

**NOMINATIONS OF JOE D. WHITLEY AND PENROSE
C. ALBRIGHT**

HEARING

BEFORE THE

**COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
ONE HUNDRED EIGHTH CONGRESS**

FIRST SESSION

ON THE

NOMINATIONS OF JOE D. WHITLEY, TO BE GENERAL COUNSEL, DEPARTMENT OF HOMELAND SECURITY; AND PENROSE C. ALBRIGHT, TO BE ASSISTANT SECRETARY OF HOMELAND SECURITY FOR PLANS, PROGRAMS, AND BUDGET IN THE SCIENCE AND TECHNOLOGY DIRECTORATE, DEPARTMENT OF HOMELAND SECURITY

JULY 29, 2003

Printed for the use of the Committee on Governmental Affairs



U.S. GOVERNMENT PRINTING OFFICE

89-036 PDF

WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

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NOMINATIONS OF JOE D. WHITLEY AND PENROSE C. ALBRIGHT

TUESDAY, JULY 29, 2003

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:34 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Susan M. Collins, Chairman of the Committee, presiding.

Present: Senators Collins, Bennett, and Lautenberg.

OPENING STATEMENT OF CHAIRMAN COLLINS

Chairman COLLINS. The Committee will come to order.

Today, the Committee on Governmental Affairs is holding a hearing to consider two nominations for the Department of Homeland Security: Joe Whitley, to be the General Counsel, and Penrose Albright, to be the Assistant Secretary of Homeland Security for Plans, Programs, and Budget in the Science and Technology Directorate.

Mr. Whitley, if confirmed as General Counsel, will face many challenges. As the chief legal officer of the Department, the General Counsel is responsible for providing legal direction to and coordination of the various components of the Department. The General Counsel also provides legal advice to the Secretary and other senior officials while managing the Office of the General Counsel.

The Department of Homeland Security is responsible for carrying out laws as diverse as customs and emergency response. Immigration laws, for example, are carried out by three separate bureaus within the Department. Ensuring consistency in their interpretation and application will be a challenge for the new General Counsel.

I am also concerned, as are many members of the public, about the protection of privacy and civil liberties as we battle the terrorist threat. The General Counsel will need to advise and provide leadership in defining the legal parameters under which programs affecting these fundamental liberties must operate.

Another challenge for the General Counsel will be the Department's development of its new personnel system. The General Counsel will help to ensure that those charged with creating and implementing the new plan carry out their obligations consistent with merit system principles and due process.

There clearly are many complicated and important legal issues related to the new Department. The General Counsel must be someone who possesses the strong leadership skills, exceptional

legal talent, and experience to take on these challenges successfully. Mr. Whitley is well qualified for these far-reaching responsibilities.

Mr. Albright's position will be vital to the Science and Technology Directorate's efforts to secure our communities. I look forward to working closely with him as he helps to identify research and develop products and services to prevent and respond to any future terrorist threats.

From developing more effective radios for our first responders to researching sensors to detect radiological devices, innovative technologies are a focal point of our homeland security efforts. Coordination among research and development efforts will be key to the Department's success. In addition to overseeing the research efforts within the Department, Mr. Albright must work with numerous other agencies outside of the Department. I look forward to hearing from him how he plans on working, for example, with the National Institutes of Health, which spends several times as much as the Department on biodefense efforts.

We must also work to establish cooperative relationships with the private sector and with our research universities. By partnering with companies and the academic community, the Department can truly maximize Federal homeland security dollars.

I want to emphasize to the nominee the importance of working with our small business community, which often has the most innovative ideas and solutions to confront our homeland security challenges. For example, in my home State of Maine, there are a number of innovative sensor technology companies that have developed products to help secure our ports, borders, and food supply. We want to make sure that the Department reaches out beyond the Beltway to tap the creative energy of our small businesses. I look forward to hearing from Mr. Albright on these and many other issues relating to the responsibilities for which he has been nominated.

Again, I think we are very fortunate today to have two highly qualified nominees appearing before the Committee. Before turning to the two distinguished Senators who are here to introduce the nominee, I would like to turn to Senator Lautenberg for any opening comments that he might have.

OPENING STATEMENT OF SENATOR LAUTENBERG

Senator LAUTENBERG. Thank you, Madam Chairman.

I have to say it feels pretty good to be sitting this close to the middle of the dais rather than at the end. There was a time in my life when I used to sit here regularly. Now I sit there regularly.

I am pleased to welcome our first two nominees, Penrose Albright and Joe Whitley, to this confirmation hearing. I have not had an opportunity to meet with either one, but based on their backgrounds, these are very well-qualified people for the posts.

Dr. Albright has been nominated to serve as Assistant Secretary of Homeland Security for Plans, Programs, and Budget, and he is truly a rocket scientist. And it must feel pretty good to be the barometer of what stands for intellect and achievement because we use the term here too frequently talking about one another, I think. And so it is nice to meet a real rocket scientist, I must say.

Dr. Albright holds a Ph.D. in theoretical physics, has spent much of his career working on missile ballistics, but also managed programs in molecular biology while at DARPA. This experience will come in handy. And your position, the position you are about to assume, falls under the Science and Technology Directorate at the Department of Homeland Security and will be one of your many responsibilities. Also, you will be asked to be on the leadership group that tries to develop vaccines, antidotes, diagnostics, and therapies against biological and chemical weapons.

And Mr. Whitley has been nominated for a very important post, DHS General Counsel, and, of course, as such, you are going to be Secretary Ridge's chief legal adviser and oversee the work of some 1,500 DHS lawyers. Now, that is really a job. I am sure you will do well, Mr. Whitley. You have got a lot of experience. You have had extensive public and private sector experience and served as Acting Associate Attorney General under the former President Bush. Your activities are worthy of the American Bar Association. That affiliation apparently hasn't damaged your reputation with the current administration.

Seriously, these are important positions that we are filling. Bringing many disparate agencies under one roof at DHS has not been an easy task. It is very complicated. And the changes that are under way are, in fact, revolutionary in character in many ways, to take people from so many departments and bring them together under one management.

So I want to know what progress has been made on that front, and I also want to know about DHS policies regarding labor rights of its personnel, civil liberties, and gun control. In all candor, I have to say that the DHS color-coded homeland security advisory system is kind of a mystery. Today we hear in the public media that there is an increased risk of attack on Americans by terrorists. And I noted that at the same time they decided not to change the color of the advisory. And, frankly, before, what we got was color warnings without even as near a direction as an attack on American soil. That is not very specific, but it is a lot more than simply saying we are going to go from yellow to orange or what have you. And I assume that the parties who are involved in protecting our citizenry have been advised on more specific things.

I had offered an amendment to the DHS appropriations bill that the Senate passed last week asking the Department to report back to Congress on whether the color system really is doing any good. And I am anxious to hear the results of that.

So I look forward, Madam Chairman, to hearing from the nominees on these and other important issues, and it is a wonderful thing that we have two candidates who represent the kind of achievement and responsibilities that they do.

Thank you very much.

Chairman COLLINS. Thank you very much, Senator. It is a great pleasure to have you in the capacity as the Ranking Member today.

Senator LAUTENBERG. Can we effect a permanent change?

Chairman COLLINS. Perhaps if you came to my side of the aisle, we could work a deal on that. [Laughter.]

I am very pleased to welcome two of our distinguished colleagues who are here today to introduce Mr. Whitley. We are very pleased

to be joined by Senator Zell Miller of Georgia and Senator Saxby Chambliss, also of Georgia. We will start with you, Senator Miller, to introduce the nominee.

**TESTIMONY OF HON. ZELL MILLER,¹ A U.S. SENATOR FROM
THE STATE OF GEORGIA**

Senator MILLER. Thank you, Madam Chairman, Senator Lautenberg, and Senator Bennett. It is an honor to be here with my good friend and colleague, Senator Chambliss, to appear before you to present Joe Whitley, whom President Bush has nominated to be the General Counsel for the Department of Homeland Security.

Madam Chairman and Members of the Committee, this is not just a constituent. This is not a casual acquaintance. This is a man I know very well. I have watched his work up close for many years. And I recommend him as highly as I possibly can to this Committee and to the full Senate.

Joe Whitley has been to Washington before. He served as Acting Associate Attorney General at the Department of Justice between stints as the U.S. Attorney in two out of Georgia's three districts, where, as I said, he did an outstanding job. He wins plaudits from all sides as being, as someone wrote me, competent and wise, quiet and cautious. Another one described him as self-effacing and understated.

Madam Chairman, self-effacing and understated, Washington needs some men like this.

This newly created position requires someone who can provide Secretary Ridge with sound counsel. Senator Lautenberg mentioned that this is a Department that consists of 1,500 lawyers, 180,000 employees merged from 22 different agencies. It is going to have to have someone who can bridge together contending factions. It is not going to be an easy job. It is going to be difficult. But Joe Whitley, I am confident, can do this. He is shrewd, he is tough, he is Marine tough. He is also a consensus builder. I can tell this Committee, after watching him for many years in some very tough situations, he has a unique ability to bring people together, and that is what is needed around here more than any place I have ever seen.

Madam Chairman, as we continue to transform our government to protect our homeland, we need the hardest worker, we need the sharpest mind as the first General Counsel and top lawyer of this new Department. We need someone with enormous judicial talent and someone with sharp legal skills. We need someone who is dedicated beyond measure.

Madam Chairman and Members of the Committee, I submit to you that I have just described Joe Whitley, and I give you my strongest endorsement for his confirmation as General Counsel of the Department of Homeland Security.

Chairman COLLINS. Thank you very much, Senator, for those high words of praise for our nominee. Senator Chambliss.

¹ The prepared statement of Senator Miller appears in the Appendix on page 24.

**TESTIMONY OF HON. SAXBY CHAMBLISS, A U.S. SENATOR
FROM THE STATE OF GEORGIA**

Senator CHAMBLISS. Thank you, Madam Chairman, Senator Lautenberg, and Senator Bennett. I am very pleased to be here with my good friend and my colleague, Senator Miller, to present to you Joe Whitley, who has been nominated as General Counsel to the Department of Homeland Security to serve with our friend, Secretary Tom Ridge. Joe brings extensive experience to this important position, both from his work in private practice as well as at the Department of Justice. Like myself, Joe is a member of the Bulldog Nation, having graduated from the University of Georgia with both an undergraduate degree as well as his juris doctorate.

Joe began his career in public service with the U.S. Department of Justice and has served that organization in various capacities. I first met Joe Whitley when he was U.S. Attorney for the Middle District of Georgia, having been nominated by President Reagan for that position. That is the particular district that I practiced law in for 26 years, so I got to know Joe well back in those days.

He then was nominated in an unusual situation. It is not very common to have someone serve as U.S. Attorney in two districts, Federal districts, but Joe was nominated to be U.S. Attorney for the Northern District by George H.W. Bush. He was then promoted in the first Bush Administration to serve as the Acting Associate Attorney General, which is the third-ranking official at DOJ. Those are just the highlights of a career at DOJ that spans five attorneys general that Joe served under.

Mr. Whitley also achieved great success in the private sector. He became a partner with the prestigious Atlanta law firm of Alston and Bird where his duties included chairing the firm's government investigations and compliance group. In this capacity, he represented and defended both individuals and corporations in cases ranging from government investigations to complex civil litigation matters. Outside of his employment, Joe Whitley has been very active in the American Bar Association. He frequently lectures at ABA programs, including environmental crime, computer crime, and health care fraud seminars.

Joe has chaired several continuing legal education programs on topics ranging from white-collar to cyber crime and health care fraud. All these activities demonstrate Joe's dedication to improving the legal profession, and I am confident he will work just as hard in this regard as General Counsel to the Department of Homeland Security.

On a very personal note, as I say, I have known Joe for a couple of decades and have had the opportunity to see Joe operate in the courtroom and outside the courtroom. Joe Whitley is not just one heck of a lawyer. Joe Whitley is a heck of a man. And I am just excited as I could be about having Joe Whitley return to public service, and particularly in this position, this newly created position of General Counsel at the Department of Homeland Security. He and his wife, Kathy, of course, have been living in Atlanta, and while they are excited about moving here, we should all be excited about having a man of his caliber to serve in this capacity. And I am very pleased to introduce him and recommend him to this body today. Thank you very much.

Chairman COLLINS. Thank you, Senator. I am sure the nominee is very grateful for your endorsement as well as Senator Miller's. That sort of bipartisan support bodes well for his confirmation.

I want to thank both Senators from Georgia for being with us. I know you each have other engagements, so I am going to excuse you at this point so that you can keep your commitments. Thank you for being with us this morning.

Before turning to our nominees, I want to call on Senator Bennett if he has any opening remarks he wishes to make.

OPENING STATEMENT OF SENATOR BENNETT

Senator BENNETT. Thank you very much, Madam Chairman, and I will take advantage of your courtesy, because I have to follow Senator Miller immediately up to the Banking Committee, to say to Mr. Whitley that I have a particular problem which I hope you will address and that you will get back to me on before the confirmation vote is taken. I will give you a quick background.

Since 1999, when I was heavily engaged in the Y2K issue, I have had conflicting statements from the administration officials regarding the applicability of the Defense Production Act to critical infrastructure protection. I was interested that Senator Saxby Chambliss referred to your background in cyber crime, so you have an understanding of what it is I am talking about.

During the Y2K activities, the administration, admittedly then the Clinton Administration, said as a matter of law the Defense Production Act may not be used to protect and restore computer systems affected by Y2K. Now, on June 5 of this year in a Banking Committee hearing, the administration, admittedly now the Bush Administration, testified that the Defense Production Act may be used for critical infrastructure protection, particularly in the time of attack.

I have tried to find out the reason for these contradictory positions because they are not ideological. It is not a liberal position that the Clinton people would take or a conservative position that the Bush people would take. And I have been told it boils down basically to how the General Counsel feels. And if the General Counsel thinks one way, then the lawyers say, OK, that is the way it is going to be. And if he says, no, I am the other way—so you can understand why I am raising this issue while you are here in your confirmation process.

I am concerned because if we do indeed have an incident of some kind of cyber attack against this country that shuts down our critical infrastructure, I don't want an internal debate within the Department of Homeland Security of saying, well, can we use the Defense Production Act or can't we? Does it apply or doesn't it? I think the decision ought to be made now when there is no crisis pressing on us so that appropriate plans can then go forward from that decision as to how we respond or how we deal with it.

Now, I have asked this administration in writing for a response, and I have not received a response in writing. I have asked the question in open hearing, as I say, and administration official said yes, absolutely, Senator, the Defense Production Act does apply.

So my concern is if you could take the time, I would appreciate it if you would respond in writing so that we have more than just

the record of a witness in a hearing as to whether or not you would support including specific language in the Defense Production Act reauthorization that makes it clear that DPA can be used for critical infrastructure protection and restoration.

The reason there is a time limit on this, Madam Chairman, is that DPA expires on September 30, 2003. And I would like to get this resolved and get the understanding firmly nailed down before that time. So it is felicitous that we have Mr. Whitley before this Committee. His confirmation will take place in this time frame, and I will follow up with something in writing if you would like, but that is my main issue here this morning. Other than that, I accept at full face value all of the wonderful things that Senators Miller and Chambliss have said about you. I don't know what being part of the Bulldog Nation means. I don't think that is an Indian tribe, but from where I come from in Utah, sometimes reference to one kind of a Nation or another does imply connection with a Native American group. And you perhaps could explain that to us if it is important.

But I do appreciate, Madam Chairman, your allowing me to do this now, and I do have to run off to the Banking Committee. Mr. Whitley, I congratulate you on your willingness to accept an appointment in public service. I know you don't make nearly as much money in this as you do elsewhere. I am sorry to put this right on your lap first thing, but we do have the deadline that is in the law, and we have to deal with it.

Mr. Albright, you get a free ride. Thank you. [Laughter.]

Chairman COLLINS. Thank you, Senator Bennett.

Mr. Whitley's background has already been highlighted by the two introductions that he received. I want to provide a little more of an introduction for Mr. Albright, who has an equally impressive career in science. As Senator Lautenberg pointed out, he does have a Ph.D. in physics. He currently serves as senior adviser to the Under Secretary for Science and Technology at the Department of Homeland Security. Prior to that, he served as Assistant Director of Homeland and National Security in the Office of Science and Technology Policy. During that time, he also served as Senior Director for Research and Development in the Office of Homeland Security. He has served as a program manager at the Defense Advanced Research Projects Agency, known as DARPA, and several other positions as well.

Both nominees have filed responses to a biographical and financial questionnaire, answered pre-hearing questions submitted by the Committee, and had their 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.

Our Committee rules require that all witnesses at nomination hearings give their testimony under oath, so I would ask the two nominees to 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. WHITLEY. I do.

Mr. ALBRIGHT. I do.

Chairman COLLINS. You may be seated.

Mr. Whitley, we are going to start with you this morning. I would first invite you to introduce any family members that you may have present with you and then proceed with your statement.

Mr. WHITLEY. Thank you, Madam Chairman. Behind me is my wife, Kathy, my daughter, Lauren, and my son, Thomas. And I am very glad to have them here with me this morning. Thank you very much.

Chairman COLLINS. We welcome them as well.

Mr. Albright, I am going to give you the opportunity to introduce your family members now also, and then we will come back to Mr. Whitley for his statement.

Mr. ALBRIGHT. Thank you, Madam Chairman. Behind me is my wife, Jamie; my daughter, Courtney; my son, Chris; my daughter, Meredith; and my father and mother are in the row behind me.

Chairman COLLINS. How nice, and we welcome them as well. And we hope we didn't embarrass Courtney too much by being introduced, but we really are happy to have your whole family with you today.

Mr. Whitley, you may proceed with your statement.

**TESTIMONY OF JOE D. WHITLEY, TO BE GENERAL COUNSEL,
DEPARTMENT OF HOMELAND SECURITY**

Mr. WHITLEY. Thank you, Chairman Collins, Senator Lautenberg, and Senator Bennett, and distinguished Members of the Committee who are not here with us today. I am honored to appear before you. I am very grateful to President Bush for nominating me to serve as the first General Counsel of the Department of Homeland Security.

Some years ago, after having served five different Attorneys General from both political parties, I left public life. I believed then I would not return to government service. However, the events of September 11, 2001, and a few conversations with a number of people whose views I respect, among them Secretary Ridge, convinced me that I should accept the challenge of building the Office of General Counsel at DHS.

If I am confirmed by the Senate, I look forward to working with this Committee and other Members of the Senate and House of Representatives in making the DHS Office of General Counsel an effective and responsive legal arm of the Department for the benefit of the American people.

Over the last several weeks, I have had the opportunity to meet with some of you and hear your thoughts about the future of this critical Department. I fully understand and respect the importance of the role reserved to Congress to oversee the evolution of DHS. I look forward to working with all of the Members of this Committee to establish a relationship that will better enable the Department to fulfill its role as the protector of the American people.

Also, I have had the pleasure of meeting with some of your staff, and I wish to commend them for the dedication, the knowledge, and the skill they have demonstrated during this process.

Congress took a bold and historic step to establish the Department of Homeland Security. As a consequence, for the first time in

the history of this country we have a Federal Department whose primary mission is to protect the American people against terrorist attacks on American soil. Now just 6 months into the life of this new Department, we are at the beginning of the largest and most significant transformation of government in over half a century, merging 22 separate work cultures, operating procedures, management structures into one cohesive organization.

While much has been accomplished, considerable work remains, much of it dealing with implementing the Homeland Security Act and related legislation. If confirmed, I will commit myself to developing the legal infrastructure needed to make America more secure, to prevent the entry of terrorists and instruments of terrorism into the United States, while at the same time protecting the rights and liberties of U.S. citizens and lawful visitors to the United States.

