planning Scenarios, synchronizing state plans with federal plans, and increasing the planning capacity at the state level. The program, "Task Force for Emergency Readiness" (TFER), is currently funding five state governments to hire planners with civil-military planning expertise at a total cost of \$1.5 million; the program is due for evaluation at the end of 2009.

- a. Are you familiar with the TFER pilot program? If so, what is your view of it?

In my roles with NEMA, the NGA-GHSAC, and the National Homeland Security Consortium, I have been briefed on the TFER pilot program and the intents. I am eager to see how the program progresses and to examine the results of the pilot's evaluation.

- b. If confirmed, will you commit to conducting a timely evaluation of the TFER pilot project to determine whether it is effective and can be expanded or whether there are modifications that can make it more effective?

If confirmed, I will direct the completion of an initial evaluation of the pilot prior to the end of the Fiscal Year. I would require the review to address progress to date, initial feedback from sites on its effectiveness, and the potential future direction of the program.

Exercises and Training

40. In addition to conducting deliberate planning, building the necessary capabilities, and training response personnel, preparing for a successful response to a disaster or a catastrophic incident requires rigorous exercising. Those exercises must involve all of the key players in the roles they would actually play in a response, and those players must receive timely feedback so that they may quickly learn and build upon the gaps. However, the Committee has identified numerous challenges to the National Exercise Program (NEP), which under the Post-Katrina Act, is to be managed by FEMA. Specifically, key agencies and personnel have not been involved in the most significant exercises, the federal exercise schedule has not been synchronized with state and local schedules to enable their participation, and lessons-learned reports have not been distributed to state and local governments in a timely manner, if at all.

- a. The Post-Katrina Act assigns the FEMA Administrator the authority to direct the NEP to realistically test the nation's response capabilities. What will be your goals and priorities in developing national level exercises?

If I am confirmed my goals are to continue to build upon the progress made on the National Exercise Program, and to ensure that every part of our national response is ready through real world scenarios, using the best technology available. Finally, these exercises should reflect the priorities of the administration and of the type of disasters we face as a nation on a continual basis. As we become better at working together through proper exercise planning, we become better prepared to respond and recover when the time comes.

Secretary Napolitano has expressed her intent to search for efficiencies, and I believe there are applications and innovative tools that can reduce our expenses in the design, development, conduct and evaluation of exercises while substantially improving learning retention and efficiency of delivery.

- b. However, some of the largest domestic disaster exercises have been conducted by DoD, but without significant DHS and FEMA participation. While DoD must necessarily exercise its own capabilities under its own authorities, such divergent programs render it impossible to simulate a realistic interagency response, and serve as a drain on state and local participation. What will you do to ensure better cross-government participation under the NEP?

My understanding is that there were several processes put in place under the Post-Katrina Emergency Management Reform Act to establish a national exercise program; and since 2007, many of the largest domestic disaster exercises have, in fact, been collaborations between DHS/FEMA and DoD. If confirmed, I will work to continue to build on that collaboration.

41. The after action report from Top Officials (TOPOFF) 4, conducted in October 2007, has not yet been released, and the after action report from TOPOFF 3, conducted in April 2005, was not released until December 2008. Similarly, two Tier II National Level Exercises were conducted in 2008, and after-action reports and plans for improvement have not been issued for these exercises. This failure to expeditiously analyze and learn from exercises severely undercuts the value of the exercises in their ability to improve national preparedness by identifying problems and implementing corrective actions. Furthermore, procedures have not been fully developed to track and implement corrective actions from exercises conducted under the National Exercise Program.

- a. What will you do to expedite the compilation, publication, and dissemination of after action reports from TOPOFF and other major exercises so that state and local governments, first responders, and other participants may learn from it and implement improvements?

As a state Director of Emergency Management, I am a strong believer in learning from past experiences, both exercise and real-world events, through the after-action process, and the identification of lessons learned. I am aware of recommendations from recent GAO, OIG, and CRS reports that identified challenges in disseminating after action materials, to include corrective actions and lessons learned, in a timely manner.

I have seen in my experience with the development of after-action reports, the concern of partners in inaccurate analysis of crisis decision making and misinterpretation of actions. This can lead to a lengthy writing and review process. If confirmed, I will work to speed up this process and issue more timely after actions reports, while respecting the needs of partner agencies and governments, and ensuring an accurate and useful product.

- b. What will you do to ensure that policies and procedures are fully developed to track and implement corrective actions? What, in your understanding, are the most

significant obstacles, both within FEMA and across federal agencies, that must be overcome in doing so?

As previously stated, if confirmed, I will call for the development of a comprehensive lessons-learned and corrective action process for both exercises and real world incidents. A full review of the current policies and procedures regarding the development, assignment, and tracking of corrective actions, not only within FEMA, but across federal agencies will be an essential component of this initiative.

Several significant obstacles currently exist when attempting to implement a single corrective action process for FEMA as well as other federal agencies interfacing with FEMA during multi-agency exercises or real world incidents. FEMA currently has two similar but distinct lessons-learned and corrective action programs actively used within the agency. I am aware of the work that is currently underway to consolidate these two programs and believe that establishing a single process within FEMA is necessary before engaging the rest of our federal partners.

In addition, a number of federal agencies, such as DoD, already have established internal corrective action policies and procedures in place. It will be essential for FEMA to leverage, not replace, these existing programs and establish common processes and procedures for interagency interaction. This will not only ensure a single approach is taken regarding lessons learned and corrective action but that the appropriate level of stakeholder collaboration is achieved.