Almost every action taken by DHS employees has a legal impact. As President Bush has stated, we have a huge responsibility, and that is to protect and defend America while protecting our great liberties. The President and Secretary Ridge have given the Department a clear mission. In addition to protecting America's assets, DHS must also protect America, our way of life, our constitutional framework, and basic civil liberties that we revere, including our freedom of speech and our right to dissent.

The General Counsel, as the chief legal adviser to the Secretary, will and must play a significant role in ensuring that the Department protects and enhances our civil rights and civil liberties, while at the same time preventing future terrorist incidents. To that end, together with the Department's Office for Civil Rights and Civil Liberties and the Privacy Office, I will carefully review any data-mining, intelligence gathering, or programs to enhance information collecting or sharing by DHS and balance our mission needs with the privacy rights and civil liberties guaranteed to the American people under our Constitution.

During my earlier service in Washington, I had the pleasure of being the Justice Department's representative on the Terrorism Working Group that met weekly to plan how better to predict domestic terrorist activity. I came to appreciate the men and women who daily devoted their lives to this effort. But I also came to appreciate the need for better coordination and communication among all of those involved in our efforts to prevent future terrorist incidents.

If confirmed, I will work to foster better coordination and communication within the DHS Office of General Counsel and our client offices. I expect to structure the office along the lines of the DHS management structure. Each of the five directorates headed by an Under Secretary will be served by an Assistant General Counsel within the Office of General Counsel. Counsel within other DHS components will also report to the Office of General Counsel. We will create a culture in which every attorney is thinking about how his or her job fits into the larger responsibility of protecting America.

To be successful, we will need to implement management systems that facilitate coordination, collaboration, and team work. I

hope to encourage in all DHS lawyers a strong sense of pride about working together in the public interest.

Before I close my preliminary remarks here today, I should say, like many Americans, I stand on the shoulders of prior generations of family, friends, and business associates, some of whom are here today as my guests and many of whom could not be here. To them, let me say a few words of thanks and praise and appreciation.

I am most grateful that Senators Miller and Chambliss of Georgia would take time away from their busy schedules to introduce me here today.

To my extended family and my mother, Mary Jo Whitley, who made all of this possible for me, I hope to make you proud, as we say in Georgia.

In life, it is good to have a partner who is smarter and more gifted than you are to make you better than you might otherwise be, and my wife, Kathy, has been that person for me in my life.

Finally, I would like to thank our two children, Lauren and Tom, for their support and love they have given us both.

With that, Madam Chairman, I thank you for allowing me to make this opening statement. If the Senate confirms me, I look forward to serving the President, the Members of this Committee, and the American people to the best of my ability. I look forward to the opportunity to answer your questions here today as well as those of your colleague, Senator Lautenberg.

Thank you very much.

Chairman COLLINS. Thank you. Mr. Albright.

TESTIMONY OF PENROSE C. ALBRIGHT, TO BE ASSISTANT SECRETARY OF HOMELAND SECURITY FOR PLANS, PROGRAMS, AND BUDGET IN THE SCIENCE AND TECHNOLOGY DIRECTORATE, DEPARTMENT OF HOMELAND SECURITY

Mr. ALBRIGHT. Thank you, Chairman Collins, Senator Lautenberg, and distinguished Members of the Committee who could not be present this morning. It is an honor to appear before you today regarding my nomination as Assistant Secretary for Plans, Programs, and Budget in the Science and Technology Directorate of the Department of Homeland Security. I am most honored to have been nominated for this position by the President and thank him and Secretary Ridge for their confidence and support.

The President has stated on a number of occasions that our Nation's advantage in science and technology is a key to securing the homeland against the threat of terrorism. Just as science and technology have been crucial to our ability to defeat past and present enemies overseas, so, too, will it work to defeat those who would attack our homeland and disrupt our way of life.

Our Nation is blessed with a vast scientific and technological enterprise. There are companies, universities, institutes, and government labs of all sizes that conduct research and development over a very broad range. That enterprise must be harnessed in support of homeland security.

To do this, the President and Congress established the new Department of Homeland Security and created within it the Science and Technology Directorate. It serves as the Federal lead for homeland security research and development and works with private

and public entities to assure a research and development effort of sufficient size and scope to counter the threat of modern terrorism. Creating and guiding this effort is a major undertaking, and if confirmed, I will be pleased and honored to be supporting Dr. Chuck McQueary, the Under Secretary of Science and Technology, in this endeavor.

A key role of the Assistant Secretary for Plans, Programs, and Budget in the Science and Technology Directorate is to be responsible for the Directorate's planning, programming, budgeting, and execution oversight processes. The Assistant Secretary also develops and executes the Directorate's policies associated with setting and promulgating standards for homeland security equipment and technologies in coordination with other entities of the Department.

Additionally, the Assistant Secretary develops for the Under Secretary policy options associated with the external research and development community, with State, local, and Federal agencies, and with the international community, and acts as the principal deputy to the Under Secretary for Science and Technology.

My education and background provide me a strong base for leading these activities should I be confirmed. In my role as Assistant Director for Homeland and National Security in the White House Office of Science and Technology Policy, and as Senior Director for Research and Development in the Office of Homeland Security, I advised the administration on science and technology issues surrounding homeland security and on organizing the Nation's research and development community on homeland security issues. I also led the transition planning activities for the Science and Technology Directorate prior to the formation of the Department.

Given that experience and my background in analyzing and developing technology options for the national security community, I understand both the magnitude and scope of effort required for this position.

Dr. McQueary has stated on many occasions the importance of developing and deploying to the field as rapidly as possible new capabilities for enhancing our security. Thus, if confirmed, I will base the planning process for the Directorate on a so-called spiral development paradigm. This means that we rapidly field available technology where it is cost-effective to do so, provide upgrades using near-term technologies available from the labs and private sector, and yet at the same time assure a long-range research and development effort aimed at meeting the full set of requirements.

These requirements must be developed in close coordination with the user community, the other Directorates within the Department, and the State and local public safety communities. Dr. McQueary has pointed out that these front-line operators are the customers for the Science and Technology Directorate, and if confirmed, I will assure that our plans are the result of a close and continuous working relationship with these entities. As our customers, they will define the problems we need to address and the parameters for defining success.

Much of the research, development, test, and evaluation activities relevant to homeland security occur in other Federal agencies, such as the National Institutes for Science and Technology, the Department of Health and Human Services, and the Department of

Defense. The Science and Technology Directorate must coordinate with these activities to define a national strategy for homeland security research and development. If confirmed, I will work closely with my peers in these agencies and with the White House to develop a national plan and strategy to develop countermeasures for chemical, biological, radiological, nuclear, cyber, and other emerging threats.

Should the Senate confirm my appointment, I would welcome the opportunity to work with the Congress and this Committee to accomplish the important mission of homeland security before us.

Thank you for your consideration of my nomination and for the honor of appearing before you today. I am happy to answer any questions you may have.

Chairman COLLINS. Thank you very much, Mr. Albright.

There are three standard questions that are asked of all nominees that I will proceed to at this time. Is there anything you are aware of in your background which might present a conflict of interest with the duties of the office to which you have been nominated? Mr. Whitley.

Mr. WHITLEY. No, ma'am.

Chairman COLLINS. Mr. Albright.

Mr. ALBRIGHT. No.

Chairman COLLINS. 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. Whitley.

Mr. WHITLEY. No, I do not.

Chairman COLLINS. Mr. Albright.

Mr. ALBRIGHT. No.

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

Mr. WHITLEY. Yes.

Mr. ALBRIGHT. Yes.

Chairman COLLINS. You passed that round very well. [Laughter.]

We are now going to proceed to 10-minute rounds of questions for both nominees.

Mr. Albright, if you are confirmed, you are likely to be involved in the development of technology used to foster information sharing. You may also be involved in the development of data-mining technologies, which have been very controversial.

From your experience in DARPA, you are probably familiar with the controversy surrounding the Total Information Awareness program. What steps will you take in your new position to ensure that information-sharing programs and technologies developed by the Department of Homeland Security do not raise the same kinds of privacy concerns as the Total Information Awareness program at DARPA?

Mr. ALBRIGHT. The Homeland Security Act provided the Department a privacy officer who among her duties includes assuring that the activities that we undertake within the research and development piece of the Department, in fact, are consistent with both law and tradition in this country in terms of protecting privacy.

As we go about developing or looking into those kinds of programs—and as you point out, we will be involved in that kind of activity. After all, one of the rationales for creating the Department was to, in fact, bring intelligence data together and to think about connecting the dots to some degree. So as we bring together programs that are designed to do that, you have my assurance that the privacy officer will be involved right from the very beginning in these kinds of activities and will be consulted and will guide the activities that we conduct.

Chairman COLLINS. Mr. Whitley, do you believe that the Privacy Act of 1974 is sufficiently up-to-date to address the effect on personal privacy of new technologies such as data mining?

Mr. WHITLEY. Senator, we will evaluate the application of the Privacy Act to those activities once I am confirmed, if I am confirmed, as General Counsel of this Department, and report to you if there are any modifications that we think may need to be enacted to protect Americans in their privacy rights.

Chairman COLLINS. Section 222 of the Homeland Security Act, which Mr. Albright actually just referred to, directs the Department's privacy officer to ensure that the use of technologies sustain and do not erode privacy protections. Do you believe that this language provides for any additional protection for personal privacy beyond that already covered by the Privacy Act?

Mr. WHITLEY. I believe it gives us an opportunity, Senator, to set a standard that may be higher than what is required by the Privacy Act. I look forward to working with our privacy officer, Nuala O'Connor Kelly, in the Department, supporting her efforts to evaluate her undertaking in this effort to make sure privacy rights are protected.

I do believe that we will be seeking to create a higher standard, if you will, an appearance and a reality of privacy for Americans in things that need to remain private.

Chairman COLLINS. This is an issue of considerable concern to Congress and to the public. I want to follow up, Mr. Whitley, with you with a specific program that the Department is in the process of developing, and that is the Computer-Assisted Passenger Pre-screening System, which is known as the CAPPS-II program. As I understand it, this program will match airline passengers' names against commercial and intelligence databases to assess how great a risk they pose and determine whether or not they should receive additional screening before they board their flight.

Now, on the one hand, if this is successfully implemented, it should dramatically reduce the number of airline passengers who receive heightened scrutiny at airports. One of my Senate colleagues and I were traveling together recently, and both of us were selected for the special screening at the gate, and perhaps a program like this might allow us to have a more focused approach. On the other hand, if the program is not properly implemented, it could result in an unwarranted intrusion into the privacy of law-abiding citizens.

What are you going to do to ensure that we strike the right balance? And a related issue on this is the CAPPS-II program is going to rely in part on commercial databases, which may or may not have accurate information. I think any of us who have dealt with

constituents' problems with credit reports or identity theft understand that information is not always accurate. How are you going to strike that right balance and ensure the accuracy of databases on which the Department will rely?

Mr. WHITLEY. Senator, let me respond to that and share with you some thoughts I have on this. I look forward to working with this Committee and also with our privacy officer as I go forward, if I am confirmed, in making sure that this CAPPS-II program that you are talking about works in an effective way so that people who are law-abiding citizens who don't have any concerns are boarded promptly on airplanes so that we can promote the commerce that air transportation brings to our country, both for visitors to this country from out of the country and visitors around this country. We simply can't impede that sort of traffic, so the goal, if you will, of the legal support that I will be providing to the privacy officer will be with that in mind.

But, specifically, let me say this about my understanding about the CAPPS-II program and what will be done with it, which will be very careful implementation of the new procedures, testing them to make sure that there aren't any situations where people are detained who should not be detained or who are not on flights that they should be on, so the goal will be to make sure that we create a program that is as flawless as possible. There definitely will be flaws in any program that has any human involvement in it, but we need to minimize those situations where people are not boarded on an airplane for reasons that are no fault of their own. And we need to make sure that with these programs we are going to be pulling information from the private sector that the information is looked at in a redundant manner so that we are sure that the information is accurate about the identification of the individual who is getting on that airplane.

We have to balance those privacy rights—and we will do our best to do that—against the rights of the other individuals on these airplanes who are expecting a higher degree of safety when they board airplanes. So we will deal with that balancing act, and we will work with this Congress and with your Committee in making sure this program is effective.

Chairman COLLINS. In light of media reports today indicating there are some indications of new plans by Al-Qaeda members to attack airlines, this is going to be particularly important that we get this right, both to ensure that we are making our airports and airlines as secure as possible, but also making sure that we are doing so in a fair way and not infringing on the right to travel and the privacy rights of law-abiding citizens.

Mr. WHITLEY. I agree.

Chairman COLLINS. Mr. Albright, this Committee has had extensive hearings on the needs of first responders, those who are on the front lines in the war against terrorism. Your answers to your written questions suggest that, if confirmed, you will focus on homeland security equipment for first responders. How will you work with the different agencies that are involved to make sure that equipment purchased with Federal funds meets certain standards? For example, we have heard at our previous hearings that there are five different agencies providing funding for interoperable com-

munication systems equipment. Well, if you have five different agencies with different technical standards, that only contributes to the problem of incompatibility.

What will you do to make sure that these grant programs are better coordinated to help ensure that there are set standards to promote interoperability?

Mr. ALBRIGHT. The Science and Technology Directorate has recently taken on responsibility for management of an OMB e-gov initiative called Project Safe Com, which is one of the top Presidential management priorities. And Project Safe Com's rationale, what it is there to do, is, in fact, to set standards for interoperable communications between Federal, State, and local entities. And I am pleased to say that Project Safe Com has recently had its governance structure and its guidance to Federal grant-giving agencies, the main ones being the Office for Domestic Preparedness, the COPS Program, and former FEMA, now Emergency Preparedness and Response Directorate within the Department, they have accepted our grant guidance created under Project Safe Com and working through the Coalition for Improved Public Safety Communications, which includes all the major first-responder key associations, they have approved that governance structure. They have approved that grant guidance, and that is now being included as we start to issue new grants to make grant money available to the State and local communities.

Chairman COLLINS. Thank you. My time has expired. Senator Lautenberg.

Senator LAUTENBERG. Thank you very much, Madam Chairman. That is an anomaly I can't get used to, "Madam Chairman," but I think we have to define "chairman" as kind of a non-gender word and let it go at that.

Mr. Whitley, I had to smile a couple times at things that you said. One of them was that you never expected to return to public life. And I can tell you firsthand that when I left here 2 years ago, the furthest thing from my mind was that I would be sitting back here, even though the company is so forthright and as leaderly as Susan Collins, my colleague and friend. But I never expected to be back here, and I was reminded that I was back when I got my first paycheck. [Laughter.]

You, too, will notice that. It is nice to meet your families. I assume they are in both cases willing to make the big sacrifices that you are going to have to make. Don't prepare dinner at a precise time. I caution you about that.

Dr. Albright, your position, you will be working on the budget of the Science and Technology Directorate of DHS, and we have just heard some discussion about first responders. And it is, I think, going to be a lot easier to coordinate the activities than it is to prepare the first responders for a biological or chemical attack.

What do you do about something like that?

Mr. ALBRIGHT. That is an excellent question, Senator. You are absolutely correct. It is not enough to create standards for homeland security equipment and to provide grant guidance for homeland security equipment and then, in essence, to throw that equipment over the transom, so to speak, and let them have at it.

What one also needs to do in conjunction with these activities is also to develop training tools and provide environments where first responders can come and train with these kinds of equipment. They are not likely to be frequently engaged in training for a radiological event, for example, so what we have to do, I think, is create Web-based tools, for example, where first responders from their desktops can get on and go through scenarios and allow themselves to be trained for events that may never happen in their entire lifetimes and hopefully won't ever happen in their lifetimes.

We have also been discussing the notion of creating sites where we could periodically bring first responders, much like the red flag kind of activities that the Air Force does out at Nellis. We could bring in trainers or bring in first responders, have them run through scenarios, and then they can go back and train the trainers.

But your point is an excellent one, that providing equipment without an understanding of how to use it, how to maintain it, or how to calibrate it, is crucial.

Senator LAUTENBERG. It is going to be very tough to get that knowledge all the way down to the first-responder level because in many instances first responders in one community are quite differently trained than first responders in others, the large urban centers versus the more rural communities.

Mr. Whitley, the questionnaire that you submitted, when asked how DHS could ensure that its broad authority over a personnel system would protect the rights of Federal employees, you promised in your comments that any new DHS employment system would abide by both the legal provision and "the spirit of the safeguards." I wonder if you could explain what you mean exactly by the spirit of the safeguards.

Mr. WHITLEY. Well, as I am learning this new Department as a consultant, one of the things I will be careful to say, Senator, is I don't know the answers to all the questions that you may pose to me here today, but I look forward to being more responsive to that question later.

But I will say this: It is my understanding that our human resources design team, which is coordinated by Under Secretary Janet Hale, is working on these types of issues together with Secretary Ridge and the Office of Personnel Management to assure that we come up with a state-of-the-art new personnel system, if that is where we move, so that we will have transparency and accountability, so if people are disciplined in the workplace or they are in situations where they need to be held accountable for their conduct, they will know what that was and what their rights are very clearly.

And so that is what I mean when I answered that comment, which is that the rights of individuals in this system need to be clear to them. Accountability needs to be clear to them so that when incidents occur, they will understand what they need to do to protect themselves.

Senator LAUTENBERG. I am talking about a broader issue, Mr. Whitley, and that is the question of whether or not DHS employees have the right to bargain collectively.

Mr. WHITLEY. Some DHS employees, it is my understanding, Senator, do currently have a collective bargaining arrangement. As you are aware, we are a group of legacy agencies, some of which are from former U.S. Customs, some of which are from the Immigration and Naturalization Service. It is my understanding that within DHS there are still some of those current—those bargaining units.

Senator LAUTENBERG. Because, as the DHS concept developed, a large point of contention was whether or not the employees to be hired would have the right to bargain.

Mr. WHITLEY. Let me say this, Senator, I am aware that the human resources design team is a collaborative effort with the labor unions in the Department. And one of the things that I understand has happened is that the labor unions or some of the labor unions' leadership have expressed their satisfaction, at least, from what I have read and heard, with the direction we are heading in, that they are being brought into the process, that they are being respected in the process, and that hopefully in the end they will be all together with us on the results we come to.

Senator LAUTENBERG. I would hope that is true because something as complicated as this amalgamation of all these departments, the numbers are staggering, 150,000 or whatever the round number is of employees, the different skills that are going to be merged here. Nevertheless, it doesn't remove their right to have job standards, to have compensation, what have you, to fit the norm of what is customarily government. This is not a private agency, and as a consequence, people have the right, in my view, to expect a type of treatment that respects their needs and their interests.

I noted in some of the reading that I have done that it seems to separate local rights for collective bargaining from a national right to collective bargaining. And I think that locally the right has been removed, but nationally there is some question about whether or not they can bargain collectively.

Mr. WHITLEY. Senator, I look forward to looking into this issue.

Senator LAUTENBERG. Well, I look forward to working with each of you. The assignment is enormous. I come out of the technology business, and the best thing that happened to me is that I wasn't the technician. I was more on the marketing side of things, so I didn't stand in the way of success at all. [Laughter.]

But I would ask who might, in your judgments collectively, be responsible for the plans that affect specifically, let's say, aviation. We have an aviation security bill that was voted upon during my absence, and I am not being critical in any way. But I was a committee member of the Pan Am 103 study, and I was an author of the report at that time. And, frankly, we went through some things—now, this goes back more than 10 years ago—that I think would have applied just as well right now. So I would hope that you will take a look at that to see as counsel whether you think the present plan, which is not only cumbersome but it may have to be in this stage of our activities, but we want it to be effective. That is the first thing, so no matter how cumbersome, but it is a peculiar condition that we run into.

Yesterday, for instance, I flew down from New Jersey, and when I got to the airport a half-hour before the flight, I was told that the

flight had been shut down, closed, for its trip to Washington, 35 minutes of lying time. And this was a half-hour before the scheduled departure. And they said, well, it was closed down, not because it was oversold but because there was a security concern now established. And I don't know whether that meant—and I am not revealing anything here—that there was an alert from DHS that said give us time to check the passenger roster more carefully. But it was a frightening prospect because we had a vote here, had everything scheduled for it. Anyway, finally—and I promise you I didn't kick and scream. I know better than to do that. You can do that when you are a private citizen. You can't do that when you are public. But I would appreciate it if you would look at that.

Madam Chairman, we have lots of questions that we would like to have answered. I am sure I speak for you as well as myself. So if we will keep the record open, I would ask each of you to respond as promptly as you can and to wish you both well. You are excellent candidates, and I appreciate the fact that you have taken on an assignment that has significant risks but has great opportunities for our safety and our public being. So thank you.

Chairman COLLINS. Thank you, Senator.

I, too, have a number of additional questions that I am going to submit for the record. There are a couple, however, that I do want to ask you here.

Mr. Whitley, you mentioned in your statement the importance of congressional oversight in helping the new Department be effective, and it is the most massive reorganization of the Federal Government in half of a century. Your office will play an important role in responding to congressional requests, and there are times when the Department or its IG may be conducting its own investigation into an issue that is of interest to Congress.

Legally, do you believe that there are any cases in which it is appropriate for the Department to withhold information from Congress because the Department or its Inspector General is already conducting a parallel investigation?

Mr. WHITLEY. Senator, I am not aware of any prohibition on information sharing with this Committee or other parts of Congress, if requested, if there is a parallel investigation underway.

Chairman COLLINS. It is important that we do have access to information in order to carry out our oversight responsibility, so I am pleased to hear your response.

Mr. Albright, just a couple of closing questions to you. There are many small technical companies in both the Senator from New Jersey's State and my State who find it very difficult to penetrate the bureaucratic maze to do business with the Federal Government. Yet many of these small companies—I am thinking of some small sensor companies in Maine, for example—have products and services that would be extremely valuable to the new Department of Homeland Security.

What steps will you take to make sure that the new Department makes contracting opportunities available to the small business sector? The large companies have several experts and contracting officers and previous relationships and the ability to monitor contracting opportunities. But for small firms that may have exactly the cutting-edge invention or technology the Department needs, it

is a daunting task to figure out how to do business with the new Department.

Mr. ALBRIGHT. Absolutely. It has been clear from the outset that a great part of the research and development community that needed to be engaged in Homeland Security was, in fact, comprised of what we call non-traditional government contractors. Those could be very large businesses such as pharmaceutical firms, or they can be many smaller businesses as well.

What we have done is several things. Congress gave us in the Homeland Security Act under Title 3 something called a technology clearinghouse function. And what we have done is entered into a partnership with something called the Technical Support Working Group, which was an entity that was formerly comprised or led by the Departments of State and Defense, and it was aimed at getting small businesses in particular engaged in rapid prototyping activities and taking off-the-shelf or nearly off-the-shelf technologies and putting them in the hands—initially for the special operations community.

What we have done is we have engaged the Technical Support Working Group in our endeavor as well, and they recently released a broad agency announcement that got over 3,000 responses on a wide variety of near-term technologies that we wanted to see for the various user communities that comprise our customer base.

Now, the intent with TSWG is to create an environment that is very small business friendly. So, for example, the way it operates is when you respond to the initial solicitation, you send in a single piece of paper that indicates what it is you are trying to sell.

The advantage to that is it gives the government an opportunity to perform very rapid triage on those kinds of proposals, while at the same time sparing the expense of the smaller companies, in particular, from engaging in a very expensive bid and proposal kind of activity. So what we do is we have a staged process with the TSWG where they send in a single sheet. If that is something that is of a priority for the government to invest in, we will then come back and ask them for a white paper. And we don't really get to a full proposal until fairly late in the process.

The intent also by this fall is to allow businesses to track the status of that proposal electronically. They will get a PIN number when they submit that proposal into the Department. Then they will be able to sign on to a website, enter their PIN, and they will find out precisely where they are in the evaluation process.

Now, the other thing that happened was that you granted us other transactions authority within the Homeland Security Act, and that is very important for non-traditional contractors because it allows us a freer hand in negotiating intellectual property rights between someone who is under government contract and the government, and it also allows those contractors to manage their finances under generally accepted accounting rules as opposed to very specific government accounting rules and regulations. Many of these companies are not interested in overturning their entire accounting system just to deal with the Federal Government.

So we have tried to make this as small business friendly as we possibly can. And, of course, as you know, there is also a special assistant to Secretary Ridge for the private sector who is engaged

certainly with the small business community, has been conducting business roundtables throughout the country, and we expect to continue that. If confirmed, I will certainly participate in those kinds of activities.

Chairman COLLINS. Thank you. I am going to follow the lead of the Ranking Member today and submit the rest of my questions for the record. Without objection, the record will be kept open until 5 p.m. today for the submission of your answers to our questions and any other statements for the record.

Senator LAUTENBERG. Five p.m. today?

Chairman COLLINS. Yes. They would like to be confirmed before we go home.

Senator LAUTENBERG. Well, I think the modesty raised when the question of confirmation comes up, as we would say, you, I think, are rather shoo-ins.

Chairman COLLINS. Did you have another one that you wanted—

Senator LAUTENBERG. I do, if I may.

Chairman COLLINS. Absolutely. Go ahead.

Senator LAUTENBERG. Mr. Whitley, two laws have been passed in the last couple of years. First, the ATS, the Aviation and Transportation Security Act of 2001, federalized the airport screeners as part of TSA. And then the Homeland Security Act of 2002 transferred some TSA employees to the Department of Homeland Security.

Now, there is some confusion here about the labor status of these Federal workers. Will they be, do you think, considered full employees of DHS or will they remain part of a separate personnel system within DHS?

Mr. WHITLEY. Senator, this is an issue that you broached with me that I have not studied or looked at, candidly. But what I will do is I will look at that issue and try to respond to your question.

I will be dealing with lots of labor-related issues, I am sure, in the performance of my duties, and I will have on my staff, if I am confirmed, people who are very capable in these areas. And, unfortunately, I don't have a response to your question, but I will get you a response.

Senator LAUTENBERG. Well, if you would take a look at that and get back to us, I would appreciate it.

Mr. WHITLEY. Thank you.

Senator LAUTENBERG. Another question for you, Mr. Whitley. A CRS report that I requested revealed that known terrorists on the State Department's list can easily purchase weapons such as M-16s or .50-caliber assault weapons in the U.S. civilian market. After complaining about that, the Department of Justice now cross-checks gun purchases to see if the purchaser is on the terrorist watch list.

Do you believe that any individual whose name is on the terrorist watch list should have the freedom to purchase weapons legally in the United States?

Mr. WHITLEY. I haven't studied this issue, Senator, but as a practical matter, no, I don't think anyone who is designated as a potential terrorist should be purchasing firearms.

Senator LAUTENBERG. Do you think that DHS or other authorities ought to be notified when a person on a terrorist watch list attempts a gun purchase?

Mr. WHITLEY. Senator, any avenue where we can have better communication about potential purchases or acquisitions of weapons by people who are in the category that we deem to be dangerous, we should have that kind of communication. Again, I haven't studied this issue, Senator, but I am——

Senator LAUTENBERG. I will trust your good judgment and check on it once in a while.

Mr. WHITLEY. I certainly will. One of the things that we want to do is protect all Americans, and there are certain rights that Americans have certainly to bear arms. But at the same time, those rights have constraints on them, and this right is something we need to evaluate in terms of these individuals who are acquiring these types of weapons.

Senator LAUTENBERG. Well, if we have the liberty of detaining suspected terrorists without charge for a period of time, certainly we ought to say, hey, you just can't walk up like any other law-abiding citizen in the United States and exercise the right to buy a gun. That is kind of simple common sense to me.

Mr. WHITLEY. Thank you, sir.

Senator LAUTENBERG. Dr. Albright, do you think that—and I don't mean to insult the system, but the color war, I will call it, security assessment system can be enhanced to provide accurate, specific warnings to the general public? And what can DHS do to instruct Federal and local agencies to respond more effectively just do a lot of hard work there? But if you will answer the first part of that, can we have a security alert system that tells people enough to put them on guard without totally terrorizing our population into questions like: Dare I go to New York with my family for a vacation? Dare I put my children on the school bus? Can I plan a vacation trip? I mean, people are concerned, and I worry about the effects of scare without fact, and yet there is an enormous responsibility of DHS and all of us in government to tell people what they can do to protect themselves. Is it possible to achieve both ends of the goal, tell people what to worry about and at the same time not frighten them into inaction or otherwise?

Mr. ALBRIGHT. Well, this is an issue that I personally haven't studied in any great depth. The Information Analysis and Infrastructure Protection Directorate are the people who provide the intelligence information. And I think it is certainly or it is my understanding, at least, that it is certainly within the intent of what Secretary Ridge and the Department would like to do to provide perhaps more focused alerts and to perhaps make them more regional in nature or infrastructure-specific. I think the Secretary has testified to that effect in the past.

One area that we are expecting to invest in within the Science and Technology Directorate, should I be confirmed, is in some behavioral research studies that actually get at these kinds of issues. There have been experiments done for decades looking at how people respond to imminent natural disasters, for example, hurricanes, that sort of thing, how people responded during the blitz during World War II, for example. We ran experiments in Germany after

World War II on air raid sirens, for example, and how people responded to that sort of thing.

And your point is well taken that the concern you have is that by constantly raising the alert status, people get inured to the threat level and either start to ignore it, which is obviously something we don't want to see happen, or change their behaviors in a way that we don't necessary want to see either.

So that is an area of research that the Department has already entered discussions with the National Science Foundation and with some of the social and behavioral sciences communities to investigate.

Senator LAUTENBERG. I would close with this, Madam Chairman. Is there a department there that devotes its time to acronyms? [Laughter.]

Because it seems to me that you have got a batch of them there, and I just hope everybody remembers what the code for the short name is.

Thank you very much.

Chairman COLLINS. Thank you.

I want to thank both of our nominees for appearing today and for their forthright answers to our questions. I also want to thank both of you and your families for your willingness to step forward and once again serve your country. We are very fortunate to have people well qualified and with your background who are willing to do yet another stint in the public sector. So thank you for being with us today.

As I mentioned, the record will be kept open until 5 p.m. today. This hearing is now adjourned, but I would alert people we are going to go immediately into a new hearing.

[Whereupon, at 10:49 a.m., the Committee was adjourned.]

A P P E N D I X

PREPARED OPENING STATEMENT FROM SENATOR AKAKA

Thank you Madam Chairman for holding this hearing. Today, we are considering the nominations of two individuals to very important positions in the Department of Homeland Security (DHS).

The first is Joe Whitley who has been nominated to be the General Counsel. If confirmed, Mr. Whitley will serve as the chief legal officer of the Department. He will provide legal policy, oversight, advice, and direction throughout the Department. While the General Counsel of any agency has great responsibility and challenges, the first General Counsel at DHS faces unique challenges. The new agency is just organizing. Many of its programs and policies are not yet in place. This is particularly important in the context of the development of the new human resources system and the critical infrastructure protection program.

As my colleagues know, I am an advocate for the rights and benefits of Federal employees, including whistleblowers. I would urge Mr. Whitley to ensure that whistleblowers have the same rights as other Federal employees and the right to bring concerns involving critical infrastructure information to Congress. Federal employees must have fair treatment and due process, including having final decisions made by a neutral decisionmaker, when appealing personnel decisions.

Our second nominee is Penrose Albright, who, if confirmed, will be the Assistant Secretary of Homeland Security for Plans, Programs, and Budget within the Science and Technology Directorate. Mr. Albright will guide science and technology policy and oversee the execution of the Science and Technology Directorate budget.

The Directorate plays an important role in setting the direction of this nation's policies and spending on homeland security technologies. I look forward to working with Mr. Albright to ensure that there are sufficient resources available for homeland security technologies, particularly for defense against biological and nuclear attacks.

I say this because of my concerns that the Administration's policies on science and technology spending are not balanced. For example, the Administration has requested \$9 billion for a national missile defense system, but we still lack funds to protect our citizens and our agricultural base from a bio- or agroterrorist attack. It will cost billions of dollars more to increase our capability to respond to an adequate level.

Similarly, the Administration wants \$21 million to explore advanced concepts for new nuclear weapons, even though we are not doing enough to protect ourselves from a terrorist attack using a dirty bomb. I have sponsored several GAO reports that examined U.S. and international efforts to control and secure radioactive sealed sources. However, the GAO has determined that we have done a poor job in tracing and controlling these sources. Several tens of millions of dollars would go a long way toward improving the control and security of radioactive sealed sources in this country and abroad.

It is not Mr. Albright's responsibility to set spending priorities for this Administration. However, he will be an important and influential voice in setting those priorities.

Thank you again Madam Chairman for holding this hearing. I look forward to hearing from the nominees and discussing these important issues further.

**Prepared Remarks of Senator Zell Miller on the
Nomination of Joe D. Whitley to be General Counsel for the
Department of Homeland Security**

Mr. Chairman, Members of the Committee:

It is my honor to appear before you to present Joe Whitley, whom President Bush has nominated to be General Counsel for the Department of Homeland Security.

This is a man I know very well. I've watched his work up close many years. I recommend him highly to this committee and the full Senate.

Joe has been to Washington before. He served as acting associate attorney general at the Department of Justice between stints as the U.S. attorney in two out of Georgia's three districts.

He wins plaudits from all sides as being "competent and wise," "quiet and cautious," "self-effacing and understated."

"Self-effacing and understated." Washington needs a man like this, Mr. Chairman.

This newly created position requires someone who can provide Secretary Ridge with sound counsel. But it must also be a person who is able to bridge together contending factions in a department that consists of 1,500 lawyers and 180,000 employees merged from 22 different agencies. Joe can do this.

He is shrewd and tough but he is also a consensus builder. He has a unique ability to bring people together. We need that around here, more than any other place I've ever seen.

Mr. Chairman, as we continue to transform our government to protect our homeland, we need the hardest worker and the sharpest mind as the first general counsel and top lawyer of this new department.

We need someone with enormous judicial talent and sharp legal skills.

We need someone who is dedicated beyond measure.

Members of this distinguished committee, I submit to you that we need Joe Whitley, and I give you my strongest endorsement for his confirmation as General Counsel of the Department of Homeland Security.

**BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF
NOMINEES**

A. BIOGRAPHICAL INFORMATION

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

Joe D. Whitley
2. **Position to which nominated:**

General Counsel, Department of Homeland Security
3. **Date of nomination:**

April 28, 2003
4. **Address:** (List current place of residence and office addresses.)

Alston & Bird LLP
1201 West Peachtree Street
Atlanta, GA 30309-3424

(Office – up to 3/20/03)
5. **Date and place of birth:**

November 12, 1950
Atlanta, GA
6. **Marital status:** (Include maiden name of wife or husband's name.)

Married - Kathleen Pinion Whitley
7. **Names and ages of children:**
8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.

University of Georgia – 1969-72 – BS Political Science
University of Georgia School of Law – JD - 1972-75

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

Title	Description	Name of Employer	Location	Dates of Employment
Associate	Attorney	Kelly, Denney, Pease & Allison	318 11 th Street Columbus, GA 31994	12/74 – 3/78
Assistant District Attorney	State Prosecutor	Muscogee County District Attorney's Office	Government Center Columbus, GA 31902	3/78 – 3/79
Associate	Legal/lawyer	Hirsch, Beil & Partin	1021 Third Avenue Columbus, GA 31902	3/79 – 9/81
U.S. Attorney	Federal Prosecutor	Office of U.S. Attorney Middle Dist. Of GA	433 Cherry Street Macon, GA *****	9/81 – 2/87
Deputy Assistant Attorney General	DOJ mgmt./ Federal Prosecutor	Office of the Assistant Attorney General Criminal Division	Main Justice 950 Pennsylvania Avenue Washington, DC 20570	2/87 – 5/88
Principal Deputy Associate Attorney General	DOJ mgmt./ Federal Prosecutor	Office of the Associate Attorney General	Main Justice 950 Pennsylvania Avenue Washington, DC 20570	5/88 – 2/89
Acting Associate Attorney General	DOJ mgmt./ federal prosecutor	Office of the Associate Attorney General	Main Justice 950 Pennsylvania Avenue Washington, DC 20570	2/89 – 7/89
Partner	Attorney	Smith, Gambrell & Russell	Suite 3100 Promenade II 1230 Peachtree St. Atlanta, GA 30309-3592	9/89 – 6/90
U.S. Attorney	Federal Prosecutor	U.S. Attorney's Office, Northern Dist. Of GA	1800 U.S. Courthouse 75 Spring St., SW Atlanta, GA 30335	6/90 – 11/93
Partner	Attorney	Kilpatrick Stockton	1100 Peachtree Street Atlanta, GA 30309	11/93 – 11/97
Partner	Attorney	Alston & Bird	1201 W. Peachtree St. Atlanta, GA 30309-3424	5/97 – 3/20/03

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.

Position	Entity	Dates of Service
Board Member	U.S. Census Monitoring Board	6/98 – 9/30/01

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.

Position	Entity	Dates of Service
Secretary	AmeriSouth Recycling & Consulting, Inc.	6/7/95 – 12/98
Member, Board of Directors	National College of District Attorneys	1998-99 – Member at Large for 2 year term 200-2003 – two 2 year terms as Board Member representative for ABA
Member, Board of Directors	Natural Science for Youth Foundation	1993 – present
Member, Board of Directors	Columbus State University Foundation	2002 – present
Member, Board of Directors	Junior Achievement of Georgia	1996-97
Member, Board of Directors	Georgia Council on Substance Abuse (previously known as Mission New Hope)	7/2000 – present
Member, Board of Directors	Mission New Hope	1992 – 7/2000

See continuation in number 12.

12. **Memberships:** List all memberships and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable and other organizations.
- Member, Georgia Bar Association – 1975 - present
 - Member, American Bar Association – 1975 – present
 - Member, Attorney General's Advisory Committee ("AGAC") – 1982-85
 - Chair, Law Enforcement Coordination Subcommittee of AGAC - 1986
 - Member, District of Columbia Bar Association – 1990 - 1995 – now inactive
 - Member, Executive Working Group for Prosecutorial Relations - 1986-88

- Member, Atlanta Bar Association – 1989 - present
- Member, Criminal Justice Section (CJS) Council of ABA – 1989-present
- Member, Lawyers Club of Atlanta – 1989 – present
- Member, Atlanta Bar Association – 1989 – present
- Chair, Organized Crime & Violent Crime Subcommittee of AGAC – 1990-92
- Member, Investigative Agency Subcommittee of AGAC – 1990-93
- Chair, Prosecution Function Committee of CJS of ABA – 1992-93
- Chair, White Collar Crime Subcommittee of AGAC – 1992-93
- Co-Chair, Southeast Regional Subcommittee of CJS of ABA – 1993-98
- Member, Board of Trustees, Natural Science for Youth Foundation – 1993 – present (inactive)
- Member, Board of Directors, The Leukemia Society of America – 1994-97
- Member, Advisory Board, EPA Enforcement Manual – 1994 to present (inactive)
- State Chairman, Annual Fundraising Drive, The Leukemia Society of America – 1994-95
- Member, Editorial Board, BNA Criminal Practice Manual – 1995 to present (inactive)
- Member, Board of Directors, Junior Achievement of Georgia, Inc. – 1996-97
- Member, Federalist Society – 1990 - present
- Vice-Chair, White Collar Crime Committee of CJS of ABA – 1998-
- Member, CJS of ABA – 1999-present
- Member, Birmingham Hopewell Alliance – 1997 to present
- President, Birmingham Hopewell Alliance – 2001 to present
- Member, Board of Regents, National College of District Attorneys – 1998 – present (one 2-year term as Member at Large; two 2-year terms as Member representing ABA)
- Member, Board of Directors, Georgia Council on Substance Abuse – 7/1/2000 – present
- Member, Board of Directors, Mission New Hope - ?? to 1999 (**Becky Vaughn verifying on Monday**)
- Vice Chair, Governmental Affairs, CJS of ABA – 2002 - present
- Member, Forum on Crime & Justice Advisory Board – 2002 – present
- Board Member, Columbus State University Foundation, Inc. – 2002 - present

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 all political parties or election committees during the last 10 years.