42. State and local governments have been challenged in funding their participation in exercises under the NEP, and as a result, major exercises have not effectively simulated the complexity of federal/state/local coordination. For example, the simulation of an urban chemical spill as part of National Level Exercise 2-08 did not include the local first responders who would play the primary roles of incident management and initial response. The lack of participation was largely due to insufficient local funds and the fact that the federal exercise cycle did not align with the state and local cycles. As a result, the opportunity to exercise key functions of coordination and management was lost. Will you propose any changes to current policy and practice to enable more effective and realistic state and local participation in major exercises?

If confirmed, I will evaluate the National Exercise Program to ensure state and local participation is adequately represented in major exercises; and the lead time for the exercises are well enough in advance to allow states to adequately budget for them.

43. The Post-Katrina Act requires that the NEP include exercises that stress the national preparedness system. However, that requirement does not appear to be addressed in the NEP Implementation Plan, nor do recent exercises, such as TOPOFF 4, appear to have been designed at such a scale.
- a. What will you do as Administrator to fulfill this statutory requirement and to realistically challenge the preparedness of all levels of government for catastrophic

scenarios, while balancing this requirement with the need to continue regular operations of the government and preserve public safety?

I believe it is possible, where exercise objectives are carefully chosen to validate planning assumptions, to conduct effective and useful exercises that adequately stress the national system. Exercises should not be simple tests, where a series of events are simulated to see how people respond, and find a breaking point. They should be conducted to both examine the assumptions of, and applicability of plans, and the capability of involved personnel. Exercises with prescribed injects and actions are nothing more than theater, and do not support the national security or ability to respond to disasters. A comprehensive national exercise system, that builds on the thousands of exercises and drills held every day, culminating in careful and thoughtful national level exercises can be help that will appropriately test the systems without inordinately impacting day to day public safety.

- b. In your estimation, what is the appropriate balance between preparing for and exercising scenarios based on relatively low probability terrorist events and scenarios based on relatively high probability natural disasters, such as weather-related incidents, earthquakes, or fires?

As you are well aware we face many threats, both natural disasters that may have a natural environmental cycle and terrorist threats that have no natural cycle. We must as a nation ready for all hazards. I believe in exercising capabilities as opposed to scenarios, as was the common practice pre-Katrina. The scenario is a useful tool to help meet exercise objectives, which should be based on capabilities and/or plans to be evaluated, but the scenario should not be the driving force behind the exercise. By focusing on exercising capabilities, we ensure that those types of functions which are common to most scenarios are exercised on a regular basis.

Mass Care and Shelter, for example, is a capability that applies to both man made and natural hazards. We should be teaching our exercise constituency that a hurricane may be their most likely hazard, but an exercise dealing with a terrorist attack using weapons of mass destruction may actually afford the opportunity to exercise a greater number of capabilities and coordination that may be less well understood. Likewise, a natural disaster-focused exercise will help participants validate many capabilities that they would have to employ during a terrorist event.

Although many capabilities are cross-cutting, natural disasters certainly do pose unique challenges not found in terrorist events, and vice versa. The advantage of the new National Exercise Program is that, whereas the Top Officials exercise series mandated the use of Weapons of Mass Destruction terrorist scenarios, the NEP takes an all-hazards approach to exercises. If confirmed I intend to ensure that the NEP does not stray from this directive.

Medical Preparedness

44. Please provide your assessment of our nation's preparedness for a biological catastrophe, such as a major act of biological terrorism or pandemic influenza? If confirmed, how will you improve coordination efforts between FEMA and the Department of Health and Human Services (HHS) in preparation for such an event?

HHS and CDC have lead significant gains in the nation's capacity to detect, mitigate the effects of and respond to a catastrophic, biological incident. Our syndromic surveillance has improved, with faster data transfer and coordination between all levels of government. Hospitals and jurisdictions nationwide have undertaken training and exercises relevant to pandemic flu response. The Strategic National Stockpile program has been established along with increasingly effective methods of prophylaxis distribution and dispersal. FEMA's GAP program coordinates with HHS to obtain data on a regular basis relevant to operational response capacity. However, as with other areas of preparedness, our capacity to define and measure preparedness in the biological arena is only now beginning to mature. FEMA/NPD must partner directly with HHS and the Centers for Disease Control and Prevention (CDC) to help refine the relevant measures, and more importantly, gain a clearer picture of what data is available and how we can cooperate to analyze and asses that data to better understand preparedness and allocate resources more efficiently.

45. A pilot project is currently underway in Minneapolis, Minnesota examining the feasibility of using U.S. Postal Service (USPS) workers to distribute medical countermeasures to populations experiencing a bioterrorist attack or pandemic outbreak. To ensure the safety of USPS workers and encourage their willingness to undertake a potentially hazardous role in the response, volunteer carriers in this program are being outfitted with personal medkits for themselves and their families. The local law enforcement officers who will ride along with USPS carriers to provide security have no such safety net. Another recently completed pilot in St. Louis, Missouri found that medkits provided to first responders were appropriately maintained and were a desired capability for those responders who participated in the program.

- a. How is DHS working with HHS and USPS to ensure that medical countermeasures are quickly distributed to an affected population?

I have not yet been briefed by the DHS Office of Health Affairs (OHA) on this issue. If confirmed, I agree to work closely with OHA and other agency partners to move this issue forward.

- b. What role does DHS have in ensuring that first responders are properly outfitted with pre-stockpiled medical countermeasures so that they are protected while responding to biological threats?

If confirmed, I will work with DHS and other agency partners on this issue.

- c. On September 23, 2008, DHS made a determination that there was a potential for a domestic emergency concerning an anthrax attack that was used as the basis for

issuing the Emergency Use Authorization (EUA) to allow USPS workers to possess personal medkits. In that determination, DHS pointed to the need to protect the entire delivery chain, including first responder and law enforcement in addition to USPS workers. Is DHS currently working with its interagency partners to obtain an EUA for personal medkits for first responders?