Acting Treasurer – Georgia Republican Party – (1995-96)

Treasurer – John Mitnick for Congress– Atlanta, GA (1996)

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

- George W. Bush Exploratory Committee – \$250 - 5/7/99
- Jeffrey R. Howard for Governor (Manchester, NH) - \$300 – 5/5/00
- Sal Martoche (candidate for New York Supreme Court) - \$200 – 7/15/99
- Friends of Dylan Glenn (GOP nominee, GA-2) - \$150 – 6/28/00
- Bob Barr for Congress - \$200 – 5/9/99
- Cheryl Custer for District Attorney - \$100 – 6/11/98
- Tom Lowe Campaign Fund (for County Commissioner) – \$125 - 11/27/98
- The Fulton County Republican Party - \$250 – 11/6/97 (Victory '98 Dinner)
- Paul D. Coverdell (Capitol Trust) - \$205 – 9/98
- Paul D. Coverdell (Coverdell Good Government Committee) - \$250 – 8/14/98
- Paul D. Coverdell (Coverdell Good Government Committee) - \$250 – 8/28/98
- Paul D. Coverdell (Coverdell Good Government Committee) - \$250 – 9/18/98
- Paul D. Coverdell (Coverdell Good Government Committee) - \$250 – 6/23/99
- George W. Bush (Bush for President, Inc.) - \$250 – 5/27/99
- Paul D. Coverdell (Coverdell Good Government Committee) - \$500 – 11/24/99
- Mack E. Mattingly (Mattingly for Senate, Inc.) - \$400 – 9/13/00

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.

- Boys' & Girls' Club of Atlanta – President's Award – 1993
- Federal Bar Association – Award for Outstanding Contribution to Federal Litigation – 12/11/92
- Georgia Sheriffs' Youth Homes – Camp Whitley named in my honor – 1993
- State of Georgia – Department of Defense – Georgia Commendation Medal – 1993
- Organized Crime Drug Enforcement Task Force – Exceptional Service Award – 1993
- Who's Who in American Law – numerous years dating to present
- Who's Who in the South – numerous years dating to present

- Who's Who in the Southeast – numerous years dating to present
- Who's Who in America – numerous years dating to present
- Named to Best Lawyers in America – 2002 – 2003
- Named one of Atlanta's Best Criminal Defense Lawyers by Atlanta Magazine – 2002 – 2003
- AV-rated by Martindale-Hubbell – numerous years dating to present

15. **Published writings:** List the titles, publishers, and dates of books, articles, reports, or other published materials which you have written.

- | | |
|-----------|---|
| 1990 | "Avoiding Criminal Penalties for Environmental Mishaps" – Smith, Gambrell & Russell Environmental Outlook Newsletter, Vol. 2, No. 2, Spring 1990 |
| 4/22/92 | Violent Crime Initiatives – LECC Conference, Rogersville, AL |
| 7/92 | "The Right to Financial Privacy Act, The Grand Jury Subpoena and the Customer's Right to Privacy" – Co-Authored with Amy Levin Weil, 1992 <i>Complex Crimes Journal</i> , The Annual Update of the Complex Crimes |
| 11-12/92 | "A Critique of the GAO and Sentencing Commission Reports: Why the Central Questions Remain Unanswered" – Co-Authored with Amy Levin Weil, <i>Federal Sentencing Reporter</i> , Vol. 5, No. 13 |
| 1992 | "Insiders' View of Current Federal Law Enforcement Priorities and Procedures" – Co-Authored with Martin J. Weinstein, <i>White Collar Crime 1992</i> , Publication of the American Bar Association, Section of Criminal Justice and the Division for Professional Education |
| Fall 1993 | Article on Gun Control & Violent Crime – ABA Criminal Justice Magazine, Vol. 8, No. 3, Fall 1993 |
| 11/93 | "White Collar Crime: A Real Priority" in <i>Legal Times</i> |
| 7/94 | "Environmental Crime 1994: Increasing Indictments, Fines, and Jail Time – White Collar Crime" – White Collar Crime, Daily Report Supplement, 7/94 |
| 7/15/94 | "A Primer on International Criminal Law Practice" – Presented to ABA Criminal Justice Section White Collar Crime Committee, Southeastern Regional Subcommittee, Co-Authored with Larry D. Thompson, July 15, 1994 |
| 8/18/94 | "The Federal Grand Jury: A Current View" – 8/18/94 |

- 9-10/94 "President Clinton's 'Three Strikes and You're Out' Proposal: More Harm than Good" - *Federal Sentencing Reporter*, Vol. 7, No. 2, September/October 1994
- 12/21/94 "A Look Inside the U.S. Attorney's Office" – Co-Authored with Martin J. Weinstein, Inclusion in Newsletter (sent to Katten Muchin & Zavis – Nancy Luque)
- 1994 Essay – "My Biggest Case – Weed & Seed" – *The Georgia Sheriff*, Vol. 94, No. 1, 1994
- 1994 "Criminal Justice in Georgia: A Plan for Change" – 1994
- 7-8/95 Article – "Sentencing Guidelines, Fine Tuning the Guidelines" - *Federal Sentencing Reporter*, Vol. 8, No. 1, July/Aug. 1995
- 1996 Article – EPA Enforcement Initiatives & Civil and Criminal Enforcement under RCRA – *Environmental Management Review Journal*, 2d Quarter 1996
- 9/96 "Healthcare Provider Compliance Plans" – Co-Authored with Thomas William Baker and Trent B. Speckhals, *Bender's Health Care Law Monthly*
- 1996 "Healthcare Provider Compliance Plans as Preventive Medicine: A Prescription for Avoiding Qui Tam (Whistleblower) Lawsuits" – Co-Authored with Trent B. Speckhals, 1996
- 9/98 "Obstruction of Justice: State Crime Lab In Crisis" – Co-Authored with Daniel Adamson, *Georgia Public Policy Foundation*
- 9/98 "The Devil's In the Machine" - *Legal Times*
- 9-10/98 "Protecting Your Intellectual Property" - *Competitive Edge Magazine*
- 10/98 "New Solutions to New Crimes" - *Fulton County Daily Report*
- 3/98 "Mandatory Indemnification of Corporate Officers, Directors and Employees in Criminal Investigations and Prosecutions" - *Annual ABA White Collar Crime Seminar 1998*
- 5/98 "Recent Developments in Criminal Prosecutions of Health Care Fraud" - *Annual ABA Health Care Fraud Seminar 1998*
- 5/98 "Trying the Health Care Fraud Case, The Rules Have Changed (Or Have They?)" - 1998 *Annual ABA Health Care Fraud Seminar*

- 11/98 "Compliance Program – Criminal Law" – ILS Publications, Inc. – 11/98
- 1998 "Employer Liability in Qui Tam Actions Under the False Claim Act" – Co-Authored with Jason Klitenic, 1998
- 1998 "The Role of Prosecutorial Discretion in Recent Criminal Prosecutions of Health Care Fraud" – Co-Authored with Suzanne Smith – 1998
- 9/99 "Anatomy of Computer Crime Prosecution: Protecting Your Company's Intellectual Property From Internal and External Threats" – Co-Authored with Randy S. Chartash, *Georgia ICLE Cyber Crime Seminar*
- 11/98 "The Economic Espionage Act of 1996" – Co-Authored with William H. Jordan, *Strategic Research Institute Competitive Intelligence Seminar*
- 3/99 "Ethical Issues For Health Care Attorneys and Prosecutors" - *Georgia ICLE 2nd Annual Health Care Fraud Institute*
- 5/99 "The Need For Internal Investigations: Before, During and After the Creation of a Compliance Program" - *Practising Law Institute Corporate Compliance Seminar*
- 8/99 "Crimes In The Information Age: An Introduction to the Computer Fraud and Abuse Act and the Electronic Communications Privacy Act" – Co-Authored with William H. Jordan, 1999 *ABA National Convention*
- 6/4/99 "Criminal Enforcement under RCRA" – Co-Authored with Douglas S. Arnold and Adam Biegel – 6/4/99
- Fall 1999 "Computer Crime" Chapter in the *White Collar Crime: Business And Regulatory Offenses Treatise*, Otto Obermaier, Editor – Co-Authored with William H. Jordan
- 11/99 "Computer Crime Chapter & Update" – Treatise, Chapter 21, *White Collar Crime: Business and Regulatory Offenses*, Otto G. Obermaier and Robert G. Morvillo, Editors, originally published in Law Journal Press on 11/99
- 1999 "Basics of the Federal Grand Jury" – 1999
- 1999 "Staying Out of Harm's Way: Liability Under the False Claims Act" - 1999

- 3/2000 "Don't Go It Alone – Conducting Internal Investigations With the Help of Private Investigators, Forensic Accountants, and Other Consultants" – Co-Author with Jason Klitenic, March 2000
- 4/2000 "Review of *Dead Run*" – Georgia Bar Journal, April 2000
- 5/22/2000 "Doing Time for Green Times" – Co-Author with Douglas S. Arnold, *Legal Times*, May 22, 2000
- 10/2000 "11th Circuit Case Highlights Increase in Criminal Prosecutions in EPA Region IV" - Alston & Bird LLP Environmental Criminal Enforcement Alert, October 2000
- 5/2001 "Crisis Mangement: What To Do When the Government Comes Knocking" – Co-Author with Marc N. Garber – May 2001
- 5/2002 "The Case for Re-evaluating DOJ Policies on Prosecuting 'White Collar' Crime" – Co-Author with Marc N. Garber, Mark A. McCarty, and Steven D. Henry – Washington Legal Foundation, May 2002
- 2002 "The Expanding Criminalization of Environmental Laws: The Recent Decisions in *Hanousek*, *Hong*, and *Hansen*," – Co-Author with Douglas S. Arnold, David B. Weinstein, and David M. Meezan, Florida Bar Journal, 2002
- 1/31/03 "The Settlement of an FCA (Qui Tam) Healthcare Case From the Provider Perspective: A Few Thoughts" - ABA Qui Tam/False Claims Act Seminar – Washington, DC – January 31, 2003
- 2/27/03 "Basics of the Grand Jury" – Co-Author with Debra D. Bernstein and Stewart Alford, Georgia ICLE Advanced Criminal Practice Seminar, February 27, 2003
- 4/3/03 "Sarbanes-Oxley: Key Provisions and White-Collar Criminal Liabilities" – Co-Author with George A. Keonig, Defense Research Institute, Chicago, Illinois, April 3, 2003
- *Undated Article – "Corporate Criminal Liability and the Federal Sentencing Guidelines" –
- *Undated "Defending a Health Care Fraud Case: Positions to Consider"
- *Undated "Obstruction of Justice: The State Crime Lab in Crisis" – Co-Author with Daniel Adamson, Commentary in Georgia Public Policy Foundation
- *Undated "Developments in Criminal Liability and Enforcement"

- *Undated "Recent Downward Departure and Acceptance of Responsibility Cases in the Second, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits" –
- *Undated "Civil & Criminal Enforcement Under RCRA and EPA Enforcement Initiatives" –
- *Undated "Recent EPA Enforcement Initiatives and Criminal Enforcement Under RCRA" –
- *Undated "EPA Enforcement Initiatives and Civil and Criminal Enforcement Under RCRA" –

*Dates of Publication unknown – attempting to determine actual date through a review of archived files

16. **Speeches:** Provide the Committee with four 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.

Not applicable

17. **Selection:**

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

It is my understanding that my background and experience in the Department of Justice and my strong commitment to public service were factors in the President's consideration of me for this important position.

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

My track record as a leader and a legal manager has its beginnings in my first tour of duty as a U.S. Attorney in the Middle District of Georgia. Later, I had the opportunity to work as the Acting Associate Attorney General and as U.S. Attorney for the Northern District of Georgia. In each position, I had important leadership responsibilities and favorable legal management experiences, giving me a background that I strongly believe will help me structure the new Office of General Counsel. Lastly, I have been a senior partner at a major national law firm coordinating a significant practice area.

B. FUTURE 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?

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

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.

None
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 and execution of law or public policy other than while in a federal government capacity.

None

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

Yes

D. LEGAL MATTERS

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

No

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

None

E. FINANCIAL DATA

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

AFFIDAVIT

Joe D. Whitley, 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 15th day
of May, 2003.

James Archie McCormack
Notary Public

JAMES ARCHIE MCCORMACK
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires December 1, 05



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

May 7, 2003

The Honorable Susan M. Collins
Chair
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250


Dear Madam Chair:

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

We have reviewed the report and have also obtained advice from the Department of Homeland Security concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is a letter dated April 30, 2003, from Mr. Whitley to the Department's ethics official, which discusses Mr. Whitley's ethics commitments and outlines the steps that he 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 the actions he agreed to take in his ethics agreement.

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

Sincerely,


Amy L. Comstock
Director

Enclosures

U.S. Senate Committee on Governmental Affairs
Pre-hearing Questionnaire for the
Nomination of Joe D. Whitley 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")?

It is my understanding that my prior significant management experience in the Department of Justice, including serving as United States Attorney in both the Northern and Middle Districts of Georgia, as a Deputy Assistant Attorney General in the Criminal Division, and as Acting Associate Attorney General, as well as my strong commitment to public service were some of the factors in the President's consideration of me for this important position.

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?

My proven track record as a leader and a legal manager has its beginnings in my first term as United States Attorney in the Middle District of Georgia. Later, I had the opportunity to serve as a Deputy Assistant Attorney General in the Criminal Division, the Acting Associate Attorney General, and as United States Attorney for the Northern District of Georgia. Most recently, I have been a senior partner at a major national law firm coordinating a significant practice area, the Government Investigations and Compliance practice group. In each position, I had important leadership responsibilities and favorable legal management experiences, giving me both a significant management background and relevant substantive legal experience that I strongly believe will help me structure the new DHS Office of the General Counsel.

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.

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.

If confirmed, I will comply with all applicable ethics rules. I will not participate personally and substantially in any particular matter involving AFLAC, Inc.; Southern Co.; Boeing Co.; Du Pont de Nemours; Honeywell International, Inc.; Agere; Cisco Systems, Inc.; Lucent Technologies, Inc.; Microsoft Corp.; Merck & Co.; Lifepoint Hospital, Inc.; Triad Hospitals, Inc.; General Electric Co.; Goodrich Corp.; or HCA, Inc., unless I first obtain a written waiver or qualify for a regulatory exemption pursuant to 18 U.S.C. § 208.

For a period of one year from March 20, 2003, I will not participate in any particular matter involving specific parties in which my former law firm of Alston & Bird, LLP, headquartered in Atlanta, Georgia, is a party or represents a party unless DHS determines that my participation in the particular matter outweighs the concern over an appearance of a loss of impartiality.

If confirmed, I will resign from the following positions: president of the Birmingham Hopewell Alliance; trustee for the Natural Science for Youth Foundation; member of the Board of Regents, National College of District Attorneys; and member of the board of trustees of Columbus State University Foundation. Therefore, for a period of one year from the date of my resignations of these positions, I will not participate in any particular matter involving specific parties in which any of those entities is a party or represents a party unless DHS determines that my participation in the particular matter outweighs the concern over an appearance of a loss of impartiality. If confirmed, I will execute written recusals and establish screening mechanisms with the staff of the Office of the General Counsel to ensure that the recusals are given effect.

6. In your financial disclosure report, dated April 30, 2003, filed in accordance with the Ethics in Government Act of 1978, you did not provide a complete list of your clients during 2001, 2002 and 2003. Schedule D, Part II of the Form 278 requests a list of "sources of more than \$5000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients . . . of any corporation, firm, partnership or other business enterprise . . . when you directly provided the services generating a fee or payment of more than \$5000."

You disclosed only one client for 2003, four clients for 2002, and 2 clients for 2001. In explaining the omission of additional clients, you wrote in your financial disclosure report: "The following is a list of clients who paid in excess of \$5000 during [2001, 2002, or 2003] for services received from Joe D. Whitley who were not considered to have been involved in

a Governmental investigation. All others for whom \$5000 or more was received during [that year] are subject to a written and oral pre-existing confidentiality agreement protecting the identity of the clients due to their status in an investigation being conducted at the time of their retention of Joe D. Whitley and Alston & Bird."

- A. Please provide and explain the basis for your omitting from disclosure clients from whom more than \$5000 was received during 2001, 2002 or 2003 for services you provided. If you believe the agreements referred to above form a basis for your non-disclosure, please explain why such agreements allow you to avoid disclosing the names of your clients despite a government requirement to do so. If you relied on other or additional grounds for non-disclosure, please indicate the grounds and explain why they justify non-disclosure in this instance.
- B. For each oral and written confidentiality agreement referred to above, please provide the language that you believe prevents you from disclosing the former client's identity to the Committee, including any exceptions to the language.

I satisfied the public financial disclosure requirements in consultation with the Office of Government Ethics (OGE), which interprets the ethics rules in question. Although ethics rules generally require disclosure of a nominee's sources of income during the preceding two calendar years, disclosure is not appropriate where that information is "confidential" in nature. (See 5 C.F.R. § 2634.308(b)(6)). In order to determine the categories of information encompassed by the term "confidential," I sought the views of the OGE General Counsel regarding OGE's interpretation of "confidential," and applied OGE's interpretation of the term in complying with all appropriate disclosure responsibilities. Specifically, OGE stated that "confidential" means:

- a privileged relationship established by a confidentiality agreement entered into at the time the person retained the services of the individual;
- a grand jury proceeding or a non-public investigation, if there are no public filings, statements, appearances, or reports that identify the person for whom such individual is providing services; or
- an applicable rule of professional conduct that prohibits disclosure of the information and that can be enforced by a professional licensing body.

Each of my clients was evaluated in light of the totality of the facts and by applying those three criteria. In addition, in applying the first and third criteria, my former law firm's professional ethics counsel was consulted. My former law firm regularly enters into client relationships with written and oral confidentiality agreements that are understood by both the firm and the client to prevent disclosure of client identities. In addition, my former firm's professional ethics counsel advised that

applicable Georgia professional conduct rules further prohibit disclosure of certain client identities. In completing my financial disclosure report, where client identities could be disclosed without running afoul of those confidentiality criteria, the identities were so disclosed.

- C. How many clients did you omit from disclosure? How many were individuals and how many were corporations, partnerships, or other business entities?

As a result of my discussions with my former firm's ethics counsel, ethics counsel at the White House, and with the concurrence of the Office of Government Ethics, I did not disclose the names of certain clients for the calendar years 2001, 2002, and 2003 on my SF 278. For calendar year 2001, nineteen clients satisfied one or more of the three "confidentiality" criteria. For calendar year 2002, twenty-six clients satisfied one or more of the three "confidentiality" criteria. For calendar year 2003, eight clients satisfied one or more of the three "confidentiality" criteria. Given that various clients carried over from year to year, the total number of clients for the entire three year reporting period satisfying one or more of the three "confidentiality" criteria and therefore not disclosed on the public financial disclosure form was forty-three. Of these forty-three clients, thirty were businesses and thirteen were natural persons. Also, my representation of four of the forty-three clients involved exclusively state investigations.

- D. Please indicate whether, for each of the clients omitted from disclosure, you were providing representation in connection with an investigation by a government entity.

For each of the clients not disclosed, I provided representation in connection with an investigation by a governmental entity.

- E. You indicate in the above quotation from your financial disclosure report that the omitted clients were subject to a confidentiality agreement to protect their identity "due to their status in an investigation being conducted at the time of their retention" of you and your firm. With respect to any of the omitted clients, has the "Governmental investigation" related to your representation of those clients either resulted in a public proceeding or been otherwise disclosed publicly?

Since executing my SF 278 for the Committee and OGE, events have continued to evolve and today, to the best of my knowledge, six of the matters that related to the representation of clients whom I did not previously list because of confidentiality issues have emerged in a public proceeding or been otherwise publicly disclosed, thereby resolving the confidentiality duties I previously faced. Certain of these clients were the subject of criminal investigations and certain of these clients were involved

in some purely civil, non-public matters. I would be pleased to convey the identities of these six clients to the Committee in an appropriate way.

- F. Please describe in what industries the clients omitted from disclosure are involved? Is a reasonable possibility that any of the omitted clients could have dealings with DHS at any time and in any capacity?

To the best of my knowledge and understanding as to the nature of these investigations none of the undisclosed clients were under investigation for conduct that implicated the support or advocacy of terrorism or terrorist financing nor were these undisclosed clients under scrutiny for matters related to the national or homeland security of the United States. The majority of the work I performed was in response to government investigations in some of the following business areas: environment, health care, government contracting, telecommunications and information technology, and entertainment. My practice involved complex civil litigation and business fraud and was similar to the mainstream litigation practices of many attorneys in major law firms throughout America.

As the questions correctly note, non-disclosure of client identities does implicate an important ethics regulation regarding impartiality. This regulation vests the Government official with the responsibility to evaluate “appearance” and “impartiality” determinations in the first instance. Specifically, as provided in 5 C.F.R. § 2635.502(a), “where an employee knows that a person with whom he has a covered relationship is or represents a party” to a particular matter involving specific parties, and “*where the employee determines* that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter” unless he has informed the agency designee of the appearance problem and received appropriate authorization to participate in the matter.

Thus, the impartiality regulation is intended to be a self-monitoring ethics rule that every official is obliged to observe and comply with during the existence of “covered relationships,” a period that extends one year when the covered relationship involves a former client. I have reviewed my former clients in light of my time serving DHS as a consultant and what I have learned about the nature of the outside entities that do business with the Department. None of the “covered relationships” will interfere with my ability to do my job effectively. I would like to assure the Committee that I will prudently manage my “covered relationships” with all of my former clients—the identities of whom I know well—and will ensure that adequate and appropriate screening mechanisms are implemented with those around me who will schedule my meetings, control access and control the stream of information that flows to me in order to ensure that I have the opportunity to make the advance determinations required by this important ethics rule. I will

also consult in advance with agency ethics counsel as appropriate to ensure that this ethics rule is observed.

II. Role and Responsibilities of General Counsel of DHS

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

The General Counsel is the chief legal officer of the Department of Homeland Security. The position has been created by statute to unify and coordinate the diverse legal components throughout the Department that make up the DHS legal function, ensuring consistency of legal advice and interpretation across the Department. The General Counsel is also responsible for providing legal advice to the Secretary and other senior DHS officials, representing the Department in various administrative fora, and for managing the Office of the General Counsel.

2. How do you plan to communicate to the staff at DHS and the Office of the General Counsel on efforts to address relevant issues?

I plan to take advantage of a number of means of communication. First and foremost, I plan to hold regular meetings with DHS leadership and the staff of the Office of the General Counsel and will assign members of my staff to work directly with DHS components on relevant legal issues. Second, I plan to use other means of communication such as e-mail and written memoranda, as appropriate.

In addition, several agencies transferred to DHS come with established and sizable Counsel components which will be incorporated into the Office of the General Counsel. I will hold regular meetings with the leadership of those Counsel components and use various other means to communicate directly with counsel staff in the components.

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

The most important responsibilities and challenges for the first General Counsel are to build a strong General Counsel's Office drawing upon the finest legal talent available to provide leadership and coordination to the approximately 1,500 lawyers throughout DHS and to ensure that the Department effectively carries out its missions and other responsibilities under the Homeland Security Act of 2002, as amended, and other legal authorities, while at the same time protecting our Constitutional framework and the basic civil rights and civil liberties of Americans.

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

Initially my principal objective will be the development of an office that will provide quality legal counsel and advice to the "client" components of DHS, together with the Secretary and leadership of the agency. Creating a strong and talented Office of the General Counsel will assist the DHS leadership in meeting their responsibilities to ensure that the Nation is prepared to prevent, respond to, and recover from terrorist attacks. Among my other objectives will be to ensure that DHS complies with all applicable laws, that we implement the provisions of the Homeland Security Act in a timely way, and that the Office of the General Counsel facilitates the work of the Department through promulgating regulations, drafting any necessary legislative proposals, defending the Department against claims and other civil actions, and providing leadership for the legal function Department wide.

III. Legal Background and Experience

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

Membership in Bar Associations and Other Legal Organizations or Committees

- Member, Georgia Bar Association – 1975 to present
- Member, American Bar Association (ABA) – 1975 to present
- Member, Attorney General's Advisory Committee (AGAC) – 1982 to 1985
- Chair, Law Enforcement Coordination Subcommittee of AGAC - 1986
- Member, District of Columbia Bar Association – 1990 to 1995 – now inactive
- Member, Executive Working Group for Prosecutorial Relations – 1986 to 1988
- Member, Atlanta Bar Association – 1989 to present
- Member, Criminal Justice Section (CJS) Council of ABA – 1989 to present
- Member, Lawyers Club of Atlanta – 1989 to present
- Member, Atlanta Bar Association – 1989 to present
- Chair, Organized Crime & Violent Crime Subcommittee of AGAC – 1990 to 1992
- Member, Investigative Agency Subcommittee of AGAC – 1990 to 1993
- Chair, Prosecution Function Committee of CJS of ABA – 1992 to 1993
- Chair, White Collar Crime Subcommittee of AGAC – 1992 to 1993
- Co-Chair, Southeast Regional Subcommittee of CJS of ABA – 1993 to 1998
- Member, Advisory Board, EPA Enforcement Manual – 1994 to present (inactive)
- Member, Editorial Board, BNA Criminal Practice Manual – 1995 to present (inactive)
- Member, Federalist Society – 1990 to present
- Chair, Executive Committee, Criminal Law and Procedure Practice Group, Federalist Society—November 1996 to November 1999

- Past Chair, Executive Committee, Criminal Law and Procedure Practice Group, Federalist Society--2000 to 2001
- Past Chair, Executive Committee, Criminal Law and Procedure Practice Group, Federalist Society--2002 to present
- Member, Board of Advisors, Atlanta Lawyers Chapter, Federalist Society--1994 to present
- Vice-Chair, White Collar Crime Committee of CJS of ABA – 1998
- Member, CJS of ABA – 1999 to present
- Member, Board of Regents, National College of District Attorneys – 1998 to present (one 2-year term as Member at Large; two 2-year terms as Member representing ABA)
- Vice Chair, Governmental Affairs, CJS of ABA – 2002 to present
- Member, Forum on Crime & Justice Advisory Board – 2002 to present

Membership in Civic or Other Organizations

- Member, Board of Trustees, Natural Science for Youth Foundation – 1993 to present (inactive)
- Member, Board of Directors, The Leukemia Society of America – 1994 to 1997
- State Chairman, Annual Fundraising Drive, The Leukemia Society of America – 1994 to 1995
- Member, Board of Directors, Junior Achievement of Georgia, Inc. – 1996 to 1997
- Member, Birmingham Hopewell Alliance – 1997 to present
- President, Birmingham Hopewell Alliance – 2001 to present
- Member, Board of Directors, Georgia Council on Substance Abuse – 7/1/2000 to present
- Member, Board of Directors, Mission New Hope - 1994 to 1999
- Board Member, Columbus State University Foundation, Inc. – 2002 to present

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

1989 Supreme Court of the United States
 1989 U.S. District Court for the Northern District of Georgia
 1989 District of Columbia
 1989 10th Circuit Court of Appeals
 1980 11th Circuit Court of Appeals
 1975 Superior Court of Muscogee County, Georgia
 1975 Georgia Supreme Court
 1975 Georgia Court of Appeals

1975 5th Circuit Court of Appeals
 1975 U.S. District Court for the Middle District of Georgia

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

<u>Title</u>	<u>Description</u>	<u>Name of Employer</u>	<u>Location</u>	<u>Dates of Employment</u>
Associate	Attorney	Kelly, Denney, Pease & Allison	318 11 th Street Columbus, GA 31994	12/74 – 3/78
Assistant District Attorney	State Prosecutor	Muscogee County District Attorney's Office	Government Center Columbus, GA 31902	3/78 – 3/79
Associate	Attorney	Hirsch, Beil & Partin	1021 Third Avenue Columbus, GA 31902	3/79 – 9/81
U.S. Attorney	Federal Prosecutor	Office of U.S. Attorney Middle Dist. Of GA	433 Cherry Street P.O. Box U Macon, GA 31202	9/81 – 2/87
Deputy Assistant Attorney General	DOJ mgmt./ Federal Prosecutor	Office of the Assistant Attorney General Criminal Division	Main Justice 950 Pennsylvania Avenue Washington, DC 20570	2/87 – 5/88
Principal Deputy Associate Attorney General	DOJ mgmt./ Federal Prosecutor	Office of the Associate Attorney General	Main Justice 950 Pennsylvania Avenue Washington, DC 20570	5/88 – 2/89
Acting Associate Attorney General	DOJ mgmt./ federal prosecutor	Office of the Associate Attorney General	Main Justice 950 Pennsylvania Avenue Washington, DC 20570	2/89 – 7/89
Partner	Attorney	Smith, Gambrell & Russell	Suite 3100 Promenade II 1230 Peachtree St. Atlanta, GA 30309-3592	9/89 – 6/90
U.S. Attorney	Federal Prosecutor	Office of U.S. Attorney, Northern Dist. Of GA	1800 U.S. Courthouse 75 Spring St., SW Atlanta, GA 30335	6/90 – 11/93
Partner	Attorney	Kilpatrick Stockton	1100 Peachtree Street Atlanta, GA 30309	11/93 – 4/97
Partner	Attorney	Alston & Bird	1201 W. Peachtree St. Atlanta, GA 30309-3424	5/97 – 3/20/03

4. Describe the most significant legal activities you have pursued, including significant litigation which did not proceed to trial or legal matters that did not involve litigation.

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Describe the nature of your participation in each instance described.

Among the highlights of my career to this point are:

- Management and coordination of the U.S. Attorney's Office for the Middle District of Georgia from 1981 to 1986. We succeeded in disrupting drug trafficking activity into the District. We also effectively prosecuted political corruption at the state and local level.
- My service in the Department of Justice from 1986 to 1989 in a variety of leadership positions in the Criminal Division and in the Office of the Associate Attorney General. While at the Department of Justice, I had responsibilities related to the gathering of information concerning terrorists and terrorist related activities and I served on a counterterrorism working group.
- My service as a U.S. Attorney for the Northern District of Georgia from 1990 to 1993. My office successfully pursued high level narcotics traffickers and money launderers. We also pursued numerous political corruption matters, including the prosecution of individuals engaged in illegal activity at the Atlanta Airport.
- My service from May 2000 through July 2001 as counsel to the U.S. Court of Appeals for the District of Columbia Circuit investigating case assignment practices within the U.S. District Court.

IV. Policy Questions

1. What is your view of the mission of the General Counsel's office of DHS? What are the highest priority legal issues that you will address when you take office? What longer-term goals would you like to achieve?

I see the mission as one of service to the officials and components of DHS and, also, of developing consistency among those components on legal issues. One of the highest priority issues will be the development of all aspects of the statute creating DHS from a legal perspective, including development of a new human resources system and exercise of procurement authorities.

One of my long term goals will be to develop a sense of unity in DHS with respect to legal issues, so there will be a free flow of information to and from all of the legal components. I realize that the DHS is a combination of many preexisting Government agencies and a few newly created ones, and I further recognize that Congress, as it should, has a high level of interest in ensuring that DHS performs effectively despite its recent creation. One of my missions, should I be confirmed, is

to ensure that a sense of unity as a new Cabinet Department is created and maintained, and that, similarly, the transition to working with its new congressional oversight structure is as seamless as possible.

2. With the creation of the new Department of Homeland Security, a large number of component agencies have been brought together. Many of the agencies, including the former INS and Customs, had large legal departments.

How large do you envision the main DHS General Counsel's office becoming?
 Will the component GC operations maintain their current size and structure?
 What will be the relationship between main DHS GC and the legal departments of the components? What steps will you take to assure the consistency of legal positions across the Department?

I envision the office becoming large enough to handle the management and coordination of legal issues in DHS; my understanding is that a staff of 68 people at Headquarters has been requested in the President's budget. I contemplate that the components' legal operations will undergo some changes in staffing as necessary to match the workload of reorganized DHS components.

I believe that the relationship between the Office of the General Counsel and the legal components will be strong and built on mutual trust and respect. We will provide support to the Secretary, and we will provide support to each of the Under Secretaries and their Directorates through separate Assistant General Counsel.

Consistency of legal interpretation and policy will be achieved through management controls over the lawyers in key positions serving each of the components and strong communication of legal positions throughout the Office of the General Counsel and the Department as a whole.

3. During this administration there have been information access disputes that have impeded congressional oversight of some Federal programs and activities. The ability to perform congressional oversight of DHS is critical, and requires the Department's cooperation in assuring that Congress and GAO have timely and complete access to information at DHS.

What approach will you take to ensure that Congress and GAO promptly obtain the information needed to oversee DHS? Are there any categories of DHS information that, in your view, would warrant withholding from Congress or GAO? If so, what are they, and what would be the legal justification for withholding them?

I appreciate that the Congress relies on the GAO to examine Federal programs and activities. We will coordinate closely with GAO to ensure that, to the extent possible, information is provided in a prompt manner. If confirmed, my approach

to dealing with this issue would be to ensure that DHS provides GAO and Congress access to the information it needs without materially impairing the operations of the Department and, in particular, the critical DHS mission to secure the Nation from terrorist threats.

As a former United States Attorney and Acting Associate Attorney General in the Justice Department during three previous Administrations, I am well aware of the important role that Congress plays in the oversight of Executive Branch policies and actions, and, if confirmed, I will faithfully execute the laws of the United States.

4. The Critical Infrastructure Information Act of 2002 (CIIA) (Sections 211-215 of the Homeland Security Act) contains a number of protections for critical infrastructure information that is voluntarily submitted to the Department of Homeland Security.
 - A. What is your understanding regarding the circumstances under which information voluntarily submitted to DHS under the CIIA can be shared with other Federal or state agencies?

On April 15, 2003, the Department published in the Federal Register a Notice of Proposed Rulemaking which proposes procedures implementing the CIIA. I understand that, under the proposed rule, DHS may choose to share voluntarily submitted CII with other Federal or state agencies once that information has been acknowledged and validated by DHS according to the procedures published for public comment.

- B. What is your understanding regarding the circumstances under which information provided to DHS under the CIIA can be shared with Congress?

As I understand the proposed rule, DHS will share CII information with either House of Congress, or their committees, when Congress requests that information.

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

The proposed rule authorizes disclosure of protected CII to the DHS Inspector General or any other employee designated by the Secretary of Homeland Security without the submitter's written consent under circumstances specified in the rule.

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

The Office of the General Counsel will advise the Under Secretary for Information Analysis and Infrastructure Protection and the CII Program Manager concerning

implementation of the Act.

5. During Congressional deliberations, concerns were expressed that the Critical Infrastructure Information Act of 2002 (CIIA) might have the effect of bringing under a veil of secrecy some information that would otherwise be publicly available, such as information related to environmental, health and safety risks and regulatory compliance, thereby inappropriately compromising public access to information. For example, there was concern that some submitters of information would make overbroad claims of protection under the CIIA for information that does not meet the statutory criteria, and that members of the public who wish access to the information would not have an adequate opportunity to present arguments to the Department explaining why particular information should be released. Concern was also expressed that a submitter might first "voluntarily" submit information to a critical infrastructure protection program, and then submit the same information, bearing the same express statement that the information is voluntarily submitted, to another program or agency for a purpose unrelated to critical infrastructure security (for example, perhaps to satisfy a requirement or to gain some permission or forbearance under an environmental regulatory program), and that the other agency would then inappropriately shield the information from disclosure.
- A. How would you, as General Counsel, help assure that the CIIA does not result in the unintended withholding of information that should, under the statutory criteria, be made available under FOIA?

Should I be confirmed, I will work assiduously to ensure that the critical infrastructure information program will be implemented in full conformity with all applicable laws, including the Freedom of Information Act.

- B. If DHS determines that an entity is submitting critical infrastructure information to DHS in bad faith in an attempt to improperly obtain the protections of the CIIA, what action do you envision DHS taking?

As I understand it, the proposed rule provides that, in those instances in which the Program Manager determines that information is not submitted in good faith, the Program Manager will proceed with treating the information as unprotected CII and may do so without informing the submitter.

6. The Homeland Security Act provides broad authority to exempt DHS from many of the federal personnel rules in title 5 of the U.S. Code.

What safeguards do you think DHS should incorporate to ensure that this broad authority to create and implement a new human capital system builds in transparency and accountability?

I understand that there are many safeguards in the Homeland Security Act and, if

confirmed, I will work to ensure that those creating and implementing the new DHS human capital system will abide by both the statutory provisions and the spirit of the safeguards. Transparency and accountability are two of the principles already guiding development of a new DHS human capital system. I will also work to ensure that those within DHS who are charged with creating and implementing our new human capital system are aware of our obligations to ensure that our employees are treated with the fairness and respect they deserve.

7. In the legislation creating DHS, it was the express sense of the Congress that employees be entitled to "fair treatment" in appealing decisions related to their employment. Pursuant to 5 U.S.C. § 9701(f)(2), any regulations that the DHS Secretary promulgates must comport with due process, and may differ from those that apply to other federal employees under 5 U.S.C. §§ 7701 *et seq.* "only insofar as such modifications are designed to further the fair, efficient, and expeditious resolution of matters involving the employees" of DHS.

- A. To what extent do you think modifications to the appellate procedures that apply to federal employees under 5 U.S.C. §§ 7701 *et seq.* are necessary or appropriate for DHS employees, and why?

I believe that DHS should be open to modifications that are designed to enhance the fairness, efficiency, and expeditious resolution of matters affecting our employees. The current system has been criticized by many as being too slow and unresponsive to agencies' current workplace needs. Secretary Ridge and the Director of the Office of Personnel Management (OPM) have commissioned a DHS HR Design Team to explore all options for creating state-of-the-art human resources policies and processes in a careful and thoughtful manner. I look forward to reviewing these options and studying them carefully.

- B. Do you believe that all DHS employees should have the right to meaningful due process when faced with dismissal or other adverse personnel action? If not, why not?

Yes, I believe that due process is an important component of any procedure used to remove employees from Federal service or subject them to adverse personnel action.

- C. If you believe due process rights are appropriate in only certain circumstances, please explain what those circumstances are and the basis for your conclusion in this regard.