Based upon the briefings I have received to date, I am not familiar with this issue. If confirmed, I agree to work with the appropriate offices in DHS to further study this issue.

Grants

46. The Post-Katrina Act required the merger of significant parts of what had been DHS's Preparedness Directorate with the response and recovery capabilities then existing in FEMA. Coincident with the reorganization required by the Post-Katrina Act, DHS also chose to create two new and separate offices in the new FEMA – the Grant Programs Directorate (GPD) and the National Preparedness Directorate – dividing between the two offices a number of responsibilities that had previously been housed together in the Office of Grants and Training in the Preparedness Directorate. The responsibilities of the two new directorates, however, remain closely related. The grant programs administered by FEMA, for example, allow state and local governments to build capabilities that collectively enhance our national preparedness. These grant programs also enable recipients to develop target capabilities and assist governments build successful planning, training, exercise and evaluation programs – all critical elements of preparedness.

Please explain your understanding of the respective roles of GPD and National Preparedness Directorate and how they relate to one another. If confirmed, what will you do to ensure effective coordination between the two directorates?

My understanding is that in the development of FEMA following PKEMRA, a single directorate responsible for all grants was desired by FEMA leadership. Close integration between the two directorates is required to achieve a single, unified goal, enhance national preparedness, and provide a system that understands the needs of the community and builds upon the base of local capacity. If confirmed, I will examine this relationship closely and hope to work with the Administrator and the Secretary to ensure the best system possible.

47. Our national preparedness depends not only on the preparedness of the federal government, but also, perhaps more importantly, on the preparedness of states and localities throughout the nation. What do you view as FEMA's role in promoting state, local and tribal preparedness, so that there are no weak links in our national preparedness for terrorism and natural disasters? How can and should FEMA use the various homeland security grant programs it administers to foster national preparedness?

The responsibilities to prevent, protect against, respond to, mitigate against, or recover from an incident will almost always be the primary responsibility of states, local

governments, private sector, and individual citizens. A culture of preparedness means we share a belief that citizens, local and state governments, and the private sector are equally key to our Nation's preparedness. The Federal government provides capacity to share knowledge, expertise, and specialized capabilities in direct support of their preparedness, prevention, protection, response, or recovery needs.

FEMA provides guidance on preparedness programs and procedures with technical, financial, and other forms of assistance as needed. In certain situations, such as those affecting more than one state, standards and incident command doctrine, promulgated by FEMA help, unify regional and national readiness (e.g., National Incident Management System). FEMA's conduct and/or support of exercises, evaluations and assessments helps to ascertain levels of preparedness to identify gaps, lessons learned, and best practices. Their identification informs federal support to meet their unmet needs.

FEMA's grant programs have been an effective means to promote national preparedness goals. The grants empower State and local governments to use these grants to meet urgent needs and adopt national doctrine or procedures (e.g., Homeland Security Exercise Evaluation Program).

48. The Post-Katrina Act gave FEMA the responsibility for administering all DHS grants to state and local governments. A single geographic area may receive funds from many distinct grants awarded by FEMA – the State Homeland Security Grant Program, the Urban Area Security Initiative, port security grants, transit security grants, interoperable communications grants, Emergency Management Performance Grants and more. To be most effective, those grants need to be allocated and used in a coordinated fashion, to work together to promote preparedness in that area.

- a. What role, if any, do you believe that National Preparedness Directorate can play in ensuring that each of the Department's grants in a single geographic area work synergistically to promote preparedness?

The State Administrative Agency (SAA) and UASI Urban Area Work Group (UAWG) rightly hold the greatest responsibility for ensuring the most effective and coordinated allocation of grant funds, given that they have the most thorough knowledge and understanding of the both the needs, and players, and ramifications involved. That said, NPD can be of the greatest assistance by working closely with the Grant Programs Directorate (GPD) to ensure that grant funds can systematically meet specific gaps that are found through the Comprehensive Assessment System (CAS). The best means of assuring the most effective utilization of DHS preparedness grant funds is through close collaboration between NPD and the Grant Programs Directorate.

- b. What specific additional measures, if any, do you believe should be undertaken beyond what DHS is currently doing in this regard?

First and foremost, FEMA and the Department of Health and Human Services (HHS) should agree upon the means, beginning in FY10, of making their respective grant

programs fully complementary and mutually supportive, ensuring thereby that states and major metropolitan areas are not having to expend time and effort in overlapping or contradictory plans, efforts, requirements, and reports.

Secondly, each FEMA Region should create and maintain a compendium of all Federal grant programs, preparedness projects, and planning efforts that are at work in their geographical areas. These can then be used by states and, perhaps more importantly, by other Federal partners, to help chart the best means of applying Federal support of whatever means to the gaps addressed through the Comprehensive Assessment System (CAS).

49. The Post-Katrina Act, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, requires that the FEMA Administrator submit to Congress each year a Federal Preparedness Report that includes an assessment of how DHS grants support the national preparedness system and, more specifically, how those grants have contributed to the progress of state, local, and tribal governments in meeting target capabilities and to the reduction of the national risk from natural disasters, acts of terrorism, and other man-made disasters.

- a. What additional systems or measures do you believe FEMA needs to develop or implement to perform the required assessments in a meaningful way?

A comprehensive assessment of all mission, all-hazard preparedness requires both continuous monitoring and management of key preparedness indicators, as well as capability-based assessments. If confirmed, I will work with senior leadership in FEMA, the Department and among our Federal, State and local counterparts to develop a predictive management tool for mission preparedness that draws on a fully integrated network of assessment applications in FEMA and among partner agencies and departments.

- b. If confirmed, what specific steps will you take to meet the statutory requirements and improve the current preparedness assessments?