I believe that any procedures used to remove or take adverse personnel actions against Federal employees should be consistent with all applicable law, including due process.

- D. How much and in what ways do you think the requirements under 5 U.S.C. §§ 7701 *et seq.* can be altered, while still retaining a system that provides meaningful due process?

I understand that a team of DHS and OPM employees is currently developing a set of options for improving the current system. I would like to have the benefit of the research and opinions of the team before reaching any conclusions on this issue and would be happy to discuss the issue further with Congress at that time.

- E. For example, do you believe meaningful due process for employees appealing decisions related to their employment includes access to an independent and impartial arbiter? Under what circumstances, if any, do you believe it appropriate for such disputes to be resolved by an arbiter within DHS, and under what circumstances should a dispute be referred to an external body such as the Merit Systems Protection Board?

If I am confirmed, I expect to have the benefit of the research and opinions of the HR Design Team before reaching any conclusions on this issue.

- F. How will you, as General Counsel, assure that employees at all parts and levels of the Department have access to fair and impartial hearings and appeals when disciplinary or other adverse actions are proposed?

I understand the role of the General Counsel on this issue is to provide legal advice to those designing the new DHS personnel system to help them ensure that any new process protects employees' legal rights.

8. Many of the agencies transferred to the Department of Homeland Security had their own procurement departments.

What challenges do you foresee in integrating the component agencies' procurement departments? How would you propose to meet those challenges?

If confirmed, I will work with DHS senior management, including the Under Secretary for Management, to integrate the various incoming procurement organizations. DHS must assess the current capabilities, identify opportunities for improvement, and develop an action plan that will lead to a more effective and efficient department-wide procurement function.

9. The Homeland Security Act gives DHS special streamlined acquisition authority through September 30, 2007. However, DHS may not depart from existing acquisition rules absent a determination that the Department's mission would be "seriously impaired" without the use of such special authorities.

- A. How would you define the term “seriously impaired”?

The Office of the General Counsel will be working with the Under Secretary for Management and the Chief Procurement Officer to develop criteria to determine whether the Department’s mission would be seriously impaired by following the existing acquisition rules. Should I be confirmed, I will respect Congress’s decision to facilitate the Department’s mission by providing these special authorities and will work with senior management to ensure that the Department’s mission is aggressively pursued without undermining or abusing these special authorities.

- B. What controls would you put in place to ensure that DHS meets this standard before exercising these procurement flexibilities?

I will work closely with the Under Secretary for Management and the Chief Procurement Officer and other senior management to ensure that appropriate controls are established.

10. Many experts say that the Federal government is engaging in too much contract bundling because current laws and regulations are all too often ignored in the procurement process. What steps will you take to ensure that the procurement regulations governing the bundling of contracts are honored in spirit as well as letter, and how will you work to ensure that small businesses across the country have the ability to put forth their ideas and offer their services on an equal footing with large, well connected ones?

It is my understanding that DHS has established an Office of Small and Disadvantaged Business Utilization (OSDBU) to focus on maximizing the utilization of small businesses in DHS acquisitions. Of key importance to this office is the issue of inappropriate contract bundling. If confirmed, I will work with the Under Secretary for Management, the Chief Procurement Officer, and the head of OSDBU to ensure that DHS acquisition policies promote the utilization of small businesses and that actions are taken to combat inappropriate contract bundling.

11. Under the Homeland Security Act, the Comptroller General is required to submit a report in fiscal year 2006 on DHS’s use of its special streamlined acquisition authority.

What do you view as the Department’s responsibilities in assisting the Comptroller General in carrying out this oversight function?

As with all Comptroller General oversight functions, the Department’s responsibility is to cooperate fully with the Comptroller General.

12. The *qui tam* or whistleblower provisions of the False Claims Act have been important tools for ferreting out fraud against the government. Yet, as part of your arguments for refocusing federal law enforcement resources regarding white collar crime, you

recommend certain changes in the *qui tam* provisions of the False Claims Act (“The Case for Reevaluating DOJ Policies on Prosecuting White Collar Crime,” co-authored with Marc N. Garber, Mark A. McCarty, and Steven D. Henry, Washington Legal Foundation, May 2002, pp. 27-31). Specifically, you suggest that Congress change the statute to dissuade employees from filing *qui tam* actions before they have reported the False Claims Act violations to their employers. Such a change might have the effect of dissuading some people from reporting fraud against the Government. DHS can be expected to award a large number of very significant contracts, and therefore will be seeking ways to deter and ferret out fraud. Please describe your views on this issue more fully. As General Counsel, how would you approach this challenge of deterring and pursuing contractor abuses?

The referenced article is an essay on a number of topics including the operation of the *qui tam* statute, which I strongly support and endorse. The paper was intended to encourage dialogue on whether in some circumstances the secrecy provisions of the False Claims Act prevented industry from knowing sooner about the problems they were experiencing so that corrective action could be taken promptly.

The article is in no way intended to suggest that fraud against the Government in contractor matters should not be pursued vigorously. If confirmed, I intend to use all available tools against contractor fraud and will work closely with the DHS Inspector General on these matters.

13. Some have expressed concerns that DHS programs may have a negative impact on civil rights and civil liberties. They argue that a Department whose reason for existence is maintaining the Nation’s security will be tempted to sacrifice civil rights and civil liberties in the pursuit of its security mission. To address these concerns, Congress included in the Department an Officer for Civil Rights and Civil Liberties who is charged with reviewing and assessing information alleging abuses of civil rights, civil liberties and racial and ethnic profiling by employees and officials of the Department. But, while Congress did establish this Officer within the Department, the General Counsel, as chief legal officer of the Department, would also play a role in ensuring that Department policies and programs are carried out in a lawful and constitutional manner such that civil rights and liberties are protected.
 - A. What do you believe the role of the General Counsel is with respect to ensuring the Department does not violate the civil rights and civil liberties of individuals?

From the very beginning of the homeland security effort, President Bush and Secretary Ridge have emphasized the need to protect and cherish our civil rights and civil liberties. For example, President Bush told a conference of federal prosecutors in November 2001, “[W]e have a huge responsibility, and that is to defend America while protecting our great liberties.” As Secretary Ridge recently told college and university officials, “We will not, as [Benjamin] Franklin once

warned, trade our essential liberties to purchase temporary safety.” The President and the Secretary have given the Department a clear mission: in addition to protecting America’s assets, the Department of Homeland Security must also protect America – our way of life, our Constitutional framework, and our basic civil liberties such as the freedom of speech and the right to dissent. The General Counsel, as chief legal advisor to the Secretary, will and must play a large role in ensuring that the Department protects and enhances our civil rights and civil liberties. Throughout my legal career I have been concerned with and alert to these issues and, if I have the privilege of being confirmed as General Counsel, I will continue to provide legal advice on these matters carefully and conscientiously.

- B. If confirmed, how would you and your office work with and support the mission of the Officer for Civil Rights and Civil Liberties?

I believe strongly that the Officer for Civil Rights and Civil Liberties must play an integral role in the Department of Homeland Security. It is important that senior officers within the Department receive proactive advice from the Officer, and the office he creates, so that the Department’s policies and initiatives are shaped with an understanding of how they can protect and enhance our vital civil rights and civil liberties. On April 16, 2003, President Bush appointed Daniel W. Sutherland to be the Officer for Civil Rights and Civil Liberties. If confirmed as General Counsel, I expect to have a close and supportive relationship with Mr. Sutherland and the Office for Civil Rights and Civil Liberties.

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

Working closely with the Department’s Officer for Civil Rights and Civil Liberties, I and my staff will take every opportunity to raise these critical issues with the components within DHS. I believe it is essential that all DHS personnel – from the most senior levels to the lowest ranking law enforcement officer in the field – carefully respect the Constitutional rights of the public.

14. Section 222 of the Homeland Security Act directs the Department’s Privacy Officer to “assume primary responsibility for privacy policy,” including overseeing compliance with the Privacy Act and “assuring that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection and disclosure of personal information.”
- A. What role do you envision for yourself, as General Counsel, in overseeing compliance with privacy laws?

If I am confirmed as the Department’s primary legal officer, I certainly will work to ensure the Department’s compliance with all relevant statutes. I envision working

closely with Ms. Nuala O'Connor Kelly, the Department's Privacy Officer, to develop a consistent approach to Privacy Act compliance across the various DHS directorates. Not only will Ms. O'Connor Kelly be assisted by Privacy Act officers throughout the organization, but also I further envision that the legal and the privacy offices will work very closely together in the development of privacy legal compliance and privacy policy implementation throughout the Department.

B. How will you work with the Privacy Officer to ensure she is able to perform her duties?

If confirmed, I would envision and expect that the legal department would support and complement the needs of the Privacy Officer as it would any of the activities of the other DHS components. While the Department certainly has numerous attorneys who are expert in Privacy Act matters, I would further anticipate that Ms. O'Connor Kelly and I would work closely together, and that we would also assign a senior member of the Office of the General Counsel to be the legal advisor to the privacy office.

15. Many privacy experts have suggested that the Privacy Act of 1974 is not sufficiently up to date to address the potential of new technologies to infringe personal privacy.

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

I understand that it was the intent of the drafters of this section to appoint a senior-level member of the Department of Homeland Security to oversee strict implementation of the Privacy Act and to recommend overall privacy policy guidance and vision to the organization.

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

If confirmed, I will work with the Privacy Officer to ensure that policies and programs are developed with the requisite communication not only among the legal and privacy and policy-making arms of the Department, but also with the procurers and users of the relevant technologies.

C. What will be your role in assessing the privacy implications of data mining systems implemented by the Department? Of TSA's Computer Assisted Passenger Profiling System II (CAPPS II)?

In concert with the work of the privacy office, I would anticipate that the Office of the General Counsel would play a vital role in any new system contemplated by the Department to ensure its compliance with applicable laws and to assist in the

creation of sound policy. My goal throughout my service as General Counsel would be to minimize the impact on the individual's privacy while maximizing success in achieving the Department's important mission of protecting our homeland, including the safe transport of passengers.

16. Section 428 of the Homeland Security Act gives the Secretary of Homeland Security the exclusive authority to issue regulations with respect to, administer, and enforce the provisions of the Immigration and Nationality Act with respect to the issuance of visas. However, it provides that such authority shall be exercised "through the Secretary of State."
 - A. If the Secretary of Homeland Security wishes to deny an individual visa or class of visas, but the Secretary of State disagrees, whose decision would control?

It is my understanding that the Departments of State and Homeland Security are currently working cooperatively to conclude the memorandum of understanding (MOU) contemplated by section 428 which will delineate the respective responsibilities of the Departments of State and Homeland Security.

- B. Section 428(e)(3) gives the Secretary of Homeland Security a role in the evaluation of consular officers with respect to their processing and adjudication of visa applications. If the Secretary of Homeland Security believes that an individual consular officer is not handling visa applications in a manner consistent with DHS procedures, will the Secretary of Homeland Security have the authority to remove or discipline that consular officer?

This subject will also be addressed in the MOU being negotiated between the Departments of State and Homeland Security.

17. Functions that were previously consolidated in the Immigration and Naturalization Service are now divided among three DHS bureaus - the Bureau of Customs and Border Security, Bureau of Immigration and Customs Enforcement, and Bureau of Citizenship and Immigration Services - housed in two separate directorates. Officers within each of the three bureaus, however, will be applying the provisions of the Immigration and Nationality Act.
 - What will be your role in ensuring that there is a uniform definition and uniform application of this very complex body of law?

If I am confirmed, the DHS Office of the General Counsel will have an important role in ensuring the uniform interpretation and administration of the immigration laws throughout the Department. While in the first instance, I will expect that the legal staffs in the three bureaus will work closely together to coordinate the resolution of legal issues as they arise, where necessary, the General Counsel's

Office will ensure that particular issues are resolved appropriately.

18. What is your understanding of the respective jurisdictions, responsibilities of, and relationship between, the DHS and Department of Justice with respect to implementation of the Nation's immigration laws? Is it your view that the Department of Justice can set immigration policy outside of matters before the immigration courts?

Although the Homeland Security Act transferred the immigration enforcement and benefits functions of the former INS to the Department of Homeland Security (DHS), the Executive Office for Immigration Review remains within DOJ. Existing law now provides that "the Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens," subject to certain exceptions and a proviso. That proviso directs that "determination[s] and ruling[s] by the Attorney General with respect to all questions of law shall be controlling."

Under the statutory framework, the Secretary of DHS is now charged with the administration and enforcement of the immigration laws, with certain limited exceptions. The Department of Justice does not set immigration policy in matters outside of the Executive Office for Immigration Review, although the Attorney General retains the authority to make controlling determinations of law.

19. On March 1, 2003, responsibility for the care and custody of unaccompanied alien children was transferred from the Department of Justice to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services. Under this new arrangement, DHS is required to turn unaccompanied children over to the ORR.

How will you ensure that DHS officers comply with the law and properly inform children about their rights while in DHS custody?

If I am confirmed, I will work with the Bureau of Immigration and Customs Enforcement (ICE) to ensure that DHS officers comply with the law and promptly transfer unaccompanied children to the care and custody of the Department of Health and Human Services, Office of Refugee Resettlement. It is my understanding that all juveniles that are apprehended for immigration violations are provided with a written notice of their rights, including the right to a bond redetermination hearing when applicable. The arresting officer is required to explain all documents provided to the juvenile in the juvenile's native language and in terms the juvenile can understand and must also provide a list of pro bono legal services. I also understand that there is coordination with the staff members of the facilities where juveniles have been placed so that the staff can assist the juveniles on matters such as contacting an attorney or family member.

20. In 1996, the Department of Justice's Office of Legal Counsel ruled in a published opinion *U.S. Senate Committee on Governmental Affairs Pre-hearing Questionnaire*

that local police departments were precluded from arresting aliens for violations of civil provisions of immigration law; that ruling was reiterated in November 2001. (Assistance by State and Local Police in Apprehending Illegal Aliens, February 5, 1996, Office of Legal Counsel, <http://www.usdoj.gov/old/immstopola.htm>). Last year, the Office of Legal Counsel prepared a legal opinion authorizing state and local law enforcement to pursue undocumented aliens whose names are found on the National Crime Information Center (NCIC) database. This opinion has not been made public. In letters dated May 7, 2003 addressed to Senators, however, Acting Assistant Attorney General Jamie Brown confirmed that the opinion had concluded that the "states possess inherent authority to arrest individuals whose names have been entered into the NCIC database because they have both (1) violated civil provisions of the Federal immigration laws that render them deportable and (2) been determined by Federal authorities to pose special risks, either because they present national security concerns or because they are absconders who have not complied with a final order of removal or deportation."

A. Do you believe that such an opinion should be made public?

Because I am serving in a consultant capacity, I do not have access to the information necessary to fully and appropriately answer this question. Should I be confirmed, I will review this important matter with others at DHS.

B. If state and local police agencies are to be involved in enforcing civil provisions of immigration law, what is the legal basis for such an arrangement, and what are the circumstances under which state and local police can legally exert such authority? Do you think their authority in this regard can be expanded beyond what is provided for in the May 7, 2003 letter from the Department of Justice?

As stated above, I do not have access to the information necessary to respond to this question. If I am confirmed, I will work collaboratively with the Department of Justice on this issue.

C. Which Department currently has the authority to set policy on the arrest of violators of civil immigration laws, the Department of Justice or the DHS? Do you consider the legal opinion of the Department of Justice's Office of Legal Counsel binding on the Bureau of Immigration and Customs Enforcement?

Both DHS and the Department of Justice have important roles in the enforcement of the nation's immigration laws, and coordination on areas of overlapping jurisdiction is important to both Departments. The Department of Justice serves as the Government's counsel, among other roles. With the creation of DHS, however, it is clear that the predominant authority to set immigration enforcement policy lies with DHS.

D. As cited above, according to the May 7, 2003 letter, violators of civil immigration

laws whose names have been entered into NCIC because they present “national security concerns” can be arrested by state and local law enforcement authorities. How is the term “national security concerns” defined? Is the term “national security concerns” limited in this context to individuals against whom there are well-grounded suspicions, or could it extend more broadly? For example, could it extend to all individuals from predominantly Muslim countries, or to the “similarly-situated seagoing migrants” to whom Attorney General Ashcroft referred in ordering the detention of all Haitian boat people on national security grounds? *See In re D-J*, U.S. Department of Justice, Office of the Attorney General, 23 I&N, Dec. 572 (A.G. 2003).

I respectfully defer to the Department of Justice on this question.

- E. Do you believe that DHS has an obligation to ensure that state and local law enforcement personnel are adequately trained in, and understand, the technical rules that govern immigration law? If so, how can this be done, and will you ensure that such training occurs?

Outreach to state and local law enforcement is an important part of the DHS mission. It is my understanding that such outreach sometimes occurs through formal training. In addition to training, DHS has other mechanisms in place to assist state and local law enforcement personnel with questions about immigration law or about a person they have encountered. The Law Enforcement Support Center (LESC) provides round-the-clock response.

21. On April 17, 2003, Attorney General Ashcroft issued an opinion on the detention of undocumented Haitian migrants pending deportation proceedings. He ruled that releasing undocumented seagoing migrants on bond would give rise to adverse consequences for national security, by encouraging a mass migration, and by diverting agency resources. Consequently, the Attorney General ruled that the respondent in that case should be detained without bond, and declared the opinion’s national security rationale binding on “all similarly-situated aliens.” *In Re D-J*, U.S. Department of Justice, Office of the Attorney General, 23 I&N, Dec. 572 (A.G. 2003).

- A. Is the Attorney General’s decision binding on the Bureau of Immigration and Customs Enforcement? Please explain.

The Homeland Security Act kept the Executive Office of Immigration Review within the Department of Justice. Therefore, whenever the Bureau of Immigration and Customs Enforcement (BICE) seeks detention of undocumented Haitian migrants, the Board of Immigration Appeals and the immigration judges must follow the Attorney General’s opinion and detain the migrants. It is my understanding, based on discussions with others at DHS that the Attorney General’s opinion is also binding on BICE when it seeks to detain undocumented Haitian

migrants. I have been informed that the opinion cannot be understood, however, to require that BICE always seek detention; BICE retains the discretionary authority to parole aliens out of custody when appropriate. In the event that I am confirmed, I will undertake to become more informed on this issue.

- B. Do you believe the same national security rationale should be applied to justify the detention of all seagoing migrants, from all countries? Can this national security rationale be applied more broadly, to cases not involving seagoing migrants?

Although I am not familiar with all of the relevant policy concerns involved because of my status as a consultant, I will review this matter should I be confirmed.

22. Section 871 of the Homeland Security Act permits the Secretary of Homeland Security to establish advisory committees and to exempt those committees from the Federal Advisory Committee Act.
- A. What will be the role of the DHS General Counsel's Office in making determinations regarding the exemption of advisory committees from FACA?
- B. Under what circumstances do you think it appropriate to exempt an advisory committee from FACA, and when will you advise the Secretary to do so?

If confirmed as the General Counsel, I will advise the Secretary on the use of this authority. I believe that this authority should be used carefully and where it will further the critical security mission of the Department.

23. At a Governmental Affairs hearing on May 1, 2003, Secretary Ridge was asked about recent media reports on potential conflicts of interest involving former employees of the Secretary who are now homeland security lobbyists in the private sector. At the hearing, Secretary Ridge gave assurances that one of your first responsibilities as General Counsel would be to develop an internal code to deal with conflicts of interest, post-employment restrictions, and other ethics issues. Secretary Ridge stated that the establishment of an ethical code would be a DHS priority.
- A. Please indicate whether you have had any detailed experience in developing or implementing federal ethics regulations, and whether, if confirmed, you plan to hire counsel with expertise in federal ethics matters to handle ethics issues for the General Counsel's office.

I am familiar with Federal standards of conduct. In prior Federal positions, I have received ethics training and addressed specific standards of conduct and professional responsibility issues. I believe I have a grasp of the importance of identifying and dealing with any circumstance that detracts from the integrity of the

Department's programs and operations.

It is my understanding that the position of Legal Advisor for Ethics has been designated as the Department's Designated Agency Ethics Official (DAEO). The DAEO position is in the Office of the General Counsel, is a career position, and is classified in the Senior Executive Service. Currently, the position is not filled although we do have an attorney serving as Acting DAEO. If confirmed, I will proceed quickly to fill the position.

- B. Please describe your understanding of how DHS handles ethics issues administratively and the role played by the General Counsel's office.

The Designated Agency Ethics Official (DAEO), a position within the Office of the General Counsel, coordinates and manages the Department's ethics program and provides liaison with the Office of Government Ethics (OGE). DHS components with Counsel offices will employ deputy ethics officials to provide timely guidance to employees who are confronted with ethics issues.

- C. Please describe your understanding of the proper relationship between DHS and the Office of Government Ethics.

The Office of Government Ethics provides overall direction and leadership concerning Executive Branch ethics policy and promulgates rules that are applicable to employees across the Executive Branch, including DHS employees. Additionally, the DHS DAEO will consult regularly with OGE on ethics matters. It is essential that the Department maintain a close and effective working relationship with OGE.

- D. Please identify what you see as the key ethics issues that need to be addressed in a DHS ethics regulation.

All federal employees, including DHS employees, are subject to the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR Part 2635, which are published by the Office of Government Ethics. The Standards govern gifts; financial conflicts; impartiality; seeking other employment; misuse of position; and outside activities. In addition, OGE has published Government wide regulations governing post employment contacts. It is critical that these standards of ethical conduct are clearly understood by all DHS employees and it will be one of my top priorities to ensure that DHS employees abide by them. Should I determine, upon reviewing the Department's ethics program, that any supplemental regulation is required, I will work quickly to provide additional guidance.

- E. Please indicate whether development of a DHS ethics regulation is now underway and the dates of key milestones in this process toward its completion.

As I understand it, the Department is hiring additional staff for the Office of the General Counsel to evaluate this area. Assessing the need for a supplemental ethics regulation will be a priority for the Legal Advisor for Ethics, once that person is in position.

- F. Once a draft of the ethics regulation is in an advanced stage, please indicate whether you would be willing to share this draft with this Committee.

I look forward to working with the Committee at various stages of the process as we assess the need to develop a supplemental regulation.

- G. In the interim, until the ethics regulation is completed, please indicate whether DHS has issued any guidance on ethics issues to DHS employees and, if so, what topics have been addressed.

DHS employees are subject to the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR Part 2635. In addition, it is my understanding that the Department has issued a management directive that provides basic administrative structure for the ethics program and each new employee has received a memo concerning compliance with ethical principles.

24. On May 23, 2003 the *Washington Post* reported that Attorney General Ashcroft and Secretary Ridge agreed to give the FBI sole control over financial investigations related to terrorism, including the type of financial investigations that were traditionally pursued by the Secret Service. (John Mintz and Dan Eggen, "Ashcroft, Ridge Settle Turf Battle; Some in Homeland Security See Pact on Financial Probes as a Mistake," *Washington Post*, May 23, 2003.) A copy of the "Memorandum of Agreement Between the Department of Justice and the Department of Homeland Security Concerning Terrorist Financing Investigations," signed by Attorney General Ashcroft and Secretary Ridge on May 13, 2003, is attached to these questions. The *Washington Post* story cites a memo from the Director of the Secret Service, W. Ralph Basham, saying that the agreement suggests that the Secret Service must check with the FBI before undertaking many investigations. According to the *Post*, Basham wrote, "The agreement is contradictory to the Secret Service's explicit statutory mandate to prevent and investigate financial crimes and provides an unworkable framework for current and future financial crime investigations."
- A. Do you agree with the characterization of this agreement in the quotation from Mr. Basham's memo cited above?
- B. Do you think it was appropriate for DHS and the Justice Department to enter into such an agreement, given the statutory mandate of the Secret Service? If so, why? If not, why not?

At this time, I am not aware of all the relevant facts and circumstances necessary to develop an informed opinion. If confirmed, my goals will be to ensure that DHS efforts against the financing of terrorism are effective and, at the same time, preserve the traditional investigative responsibilities of the Secret Service.

25. As you know, Congress often investigates issues that are simultaneously under investigation by other governmental entities, whether it be Inspector General offices, the Justice Department, or other Federal agencies. Please state whether and under what circumstances you would advise Department employees not to cooperate with congressional requests for information if IG or other governmental investigations are ongoing.

If I am confirmed, I will instruct employees of the Department to respect the investigative jurisdiction of Congress. Further, in the event I am confirmed, I will review the issue of parallel or simultaneous investigations in consultation with other DHS attorneys and work with this Committee to address any issues which may arise.

It is my personal philosophy that the interests of all investigations, whether they are conducted by the Congress, the Inspector General, the Department of Justice, or Federal regulators, need to be accommodated as much as legally possible to ensure that the proper role of each branch of Government is protected to the fullest. In my experience, if conflicts arise between or among concurrent investigations, the best mechanism to resolve those sorts of conflicts is direct, and preferably informal, discussions among the parties in interest on a case-by-case basis. I firmly believe in maintaining an open dialogue with Congress regarding these issues.

26. You have written regarding the Federal government's role in prosecuting environmental crimes. (In particular, in "Criminal Prosecutions for Environmental Crime: Sea Change," co-authored with Douglas S. Arnold, 2002.) (Original lettering)
- A. Please elaborate on your views regarding the appropriate role for, and conduct of, Federal prosecution of environmental offenses.
 - B. Do you advocate changes in the criminal provisions of Federal environmental laws? If so, please describe those changes.
 - C. Do you advocate a reduction in resources that the Federal government devotes to prosecuting environmental crimes?

If confirmed as DHS General Counsel, I will vigorously enforce the laws entrusted to the Department. This paper was drafted for an American Bar Association program to focus on the standards of prosecution and to suggest that, among other things, simple negligent behavior should not be considered criminal in most

circumstances. The article also noted that applying strict liability in the criminal context could undermine compliance assistance, pollution prevention, and self-policing and also could set an adversarial, rather than a cooperative, tone between regulators and industry.

- D. Please address whether the General Counsel's office would be involved with (1) any aspect of environmental enforcement by any part of DHS with responsibility for such enforcement, such as the Coast Guard; (2) compliance with environmental laws and regulations by DHS and its constituent parts; and (3) environmental issues that may arise with DHS contractors. If so, how do you view the mission of the General Counsel's office with respect to enforcing and complying with environmental statutes and regulations?

The General Counsel's office will advise the Department, the Under Secretary for Management, and the Department's operation components such as the Coast Guard on their obligations and the obligations of their contractors to comply with all environmental statutes and regulations. If confirmed, I will ensure that my office works with the Under Secretary for Management and assists our program offices by providing trained legal staff to meet their needs.

27. You have written that federal prosecutors should be more discriminating regarding the prosecution of white collar crime. Specifically, you argue that federal resources should only be devoted to those cases where there is "an important federal interest." ("The Case for Reevaluating DOJ Policies on Prosecuting White Collar Crime," co-authored with Marc N. Garber, Mark A. McCarty, and Steven D. Henry, Washington Legal Foundation, May 2002.) Please elaborate on what you believe those interests to be, and what areas of existing federal prosecution you believe fall short of that standard.

The Principles of Federal Prosecution were originally promulgated in 1980 by Attorney General Benjamin R. Civiletti. I agree with the overall tenor of the Principles which set out a number of factors to be considered in determining the existence of a substantial Federal interest. In addition, the article pointed to the utility of considering certain proposals made by the Judicial Conference of the United States, headed by Chief Justice William H. Rehnquist, which identified five types of conduct that implicate important Federal interests: offenses against the Federal government or its inherent interests; criminal activity with substantial multistate or international aspects; criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using Federal resources or expertise; serious, high-level or widespread State or local government corruption; and criminal cases raising highly sensitive local issues such as civil rights violations. The referenced article suggested that existence of a Federal interest alone, without the exercise of prosecutorial discretion, does not always justify the allocation of Federal resources.

V. Relations with Congress

1. 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.

2. 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.

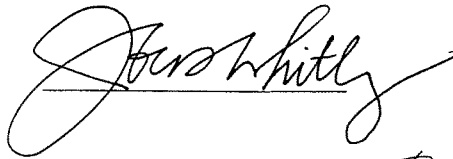
VI. Assistance

1. Are these answers your own? Have you consulted with DHS or any interested parties? If so, please indicate which entities.

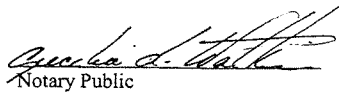
Yes, these are my answers and I am responsible for them. That said, various DHS staff assisted me in the preparation of these responses.

AFFIDAVIT

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



Subscribed and sworn before me this 17th day of July, 2003.



Notary Public

My Commission Expires April 14, 2007

MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT OF JUSTICE AND
THE DEPARTMENT OF HOMELAND SECURITY CONCERNING TERRORIST
FINANCING INVESTIGATIONS

1. Definitions. For purposes of this agreement:

- (a) "Secretary" means the Secretary of Homeland Security, and his successors, on behalf of all covered entities they head, supervise or represent.
- (b) "Attorney General" means the Attorney General of the United States, and his successors, on behalf of all covered entities they head, supervise or represent.
- (c) "Director" means the Director of the Federal Bureau of Investigation, and his successors.
- (d) "Parties" means the signatories to this Agreement and their successors, on behalf of all covered entities they head, supervise or represent.

2. Understanding the importance of waging a seamless, coordinated campaign against terrorist sources of financing, the undersigned agree that the Department of Justice will, as part of its responsibilities as the lead law enforcement agency in combating terrorism, and in accordance with the President's National Strategy for Homeland Security, lead the federal law enforcement effort against terrorist financing. The Federal Bureau of Investigation (FBI) will lead terrorist financing investigations and operations, utilizing the intergovernmental and intra-agency National Joint Terrorism Task Force (NJTTF) at FBI Headquarters and the Joint Terrorism Task Forces (JTTFs) in the field to conduct terrorist financing investigations and operations. Through the Terrorist Financing Operations Section (TFOS), the FBI will provide overall operational command to the NJTTF and the JTTFs.

3. The Secretary and the Attorney General will ensure that all appropriate information and intelligence relating to terrorist financing is shared with the members of the NJTTF and JTTFs, including Department of Homeland Security (DHS) detailees, to the greatest extent permissible by law and applicable guidelines, and consistent with the March 3, 2003, Memorandum of Understanding Between the Intelligence Community, Federal Law Enforcement Agencies, and the Department of Homeland Security Concerning Information Sharing. The parties agree to promptly take all reasonable and necessary steps to permit the maximum allowable information sharing relating to terrorist financing information and intelligence among the members of the NJTTF and the JTTFs. To further increase information sharing and coordination, the Attorney General and the Director agree to detail appropriate personnel to the financial crimes division of the Bureau of Immigration and Customs Enforcement (ICE). The Secretary shall ensure that such detailees are provided full and timely access to all data developed in ICE's money laundering and financial crimes cases on an ongoing basis.

4. After June 30, 2003, DHS will pursue terrorist financing investigations and operations solely through its participation in the NJTTF, the JTTFs, and TFOS, except as expressly approved by TFOS as provided in this paragraph. Both DHS and the Department of Justice (DOJ) will, however, continue independently to investigate money laundering and other financial crime matters that are unrelated to terrorism. DHS will focus its activities on protecting the integrity of U.S. financial infrastructures. To determine whether a money laundering or financial crime matter is related to terrorism or terrorist financing and to ensure effective deconfliction, all appropriate DHS leads relating to money laundering and financial crimes will be checked with the FBI. The parties agree to develop, as soon as possible but no later than June 30, 2003, specific collaborative procedures to enable the Section Chief of TFOS and Deputy Section Chief of TFOS detailed from DHS (or, if prior to the appointment of the Deputy Section Chief from DHS, the Associate Chief referenced in paragraph 3) to determine which leads should be provided to TFOS to enable TFOS to determine whether such leads may be related to terrorism or terrorist financing. Such procedures will provide for joint and continuous analysis of leads. Beginning on July 1, 2003, in any given matter, if TFOS determines that the matter is unrelated to terrorism or terrorist financing, the leadership of the investigation regarding the matter shall not be governed by this MOA. Determinations by TFOS shall take into account the following factors: strength of the terrorism or terrorist financing nexus; impact on the investigation of non-terrorism matters; and stage and development of the respective investigations. If TFOS, after consultation with DHS, determines that the matter is related to terrorism or terrorist financing, the investigation and operation of the matter shall be led by the FBI in accordance with paragraph 2. In pursuing investigations, TFOS will consider, among other things, the following factors: preservation of the government's flexibility and options to pursue investigations of both terrorism and non-terrorism matters; maintenance of the continuity of investigative personnel and management where appropriate (including the option, at the discretion of TFOS, to allow ICE to conduct terrorist financing investigations); and utilization of relevant expertise and authorities.
5. The parties agree that when the position of Deputy Section Chief of the TFOS next becomes vacant or by December 1, 2003, whichever comes first, the position shall be filled by a DHS employee detailed to the FBI, and shall continue to be filled by a DHS employee in the future. The employee will be chosen by mutual agreement of the Secretary and the Attorney General. Until such time as the position of Deputy Chief is filled by a DHS employee, the parties agree that a DHS employee shall be detailed to the FBI in a newly created position of "Associate Chief" of TFOS. The employee will be chosen by mutual agreement of the Secretary and the Attorney General.
6. The parties agree that the federal campaign against terrorist financing must utilize the significant expertise and capabilities of ICE. To this end, the parties will ensure that the appropriate ICE personnel have a significant and active presence on the NJTTF at headquarters and the JTTFs in the field. The Secretary will detail a significant number of appropriate personnel to the task forces, and the Director will ensure that the detailees are fully integrated into the FBI's efforts to combat terrorist financing, both at Headquarters and in the field, and are able to assist in the process described in paragraph 4, *supra*. The

Secretary will ensure that the performance of DHS agents detailed to the FBI under this Agreement is recognized as a critical component of the DHS mission and that Customs Service's pre-existing financial investigative expertise is preserved and developed through recruitment, training and retention initiatives.

7. The Secretary agrees that no later than June 30, 2003, Operation Green Quest (OGQ) will no longer exist as a program name. The Secretary agrees to ensure that any future DHS initiative or program to investigate crimes affecting the integrity and lawful operation of U.S. financial infrastructures will be performed through the financial crimes division at ICE. DHS will investigate matters related to terrorism and terrorist financing only with the consent of the FBI in accordance with this Memorandum of Agreement.
8. The Attorney General and the Secretary shall direct the Director and the Assistant Secretary for ICE to provide a joint written report to the Attorney General, the Secretary, and the Assistant to the President for Homeland Security on the status of the implementation of this Agreement four months from the effective date of this Agreement.
9. The parties shall immediately pursue implementation of the terms of this Agreement. Within ten days of the effective date of this Agreement the parties shall jointly issue guidance to all FBI and ICE supervisory agents regarding this Agreement.
10. Except where otherwise indicated, the terms of this Agreement shall be effective upon the signature of all parties.
11. These provisions are not intended to and do not create any rights, privileges, or benefits, substantive or procedural, enforceable by any individual or organization against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.


Attorney General of the United States

5-13-03
Date


Secretary of Homeland Security

May 13, 2003
Date

**U.S. Senate Committee on Governmental Affairs
 Ranking Minority Member Joseph Lieberman's
 Pre-hearing Questions for the
 Nomination of Joe D. Whitley to be
 General Counsel, Department of Homeland Security**

1. In the course of the Governmental Affairs Committee's consideration of the nomination of Michael Garcia to serve as Assistant Secretary in the Department of Homeland Security ("DHS" or the "Department"), Mr. Garcia was asked to answer questions regarding the role of the Bureau of Immigration and Customs Enforcement (BICE) in the search for an airplane of a Texas legislator. As you know, Mr. Garcia was the Acting head of BICE at the time of the events in question. On May 30, 2003, Mr. Garcia responded that because BICE referred the underlying issues to the Office of the Inspector General, "it would be inappropriate to offer comment on the questions above." On June 2, 2003, Mr. Garcia provided a similar answer to Committee staff during the bi-partisan interview Committee staff routinely conduct in the course of considering nominations. On June 13, 2003, in response to post-hearing questions asking him to explain his assertion that it would be inappropriate to comment, Mr. Garcia stated that he "received direction from the Inspector General's (IG's) Office to refer all inquiries regarding this matter to that office." After being questioned about the basis for that assertion, Mr. Garcia (on June 16) attached an e-mail the IG's Chief Legal Counsel sent on June 4, 2003 (several days after Mr. Garcia's initial response to the Committee) to the Chief Legal Counselor of DHS stating, "Attached is language Mr. Garcia can use if questioned on the Texas state legislators issue." The attachment stated the following:

Question: What action are you taking on the issue of diversion of Department of Homeland Security resources to search for Texas State legislators?

Answer: My office referred the matter to the Department's Office of Inspector General (OIG) on the evening of May 15, 2003. The OIG has asked that any questions relating to this matter be directed to them.

As the General Counsel, you would presumably be called upon to offer advice about the obligations of DHS officials and employees to respond to Congressional requests for information, whether in the context of Committee oversight activities, Committee hearings or Committee consideration of nominees.

- A. Do you agree with Mr. Garcia's May 30, 2003 suggestion, made several days before the IG's Chief Legal Counsel's June 4 e-mail and therefore presumably before receiving any guidance from the Inspector General's office, that it is inappropriate to respond to Congressional inquiries about matters under investigation by the Department's Inspector General?

- B. If you do agree with that statement, please cite the basis for your view and indicate whether you believe that it is always inappropriate to comment or just in certain cases, and indicate what situations warrant the lack of a response.
- C. As you know, Congress often investigates issues that are simultaneously under investigation by other governmental entities, whether it be IG offices, the Justice Department or federal regulators (examples include investigations of Watergate, Whitewater and, in the Governmental Affairs Committee, campaign finance abuses). Please state whether you would advise Department employees not to cooperate with Congressional requests for information whenever IG and other types of governmental investigations are ongoing.
- D. If you do not believe that it is categorically inappropriate to respond to Congressional inquiries during the pendency of an IG or other investigation, but do agree that it was inappropriate in this circumstance, please explain why.

I understand the importance of this issue, but as a consultant I have not been involved in any aspect of this matter and any comments that I might make would be without an awareness of the facts and circumstances involved. However, without addressing this specific situation, if I am confirmed, I will instruct employees of the Department to respect the investigative jurisdiction of Congress while appreciating the investigative interests of other governmental entities. Further, in the event I am confirmed, I will review the issue of parallel or simultaneous investigations in consultation with other DHS attorneys and work with this Committee to address any issues which may arise.

Again, without knowledge of this particular situation, it is my personal philosophy that the interests of all investigations, whether they are conducted by the Congress, the Inspector General, the Department of Justice, or Federal regulators, need to be accommodated as much as legally possible to ensure that the proper role of each branch of Government is protected to the fullest. In my experience, if conflicts arise between or among concurrent investigations, the best mechanism to resolve those sorts of conflicts is direct, and preferably informal, discussions among the parties in interest on a case-by-case basis. I firmly believe in maintaining an open dialogue with Congress regarding these issues.