As I understand the issue from recent briefings, the Evaluations and Assessments Program is developing the first annual National Preparedness Report (NPR). It will be a first of its kind analytical capstone designed to fulfill six Congressionally mandated preparedness reporting requirements while providing a heightened level of preparedness data evaluation. NPR will fulfill the Federal Preparedness Report (PKEMRA 652(a)), Catastrophic Resource Report (PKEMRA 652(b)), Emergency Support Function (ESF) Report (PL 110-161 SR 110/84, pg. 92), and Emergency Medical Services (EMS) Report (EMS HR 110-181, pg. 105); the Territorial Preparedness Report (JES to H.R. 2638, Page 621, 2008); and, include summation of the 2009 State Preparedness Reports (PKEMRA 652 (c)) submitted annually by the States to FEMA. The consolidation of the five subordinate reports into one capstone document is intended to allow integration and much improved analysis of the disparate information contained in those reports and to decrease the reporting burden on Federal, State and Local respondents. FEMA, working with our State

partners, also needs to improve the accuracy of the data collected. Often data gaps exist when States fail to report. In other cases, inadequate guidance from FEMA hinders the quantitative nature of data received. Where data collection tools are cumbersome or designed without sufficient State feedback, user burden is increased. FEMA, working with our State partners, needs to improve how data is collected, including the ease of use of data collection tools.

50. How do you believe data and assessments on national, state, local and tribal preparedness, including identification of specific short-term and long-term gaps in preparedness, should inform the development of grant guidance and the allocation of grants? If confirmed, how will you work with GPD to ensure that preparedness assessments are appropriately considered in grant guidance and allocation?

The evaluation and assessment of preparedness has to work in direct concert with the allocation of limited resources. Successful evaluation and assessment must also become recognized as a vital activity in which State and local partners view themselves as major stakeholders – not an additional burden. Evaluations and assessments have to provide reporting products and capabilities directly to State and local partners, as well as GPD, that allow all stakeholders to understand current capability levels, and how those capability levels relate to our national priorities, risks and vulnerabilities. As a first step, we currently have integrated teams with both GPD and NPD participating in the development of the Comprehensive Assessment System, the SPR Survey Tool, and the C2C efforts. These efforts should be continued so that as preparedness is measured and gaps are identified and prioritized, informed analysis will drive the allocation of grant investments to address these gaps.

51. What are some of the key metrics you believe would be most useful in assessing State and National preparedness?

Preparedness metrics are needed for all capabilities and they arise from many different sources depending upon the mission area and discipline. It is the responsibility for NPD to capture those metrics and standards and incorporate them within its broad national preparedness policies and guidance to effectively ascertain the nation's collective level of preparedness. For example, metrics on communications are derived from the DHS Science and Technology Directorate, the Office of Emergency Communications, the FEMA Disaster Operations Directorate, and various standard development organizations. Similarly, incident management standards most often originate from the FEMA Incident Management Systems Integration Office and Standard Development Organizations. The compilation of these metrics should be defined within the Target Capabilities List to be used by the assessment programs, which needs to be updated to reflect the continuous changes in standards and practices.

Besides planning, organizational, exercise, training, and equipment data, the Target Capabilities List provides the framework and the measures for assessing national preparedness. The work on the Target Capabilities List needs to be further accelerated, refined, and enhanced. Of particular interest are metrics related to special needs

populations as well as data on Federal investments towards State and National Preparedness. In addition, we must improve the volume and quality of data we gain from exercise after-action reports, ensuring that capability measures are utilized during and after exercises and that we are able to get exercise data from a significantly larger percentage of all the valuable exercises occurring nationwide, at all levels of government, at this time.

52. As New Mexico Homeland Security and Emergency Management Director, did you employ performance metrics to assess the State's preparedness? If so, please provide some examples of the metrics you used and how they were used to enhance preparedness.

Yes, as the Director of Homeland Security and Emergency Management for the State of New Mexico, I worked with the New Mexico State Legislature and Department of Finance and Administration to develop and implement performance and accountability metrics. These included the number of updated emergency operations plans at the local government level and the number of exercises conducted on an annual basis. I also adopted, as a performance measure increases in compliance with the Emergency Management Accreditation Program (EMAP) Standard. Over the course of my tenure with the agency, using increasing compliance with the standard as a measurement, we advanced our preparedness by developing the appropriate plans and capabilities, moving from a baseline compliance of approximately 47% in 2003 to 99% compliance in 2008 achieving provisional accreditation, with 100% compliance and full accreditation expected in 2009.

53. In your former position as Director of the Department of Homeland Security and Emergency Management for the State of New Mexico, what role, if any, did you play in administering federal homeland security grants that the state received?

In my role as the Director of Homeland Security and Emergency Management, I served as the State Administrative Agent for New Mexico for all homeland security and emergency management grants. I was responsible for leading the effort to identify the preparedness and response capacity needs of New Mexico and recommending to the governor the distribution of resources to sub grantees. It was my responsibility to establish the strategic goals of preparedness and response for New Mexico, and the manner in which New Mexico was to achieve the federal requirements and work toward the National Preparedness Goal, become NIMS compliant, and most importantly, protect and serve the people of New Mexico.

- a. Based on your experience, how could DHS better assist grant recipients in ensuring that grant funds are used most effectively to improve preparedness?

My experience is that grantees throughout the country are committed to building the national preparedness. I believe that given thoughtful, realistic and pragmatic goals, grantees will embrace and support them, and work hard to achieve them. A first useful step would be a careful analysis of the goal, the actual threat environment, and the manner in which use of grants funds can be more useful and helpful to grantees in

dealing with what they respond to on a frequent basis, and also prepare for the lower probability but higher consequence incident they may not prioritize on their own given limited resources. If confirmed, I will work with grantees in the states and UASIs as well as sub grantees to identify consensus means to achieve their goals while supporting the national goal, and in the process increasing preparedness everywhere.

- b. Based on your experience, how can DHS improve the grant guidance that it issues?

Grant guidance must be matched to a mean to achieve a central preparedness goal, close a specific gap, and encourage priorities while supporting a grantees' need to build their capacity to deal with local priorities. Shared goals are more useful in developing engaged work toward solutions, and a collaboratively developed preparedness goal will build buy-in around the means to achieve that goal. Grant guidance that helps achieve national priorities while realistically supporting local capacity, and developed with a deep understanding of the profession would be a strong first step. If confirmed, I commit to working with stakeholders to identify ways in which the guidance can be enhanced to support their needs while ensuring accountability for federal funds and work towards national objectives as well.

54. Some recipients of DHS grants have raised concerns that, when they participate in NEP exercises, such as TOPOFF, they are required to use their DHS grant funds in support of these exercises, even if the State originally obtained those grant funds to support other, local programs. If confirmed, how would you ensure that there is more effective coordination in this area between those who award the grants and those who administer preparedness training and exercises?

Clearly, preparedness grant funds are well suited to facilitate training and exercise programs. In years past, the planning process and determination of venues for the equivalent of National Level Exercises did not afford state and local officials the ability to forecast and budget for exercises. Grant dollars were often obligated prior to exercise concepts and locations were known. The National Exercise Program (NEP) Five-Year Schedule will greatly improve the predictability and planning process and give state and local officials the time needed to budget for exercises, and tailor their grant requests as well. As discussed above (in question 42), National Level Exercise 2011 appears to be a good indicator that this process is beginning to work. State participants for this exercise have already been identified, and their planners have been actively engaged and helping to build the exercise from the bottom up, with adequate time to address budget issues well in advance.

Regional Partnering

55. The Post-Katrina Act formally established the ten FEMA regional offices and gave significant new responsibilities to the Regional Administrators. For example, they must have regional capabilities for a national catastrophic response system, develop regional plans that support the NRP, and maintain and operate a regional response coordination

center. How do you intend to ensure that regional offices meet their national preparedness responsibilities?

I understand that in February 2008, FEMA released the Regional-National Preparedness Concept of Operations (CONOPS), which outlined the need for increased Regional capabilities and a more comprehensive Regional network and established the new role of Federal Preparedness Coordinator (FPC). Recently, the Secretary and Acting FEMA Administrator have both emphasized a need for enhanced integration with state and local government, and the FEMA Regions are well poised to assist with this integration.

While the transition of programmatic oversight and management to the Regions represents a shift in the culture at FEMA, this transformation is a necessary step. The overarching goal is to establish a mechanism for joint planning and implementation of preparedness programs that facilitates resource and program prioritization as a joint HQ/Regional effort. If confirmed, I intend to advance these goals by engaging and supporting Regional leadership in its efforts to address improved preparedness at the regional, state and local levels.

56. The National Preparedness Guidelines prioritized regional coordination. Based on your experience in New Mexico, what do you see as the major challenges in regional partnering?

Disasters and emergency do not respect political boundaries, and regional planning and preparedness is critical to building effective response systems. In my work in New Mexico, I have worked with all 50 states and the four territories to develop a nation wide interstate response system in EMAC; I have worked regionally with my neighbors on the southwest border to integrate border security planning and operations; I worked with those states and the six northern Mexican states and the Republic of Mexico to build a binational response planning and response system, and with the other states within FEMA region 6 to build a sheltering and evacuation plan for hurricanes on the Gulf coast.

In my experience, the single most difficult challenge in regional planning is the issue of unity of command; in a complex multi government construct, the lack of single coordinators with the legal and constitutional authority to make decisions poses the most complicated task. Similarly, fiscal issues pose complicated an often insurmountable complications. A frequent obstacle to regional planning and capacity building is the inability of FEMA grant systems to easily take these plans into account, and reward jurisdiction's efforts. These issues, however, are frequently overcome, and regional planning is, thankfully, becoming more commonplace. If confirmed, I hope to be able to identify a way to reward these activities, and encourage new ones through simpler application and reporting.

National Preparedness Capacity

57. National Preparedness is a new entity integrating existing organizations but with a broad mandate regarding the development, implementation, and assessment of the National Preparedness System.

- a. How effectively has FEMA performed in its responsibility to lead federal efforts to prepare for the next catastrophic incident? What additional steps need to be taken to ensure an effective federal response?

FEMA has made great progress in coordinating federal efforts. However, like its responsibilities to coordinate a response, the primary responsibilities for preparedness exist throughout the many federal departments and agencies based upon their core mission expertise. Improvements are needed to coordinate these disparate activities and synchronize their preparedness programs. In addition, while great strides have been taken in planning guidance and processes, improvements are needed in planning capacity.

- b. What would be your steps in assessing the current state of national preparedness, and in measuring progress of the development of the national preparedness system?

The first steps to assessing the capacity of national preparedness would be the evaluation of measures and metrics that should be used during that assessment. I am interested in understanding the source and quality of those metrics, and whether they adequately represent the realistic needs of the Nation, as well as state and local governments.

We have to continue to break down the barriers between FEMA, its DHS partners, the additional federal stakeholders, as well as state and local governments, to ensure effective access to preparedness data and information that will allow us to get a clearer picture of how prepared we really are. We have to send a clear message that resources alone are not preparedness, and that the effective and precise measurement of preparedness is the first step toward the efficient allocation of resources based on risk and vulnerability.

- c. What do you see as the short-term and long-term challenges in creating and sustaining the organization?

Short-term challenges to the NPD organization include its continued integration – both programmatically and organizationally – with the rest of FEMA and the Regions. Long-term challenges include the integration of national preparedness programs and policies across other federal departments and agencies and support to the family of new and modernized plans developed under the Integrated Planning System.

- d. What other initiatives might be planned to strengthen the management of DHS's National Preparedness System?

Jointly assessing and building long-term strategic national preparedness capabilities in conjunction with short-term operational or tactical federal readiness requirements. This combination of readiness perspectives should help further integrate NPD with the operational components of FEMA and DHS.

58. The Federal Preparedness Report, dated January 13, 2009, found that more than two-thirds of federal departments and agencies have not reported their compliance with NIMS. What will you do to ensure agencies and departments that have not yet reported do so to ensure the federal government is in compliance with NIMS?

A common system of responding to emergencies and disasters, as well as the other tools of NIMS, such as training and publications management, are vital to an integrated nation-wide response network. As a responder in New Mexico, fighting large wildfires or running multiday search and rescue operations in the mountains, it was the common operating system and language of the old NIMS that allowed for successful conclusion. I understand that through 2006 a federal level working group was established to identify a manner in which federal agencies could become NIMS-compliant, and metrics to track that compliance. This newer system should provide better data on the degree to which the federal departments and agencies are integrating NIMS into their systems and becoming compliant. But tracking is not enough, and new strategies may need to be developed to ensure not just increased compliance with training and planning metrics, but actual use. The state and local community is far ahead of the federal government in their adoption and embrace of NIMS, and the lag in the federal government must be corrected. If confirmed, I will personally engage on this matter and will work closely to examine the compliance of the entire community, identify new strategies for engagement and to encourage adoption, and commit to provide regular reports to the Secretary, Administrator, and Congress.

59. What role do you believe the private sector needs to play in emergency management? How can the private sector become more resilient and prepared? How can the private sector assist federal, state, and local governments in emergency management? And how can the National Preparedness Directorate improve its engagement with the private sector to ensure it is truly integrated in national preparedness efforts?

The private sector is critical to all emergency management efforts, from prevention, through response, recovery and mitigation, and in all aspects of preparedness. Just as the overwhelming majority of field-level responders work for state and local government throughout the nation, the private sector has the facilities, material, stock, transportation infrastructure, and equipment necessary to respond to and recover from disasters. The private sector owns and runs the facilities that keep the lights on and the furnaces working, and they are the engine that drives the economy. Without an integrated private sector, the best plans are incomplete, and the best response will fail. The primary difficulty in engaging the private sector is, however, working with representatives of such a diverse and heterogeneous group. I believe the Department's Infrastructure Protection division has done a good job, through its sector specific coordinating committees of

building collaborative representative groups across this diversity. If confirmed, I will work closely with these groups, as well as other representative organization through other means, such as NEMA's private sector committee, and the National Homeland Security Consortium, to draw the most cross-cutting and wide involvement possible.

Citizen Preparedness

60. The Commission on Prevention of Weapons of Mass Destruction and Proliferation and Terrorism found that the federal government has not sufficiently engaged the citizens of the United States in improving preparedness at the individual and community level for a Weapons of Mass Destruction attack. The Commission's report, *World at Risk*, states, "Citizens must be educated about what they should expect from their government in such a crisis – and what government expects from them in the form of advance preparation and responsible action." Similarly, a report by the Center for American Progress and Third Way in advance of the Presidential transition stated, "The new president should fundamentally change the way that federal agencies deal with the public on homeland security – to be clearer, to encourage citizens to be better prepared and to take prudent steps to mitigate the impact of any disaster and enable the country to recover effectively and rapidly."

The Committee agrees that the American people are insufficiently prepared to respond to natural disasters and terrorist attacks, and that although individual preparedness is ultimately a personal responsibility, FEMA should do more, through State and local governments, to ensure they are informed. What do you believe are the essential steps that FEMA should take to enhance its efforts at improve preparedness at the individual level? For example, should the existing programs CERT and Citizen Corps be strengthened, or should additional programs be developed? Will you make specific recommendations for changes?

Building on historic approaches to citizen preparedness, the Citizen Corps strategy is based on the following tenets: government must collaborate with civic leaders; local implementation is essential; and national support must include consistent policy and guidance, tools and resources adaptable for local use, and building awareness through a national voice.

To achieve this, FEMA works with state and local partners to establish effective Citizen Corps Councils at the local level to foster a collaborative process between local government and civic leaders from all sectors to develop goals and strategies for community resilience tailored to specific community vulnerabilities and population.

To improve preparedness at the individual level, we should provide additional tools to communities to tailor outreach materials to include local information on likely threats, specific preparedness measures for those threats, and community specific information on community plans and protocols, to include alerts and warning systems, community evacuation and shelter plans, school and workplace plans, and how to get timely and

accurate information during an event. We also should increase training, drills, and exercises for the general public and nongovernment organizations, to include better integration of the public in government-sponsored community exercises. And we should strengthen the relationships between emergency services providers and the public and improve the public's understanding that emergency preparedness and response is a shared responsibility.

I believe that the Citizen Corps model is effective, the nationwide network of councils and partners is a valuable asset with greater potential, and the community-based model should be strengthened. By building the interactive structure at the local level with participation from government and civic leaders, the relationships and interactive dialogue provides a more comprehensive approach to community resilience and provides flexibility for the community to adapt and change to evolving external factors – ranging from natural hazards, to crime, to manmade threats, to economic downturns.

The Community Emergency Response Team (CERT) Program is an exceptionally well tested and successful program. CERT builds on the common-sense acknowledgment that community members respond to assist others who need help during emergencies. Having grown from 244 local programs in 2002 to 3,221 today, an estimated 600,000 individuals have taken the CERT basic training. The success of CERT is rooted in the clarity of the training, the hands-on practical delivery, and the connection to local emergency services, most commonly emergency management and the fire service. Building on the successful basic training, there are several additional training materials in development including Animal Response, CERT Emergency Communications, Traffic and Crowd Management, and CERT Team Leadership.

A prepared citizenry forms the backbone of homeland security and it is only through open collaboration with the public that we can truly become a more secure nation and meet the challenges of the new century.

61. What are your priorities for the National Preparedness Directorate's Community Preparedness Division?

Establishing citizen and community preparedness and resiliency is and should continue to be a priority. If confirmed, I will work to strengthen internal coordination throughout FEMA to ensure that we provide tools and resources from across the Agency more effectively. Priorities for the Community Preparedness Division should be to:

- *Serve as the integrating organizational entity for FEMA tools and resources to support community preparedness;*
- *Work with current national partners and expand our partnerships to enhance the tools and resources available to local communities;*
- *Expand education, training, and exercises for the public and make it more accessible to all, to include preparedness education and CERT;*

- Promote volunteer service opportunities to support community safety and resilience;
- Conduct research on individual, business, and community preparedness and analyze / synthesize the research of others;
- Work with the FEMA regions to support our state, tribal, and local partners; and
- Support open communications with community leaders and with the public.

Recovery

62. The recovery from Hurricanes Katrina, Rita, and other large disasters have demonstrated that all levels of government need to do a better job preparing to recovery from a disaster.

- a. What is your vision of the role of the National Preparedness Directorate in preparedness for recovery?

If confirmed, I will ensure that the National Preparedness Directorate is fully engaged in the development of a national disaster recovery effort. Ultimately, this would include using our preparedness programs, services and activities to develop tools and other resources that aid in the development of recovery capabilities and to provide support across all levels of government and to our private and nonprofit sector partners.

- b. What role should National Preparedness Directorate play in making sure FEMA is prepared to execute its recovery responsibilities?

The Preparedness Directorate can be an advocate for disaster recovery efforts and use its programs, services and activities to contribute to the preparatory actions that can be taken well before a disaster occurs. This includes working across the FEMA directorates and regions and with stakeholders to build national recovery-related capabilities, develop targeted training, conduct exercises, and evaluate progress to identify best practices and shortcomings.

- c. What are your priorities for the National Preparedness Directorate to help ensure that FEMA is prepared to execute its recovery responsibilities?

If confirmed, I will assist the Administrator in establishing the vision, goals, and means to improve recovery at all levels, across all types of disasters, as well as provide a detailed implementation plan with measurable goals to track national progress. I believe this requires a comprehensive effort led by the federal government, in partnership with local and state governments, the private sector, and non-governmental organizations. The Directorate has a key role in enabling stakeholders to take the critical steps over the coming months and years to address long standing challenges and build the necessary capabilities.

- d. What role should National Preparedness Directorate play in making sure the state, local, and tribal governments are prepared to execute recovery from a disaster?

I know the importance of federal, state, and local partnerships, and the need to engage the private and nonprofit sectors in preparedness efforts for all missions and all hazards. If confirmed as Deputy Administrator for Preparedness, I will assist the Administrator in continuous engagement with our partners early in and throughout the development of a national recovery effort and ensure that they have the opportunity to shape this effort to provide tangible results. I believe a systematic needs assessment with practitioners for this complex undertaking will help inform the range of tools and resources that need to be developed.

If confirmed, I will support the Administrator and work closely with our stakeholders to examine some of the long standing challenges to disaster recovery, such as:

- *Setting realistic expectations for long term rebuilding and reconstruction.*
 - *Acknowledging that recovery is more than just rebuilding physical infrastructure and must help restore that social services and networks that can revitalize neighborhoods.*
 - *Improving the clarity in roles and responsibilities among all levels of government, the nonprofit and private sectors, and individuals*
 - *Establishing guiding principles to manage the complexities of recovery and help reduce disaster-related costs and repetitive losses.*
 - *Ensuring affected communities are fully supported and at the forefront of recovery planning and decision making since they must live with the long term consequences.*
 - *Establishing common structures and approaches to support long term recovery and rebuilding.*
 - *Seeking efficiencies to compensate for limited resources and rising recovery costs.*
 - *Improving recovery planning and its integration and synchronization with operational planning.*
- e. What are your priorities for the National Preparedness Directorate to help ensure that state, local, and tribal governments are better prepared to execute recovery from a disaster?

Preparedness is not an end to itself, and nor should it be limited to preparing to respond to a disaster or emergency. Preparedness is an ethos that spans all phases of emergency management, all domains of homeland security, and all levels of government. Recovery should be no different. Effective and pragmatic planning for short, mid, and long term recovery is as critical as response planning. And the knowledge and skills needed in recovery require just as much training, education, and exercising as any emergency response skill. If confirmed, I will examine the recovery preparedness activities throughout the directorates and work to build an effective series of preparedness activities and measures to ensure effective and efficient recovery capabilities throughout the department and at all levels of government.

- f. What ideas do you have for incentives that could be used to encourage state, local, and tribal governments to be better prepared to execute recovery from a disaster?

One important incentive, in my experience, is to formally invite participation of local, tribal and state governments early and throughout the strategy and policy development process for disaster recovery. This will enable us to better understand the complexities of recovery and the challenges and ensure programs, services and activities meet national objectives and are suited to the needs of state and local governments, the private sector, and nongovernmental partners. If confirmed, I will work with the Administrator, the Secretary, our stakeholders and Congress in the identification and development of appropriate incentives to foster effective and efficient recovery.

63. Housing disaster survivors continues to be a difficult task. Do you believe the National Preparedness Directorate should play a role in getting FEMA and state, local, and tribal governments better prepared for housing disaster survivors? If so, what ideas do you have for steps the National Preparedness Directorate could take in this area?

Addressing the challenges posed by disasters' impact on housing has been and will continue to be an important priority for the agency. If confirmed, I will work closely with the Administrator, our Disaster Assistance Directorate, and the Disaster Housing Task Force and to provide the National Preparedness Directorate's full support in identifying key actions we can take to support the new National Disaster Housing Strategy. FEMA has appropriately placed a renewed emphasis on disaster housing and, if confirmed, I will identify ways to improve disaster housing preparedness for local, tribal, and state governments – including through the development of plans, exercises, and required training.

V. Relations with Congress

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

Yes.

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

Yes.

66. Under what circumstances, if any, do you believe that it is appropriate for the Department of Homeland Security to withhold information from Congress when Congress is exercising its legislative or oversight functions?

I believe that it is the duty and responsibility of all representatives of the Agency to respond in full and in a timely manner to all requests for information from Congress when exercising its legislative and oversight functions. If confirmed, I will commit to responding in such a manner to all requests from Congress.

VI. Assistance

67. Are these answers your own? Have you consulted with DHS or any interested parties? If so, please indicate the individuals or entities with whom you have consulted, and the nature of the assistance they have provided.

Yes. I take full responsibility for all responses. In an effort to be as forthright and responsive as possible to the Committee in the time available, I have participated in pre-confirmation briefings and consultations with staff at FEMA and the Department of Homeland Security. These consultations were used to inform my knowledge regarding the background, current operations and potential policies of FEMA and the Department. However, and in all cases, these answers are my own, and are based on my understanding and consideration of the information provided to me.

AFFIDAVIT

TIMOTHY W. MANNING being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

[Signature]

Subscribed and sworn before me this 8th day of April, 2009

[Signature]

Notary Public

Commission 1-30-2011



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

April 9, 2009

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

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Timothy W. Manning, who has been nominated by President Obama for the position of Deputy Administrator for National Preparedness, Federal Emergency Management Agency, Department of Homeland Security.

We have reviewed the report and have also obtained advice from the Department of Homeland Security concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is a letter dated April 3, 2009, from Mr. Manning to the agency's ethics official, outlining the steps Mr. Manning will take to avoid conflicts of interest. Unless a specific date has been agreed to, the nominee must fully comply within three months of his confirmation date with any action he agreed to take in his ethics agreement.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Robert I. Cusick".

Robert I. Cusick
Director

Enclosures

REDACTED

Senator Susan M. Collins
Additional Questions for the Record
Nomination Hearing of Timothy W. Manning
April 30, 2009

1. One of the most important reforms of the Post-Katrina Act, authored by this Committee in 2006, was the development of a National Preparedness System. FEMA has made significant strides toward implementing many aspects of this system, such as the development of a national planning system and a national exercise program, and establishing target capabilities and preparedness priorities. However, implementation in other aspects has been slow or, in some cases, non-existent. For example, there are still organizational reforms that need to be made to complete the re-integration of the preparedness into FEMA. Additionally, to date FEMA has failed to develop a comprehensive preparedness assessment system.

- a. How would you rate FEMA's implementation of the Post-Katrina Act?

I believe FEMA has made significant strides towards PKEMRA implementation, especially in the areas of regionalization, improved response operations, disaster assistance, and collaboration with federal, state, tribal, local and private sector partners. That said, I believe there is much work to be done to fully implement PKEMRA, and if confirmed I will work closely with the Administration and Congress to continue the efforts already underway to implement the reforms called for in PKEMRA.

- b. What would you do to ensure that FEMA fully complies with this law?

If confirmed, I will work with the Administration and Congress to ensure full compliance with PKEMRA by instituting an implementation plan and continually monitoring progress toward each remaining legislative requirement. I believe PKEMRA was the most significant development in emergency management since the enactment of the Stafford Act and I will make it a priority to ensure full implementation within FEMA and the National Preparedness Directorate.

2. DHS has made a good deal of progress in implementing the National Preparedness System required by the Post-Katrina Act. However, one major gap remains – the ability to quantifiably measure national preparedness. Will this be a priority of yours, and if so, what will you do to ensure that this is done in a meaningful way?

If confirmed, I will make it a priority to ensure preparedness metrics are implemented to effectively ascertain the nation's collective level of preparedness.

As the Director of Homeland Security and Emergency Management for the State of New Mexico, I worked with the New Mexico State Legislature and Department of Finance and Administration to develop and implement performance and accountability metrics. These included the number of updated emergency operations plans at the local government level and the number of exercises conducted on an annual basis. We also adopted, as a

performance measure, increases in compliance with the Emergency Management Accreditation Program (EMAP) Standard. Over the course of my tenure with the agency, using increasing compliance with the standard as a measurement, we advanced our preparedness by developing the appropriate plans and capabilities, moving from a baseline compliance of approximately 47% in 2003 to 99% compliance in 2008 achieving provisional accreditation, with 100% compliance and full accreditation expected in 2009.

3. I am concerned that studies have shown that few people in this country have taken basic steps like developing a family communications plan or assembling a personal preparedness kit. Current initiatives underway, such as the Ready Campaign and Citizen Corps, are effective at providing information to people who want to be actively involved, but are not necessarily effective at motivating people. How can FEMA better promote actions to achieve personal and community preparedness?

In addition to evaluating current levels of individual preparedness, I understand recent research also provides insights on how to motivate people to embrace the personal responsibility to prepare. To improve preparedness at the individual level, we should provide additional tools to communities to tailor outreach materials to include local information on likely threats, specific preparedness measures for those threats, and community specific information on community plans and protocols, to include alerts and warning systems, community evacuation and shelter plans, school and workplace plans, and how to get timely and accurate information during an event. We also should increase training, drills, and exercises for the general public and nongovernment organizations, to include better integration of the public in government-sponsored community exercises. And we should strengthen the relationships between emergency services providers and the public and improve the public's understanding that emergency preparedness and response is a shared responsibility.

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