- E. Turning to Mr. Garcia's post-June 4 responses, he stated that he believed it to be inappropriate to comment because he "received direction from the Inspector General's (IG's) Office to refer all inquiries regarding this matter to that office" and further that "the IG's office directed that it would not be appropriate to comment on this issue." Even if the IG's Chief Counsel's proposed question and answer truly constituted "direction" and suggested that "it would not be appropriate" for Mr Garcia to comment, do you believe that the IG has the

authority to order Department officials and employees not to respond to Congressional requests for information? If so, on what do you base that conclusion? Would you in all instances defer to such directions from the Department's IG? If not, how would you respond to such "directions"?

- F. If you believe that the IG does have the authority to issue such directions to Department officials and employees, do you believe an e-mail of this sort from the IG's General Counsel suffices to constitute such direction? If so, please explain specifically what you believe in the e-mail constitutes direction or a suggestion that it would be inappropriate to comment.

Based on my previous experience as a Federal prosecutor, I am not aware of any circumstance in which I could have prevented another lawfully empowered investigative or prosecutorial authority from carrying out its responsibilities. However, I do not have sufficient knowledge of the scope and implementation of the Inspector General's authority to answer these questions properly. Should I be confirmed, I commit to meeting with the Department's Inspector General to review the appropriate scope of legal authorities within the Department. Also, with assistance from staff of the Office of the General Counsel, I will independently review the relevant legal authorities and work with this Committee on these issues.

- G. Were you involved in any way in determining whether or how Mr. Garcia should answer these questions? If so, please describe your involvement, the advice you gave and the basis for your advice.

No.

2. In the early 1990's, when you served as United States Attorney for the Northern District of Georgia, your office prosecuted a controversial criminal case involving more than \$4 billion in illegal and unreported loans by the Atlanta branch of the Banca Nazionale del Lavoro to Iraq, one of the largest bank fraud cases in history (the "BNL case"). It resulted in guilty pleas by a number of fairly low-level bank staffers and about 3 years of prison time for Christopher Drogoul, a BNL manager in Atlanta. There were allegations at the time that the investigation and prosecution were limited for political reasons, as the case allegedly involved covert sales of weapons and nuclear technology to Iraq. A Justice Department analysis of the case by retired Judge Frederick Lacey in December 1992, however, determined that the way the investigation was handled was appropriate, and that the appointment of an independent counsel to look into the matter was not warranted.

You were appointed to the position of the United States Attorney for the Northern District of Georgia in June 1990, while the BNL investigation was ongoing. Prior to taking that position, and just after you resigned a high-ranking post at the Justice Department, you represented a company called Matrix-Churchill, which was apparently involved in the matters under investigation. According to press reports, Matrix-Churchill was "the

cornerstone of Iraq's effort to buy nuclear, chemical and missile technology in the West." (Peter Mantius, "Justice Clams Up On BNL Scandal," *Atlanta Journal and Constitution*, November 8, 1992.) Due to this representation, you formally recused yourself from the BNL case soon after taking office as U.S. Attorney. In late 1990 and early 1991, Matrix-Churchill officials were reportedly granted immunity in the BNL investigation.

In October 1992, then-Representative Henry Gonzalez, who at the time chaired the House Banking Committee, alleged that the "Justice Department worked systematically to prevent any meaningful investigation of the BNL scandal." (George Lardner, Jr., "Documents Detail Justice Department Effort to Stifle Hill Panel's BNL Probe," *Washington Post*, October 20, 1992.) According to the *Washington Post*, Rep. Gonzalez specifically raised questions about whether you retained prosecutorial authority over the BNL case after your formal recusal. The *Post* account cited Justice Department memoranda released by Rep. Gonzalez which seemed to indicate that you remained involved in the case. The December 1992 review of the BNL investigation, which was conducted by Judge Lacey on behalf of the Justice Department, did not address these allegations or whether you had, as Judge Lacey put it, "engaged in any impropriety or participated in a cover up" in connection with the BNL case. (Liza Kaufman, "Lacey Report Not The Last Word on BNL Mess," *Legal Times*, December 21, 1992.)

Please answer the following questions about these matters:

- A. How did you come to represent Matrix-Churchill? What was the nature and scope of your representation of that company and/or its officials?

Matrix-Churchill contacted my former firm of Smith, Gambrell, and Russell. I am not aware of how the firm was chosen by Matrix-Churchill.

- B. In connection with your nomination to be United States Attorney for the Northern District of Georgia but prior to your taking office, did you discuss with Administration officials your representation of Matrix-Churchill? What was the substance of those discussions?

No such discussions were held.

- C. Did you discuss with Administration officials the role you would take in the BNL case? What was the content of those discussions?

No discussions were held, other than that I did inform them of my recusal.

- D. Given the significance of the BNL case, did you ever discuss with Administration officials why you were chosen as U.S. Attorney at that time even though you would be expected to recuse yourself from participating in the matter?

No.

- E. Based on descriptions in press reports, two memoranda authored by a Justice Department attorney named Peter Clark appear to show your continued involvement in the BNL case. According to an account in the *Washington Post*, a memo dated September 21, 1990 counsels that the lead prosecutor in the BNL case, Assistant United States Attorney Gale McKenzie, should be warned against telling witnesses not to speak to Congressional staffers. The *Post* quotes the memo as saying, "I thought the USAO was under control now that Joe Whitley is in place." Another memo, dated February 15, 1991, from Peter Clark to Laurence Urgenson, then chief of the Justice Department's Criminal Fraud Section, addressed the large number of charges in the BNL indictment, which was in the process of being prepared. The *Post* quotes the memo as saying, "There is adamant refusal to cut counts to the 100 mark – and perhaps this will have to be readdressed via Joe Whitley." (George Lardner, Jr., "Documents Detail Justice Department Effort to Stifle Hill Panel's BNL Probe," *Washington Post*, October 20, 1992.)

- (1) Did you have any involvement whatsoever with the BNL case from June 1990 until you stepped down as U.S. Attorney in November 1993? If so, please describe the nature of any such involvement.

No.

- (2) Did you discuss the BNL case with anyone in the Justice Department, or any other federal agency (including the White House), at any time before you stepped down as U.S. Attorney in November 1993? If so, what were the circumstances and the substance of those conversations?

No.

- (3) Did you know Peter Clark during the time period from September 1990 through February 1991?

Yes.

- (4) Have you reviewed the two memoranda reportedly authored by Mr. Clark and released by Rep. Gonzalez? Do you have any understanding about what Mr. Clark may have meant in reportedly saying that the U.S. Attorney's Office would be "under control" with you "in place"?

No.

- (5) Did Mr. Clark or anyone else ever “readdress” or address the issue of “cutting counts” in the Drogoul indictment with you? Do you know any reason why, if the press reports are accurate, Mr. Clark would have mentioned you twice in the context of the BNL investigation if you were not involved with the case?

No.

I had the pleasure of serving as a United States Attorney and Department of Justice official in Washington under five Attorneys General, including almost one year in the Clinton Administration as a United States Attorney in Atlanta.

The concerns you have identified in this question have been thoroughly reviewed by a number of entities including by the Department of Justice under both the Bush and Clinton Administrations. It is my understanding that the reviews addressed my recusal from any involvement in this case from the beginning of my service as United States Attorney and my non-involvement in the investigation of BNL and related parties.

It is my recollection that the Department of Justice under Attorney General Reno directed a review of the handling of the BNL investigation and found no wrongdoing on the part of the Department of Justice or the United States Attorney’s office in Atlanta.

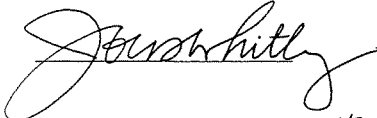
I would welcome the opportunity to address any further concerns in a meeting with you or your staff.

3. Are these answers your own? Have you consulted with DHS or any interested parties? If so, please indicate which entities or parties.

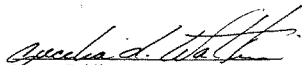
Yes, these are my answers and I am responsible for them. That said, various DHS staff assisted me in the preparation of these responses.

AFFIDAVIT

I, Joe D. Whitley, 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 11th day of July, 2003.


Notary Public

My Commission Expires April 14, 2007
My Commission Expires April 14, 2007

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

A. BIOGRAPHICAL INFORMATION

1. **Name:** Penrose Carballo Albright (nickname: "Parney" Albright)
2. **Position to which nominated:**
Assistant Secretary of Homeland Security (Plans, Programs and Budget, Science and Technology Directorate)
3. **Date of nomination:** June 26, 2003
4. **Address:**

Office: Department of Homeland Security, Science and Technology Directorate, Washington, DC 20528
5. **Date and place of birth:** October 1, 1953; Bethesda, MD
6. **Marital status:** Married to Jamie Lynn Bolton
7. **Names and ages of children:**
8. **Education:**

9/67-6/71	Langley High School (McLean, VA)	High School Diploma
8/71-5/72	North Carolina State University	(no degree)
1/75-12/76	Northern Virginia Community College	(no degree)
1/77-5/79	The George Washington University	B.S. (Physics; Applied Mathematics)
8/79-5/85	University of Maryland	M.S. (Physics 1983), Ph.D. (Physics 1985)
1. **Employment record:**

2/85-10/86	National Research Council Postdoctoral Fellow, National Bureau of Standards, Gaithersburg, MD
10/86-10/99	Research Staff Member, Institute for Defense Analyses, Alexandria, VA
10/99-12/01	Program Manager, Defense Advanced Research Projects Agency, Arlington, VA [note: On Interagency Personnel Agreement assignment from Institute for Defense Analyses]
1/02-5/03	Asst. Director Homeland and National Security, Office of Science and Technology Policy, Executive Office of the President, Washington, DC [note: On Interagency Personnel Agreement assignment from Institute for Defense Analyses through 10/02] [note: also served as Senior Director for Research and Development, Office of Homeland Security 4/02-5/03]
5/03-present	Senior Advisor to the Under Secretary for Science and Technology, Department of Homeland Security, Washington, DC
9. **Government experience:** none other than noted above
10. **Business relationships:** none
11. **Memberships:** American Physical Society; Society of Industrial and Applied Mathematics; U.S. Chess Federation
12. **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 all political parties or election committees during the last 10 years.
none

- (c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more for the past 5 years.
none

13. **Honors and awards:** National Merit Finalist; National Research Council Postdoctoral Fellow

14. **Published writings:** See attached

15. **Speeches:** While at OSTP and OHS I delivered several speeches revolving around two subjects: the organization of research and development activities for homeland security, and concerns about the publication of scientific research that may benefit terrorists. The talking points which I have used for these speeches are attached.

16. **Selection:**

- (a) Do you know why you were chosen for this nomination by the President?
Yes—I was recommended by the Under Secretary and by Secretary Ridge because of my background, which includes leading the transition activities for the Science and Technology Directorate prior to the formation of the Department.
- (b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?
I served as Assistant Director for Homeland and National Security in the White House Office of Science and Technology Policy and as Senior Director for Research and Development in the Office of Homeland Security. These positions were central in advising the Administration on scientific and technical issues surrounding homeland security, and also central toward planning for how to organize the Nation's research and development community on homeland security issues. I also led the transition activities for the Science and Technology Directorate prior to the formation of the Department. My prior positions include Program Manager for the Defense Advanced Research Projects Agency, where I initiated a number of creative projects addressing national and homeland security problems, and led or participated in a wide range studies, analyses, and planning activities focusing on national security-related science, technology, and system engineering and development efforts at the Institute for Defense Analyses.

B. FUTURE 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? 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?
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

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.

The Homeland Security Act requires that the Science and Technology Directorate of the Department of Homeland Security establish a Federally Funded Research and Development Center (FFRDC). Until October 2002, I was employed by the Institute for Defense Analyses (IDA), a FFRDC. Pursuant to regulations, I have a "covered relationship" with IDA. That relationship will continue until one year after I resigned from IDA. IDA could be a competitor to serve as the Homeland Security FFRDC. As I indicated in my ethics agreement, for the first one year after I left IDA, I will take no action as a Government employee in this or any other matter in which IDA is or represents a party, unless I am authorized to do so by the Under Secretary for Science and Technology.

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 and execution of law or public policy other than while in a federal government capacity. None
3. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position? Yes

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? No
2. To your knowledge, 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?

2/89 Driving while intoxicated Fairfax Gen District Court, VA [\$100 fine]

At the time of the offense I was participating in a wine tasting club at the office with coworkers, which met every couple of months and had several participants. On this particular occasion, many people failed to show up, and there was a large number of opened bottles of wine. Thus, I ended up drinking about a bottle of wine by myself. This was an extraordinarily unusual amount for me to drink, and attempting to drive home a clear lapse in judgment.

7/72 Trespassing; Fairfax Gen District Court, VA [small fine]

I was caught swimming in a private lake.

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? No.

4. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination. None

E. FINANCIAL DATA

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

AFFIDAVIT

Peterson C. Albright 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 7th day of July, 2003

Law Hancock, LCDR, USCG
Notary Public



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

July 7, 2003

The Honorable Susan M. Collins
Chair
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Madam Chair:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Penrose C. Albright, who has been nominated by President Bush for the position of Assistant Secretary for Science and Technology, 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 June 24, 2003, from Mr. Albright to the Department's ethics official, outlining the steps which Mr. Albright will take to avoid conflicts of interest.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Amy L. Comstock".

Amy L. Comstock
Director

Enclosures

OPEN PUBLICATIONS

- Co-author, "Renormalization Group Approach to Critical Phenomena in Fluids: A Theory of the Coexistence Curve Diameter," in *Proceedings of the Eighth Symposium on Thermophysical Properties*, Volume I: *Thermophysical Properties of Fluids*, edited by J.V. Sengers (American Society of Mechanical Engineers), New York, 1982, pp. 377–382
- Co-author, "Crossover Functions by Renormalization Group Matching: Three-loop Results," *Phys. Rev. B* 31, pp. 4576–4589 (1985)
- Co-author, "A Crossover Description for the Thermodynamic Properties of Fluids in the Critical Region," *Intern. J. Thermophys.* 7, pp. 75–85 (1986)
- Co-author, "Background Fluctuations and Wegner Corrections," *Phys. Rev. B* 34, p. 1991 (1986)
- Co-author, "A Scaled Fundamental Equation for the Thermodynamic Properties of Carbon Dioxide in the Critical Region," *J. Chem. Phys.*, 87, p. 1717, 1987
- Co-author, "Crossover from Singular Critical to Regular Classical Thermodynamic Behavior of Fluids," *Phys. Rev. A* 41, p. 3161 (1990)

LIMITED DISTRIBUTION PUBLICATIONS

- Co-author, "Present Understanding of Ballistic Missile Rocket Plume Optical Emission, with Emphasis on Countermeasures," IDA Paper P-2020, September 1987
- Co-author, "Plume Phenomenology for the Midcourse Sensors Study," IDA Memorandum Report M-440, March 1988
- Co-author, "Contamination Subpanel Report to the Phenomenology Panel of the Midcourse Sensors Study," IDA Memorandum Report M-439, March 1988
- Co-author, "IBSS Mission Requirements Document," SKW Corporation, 1988
- Co-author, "IBSS Instrument Sequencing Report," SKW Corporation, 1988
- Co-author, "Progress Report on the Air Defense Initiative," IDA Paper P-2167, February 1989
- Co-author, "Plume Measurements Program Using Aircraft-Based Sensors," IDA Paper P-2236, October 1989
- Co-author, "Space-Based Wide Area Surveillance Hybrid Study," IDA Report R-365, March 1990
- Co-author, "Progress Report on ADI/SDI," IDA Paper P-2332, October 1990
- Co-author, "Assessment of the Current State of Knowledge of Strategic Rocket Plume Signatures," *Proceedings of the IRIS Target, Backgrounds, and Discrimination Meeting*, Albuquerque, NM, January 1991
- "The Infrared Signature of the SR-71 'Blackbird'," IDA Paper P-2344, July 1991
- Co-author, "Analysis of the IBSS IR and UV/VIS Rocket Plume Radiation Data," *Proceedings of the IRIS Target, Backgrounds, and Discrimination Meeting*, Orlando, FL, January 1992

Penrose C. Albright

Publications List

- Co-author, "An Assessment of the Current State of Knowledge of Strategic Rocket Plumes," IDA Paper P-2569, April 1991
- "Plume Phenomenology Measurement Requirements for the Development of Theater Ballistic Missile Defense Systems," IDA Document D-1237, October 1992
- Co-author, "Summary of Principal ADI/SDI/TMDI Activities under Task T-E2-524," IDA Document D-1232, February 1993
- Co-author, "Low Observables and Counter Low Observables: A Comparison of U.S. and Foreign Tactical Aircraft and Air Defense Systems and Technologies," IDA Paper P-2757, February 1993
- Co-author, "Analysis of the IBSS IR Orbiter Plume Measurements," *Proceedings of the JANNAF Exhaust Plume Technology Meeting*, February 1993
- Co-author, "SWIR Band Selection for Missile Launch Warning Systems," *Proceedings of the IRIS Target, Backgrounds, and Discrimination Meeting*, February 1993
- Co-author, "Analysis of the IBSS IR Measurements of the OMS Vacuum Core Emission," *Proceedings of the IRIS Target, Backgrounds, and Discrimination Meeting*, February 1994
- Co-author, "On the Selection of the Optimal SWIR Passband for Below-the-Horizon Missile Launch Detection," IDA Paper P-2920, not published
- Co-author, "Analysis of Low- to Mid-Altitude Plume Phenomenology for the Comet West Mission: A Comparison Between Data and Model Predictions," *Proceedings of the IRIS Target, Backgrounds, and Discrimination Meeting*, February 1994
- Co-author, "The Alarm Technology Demonstration," IDA Document D-1642, not published
- Co-author, "Strategic Systems Phenomenology Impact Study," Lincoln Labs., November 1994
- Co-author, "Space-Based Infrared Technical Support Group Report to USD(A&T)," Mitre Corporation, February 1994
- Co-author, "An Investigation of the Effect of Turbulence on Low-Altitude Ballistic Plume Modeling," *Proceedings of the JANNAF Exhaust Plume Technology Meeting*, Sunnyvale, CA, October 1994
- Co-author, "Analysis of Low- to Mid-Altitude Plume Phenomenology for the Comet West Mission," IDA Paper P-2957, June 1996
- Co-author, "SWORD Technical Assessment," IDA Document D-2212, October 1998
- "Turbulence and ABL—A Brief Review of Current Issues and Uncertainties," IDA Document D-2298, September 1999
- Co-author, "Rapid Response Force Deployment and Sustainment," IDA Document D-2383, February 2000
- Co-author, "Airborne Laser Technical and Performance Risks," IDA Document D-2393, October 1999

Talking Points on Research and Development for Homeland Security

- Thank you for inviting me—it's a real pleasure to have the opportunity to speak to you today.
- The President has stated on a number of occasions that our Nation's advantage in science and technology is a key to securing the homeland against the predations of terrorists.
- Just as S&T has been crucial to our ability to defeat past and present enemies overseas, so too will S&T work to defeat those who would attack our homeland and disrupt our way of life.
- Thus—the Nation needs a systematic National effort to harness S&T in support of Homeland Security.
- There has been little focus historically on homeland security R&D. Part of the reason for this has been the low priority placed at the federal level in developing new and advanced capabilities in the homeland security arena. Precedence has been given in the past to efforts associated with developing capability for our military and intelligence community, with the implicit idea that we would deter and if needed defeat threats to our nation overseas. While overseas engagement is still an important element to our security posture, September 11th, the anthrax attacks that occurred soon afterwards, and the ensuing examination of our vulnerabilities and the motivations of our enemies, made it clear that we needed to bolster our defenses here at home.
- Creating and guiding an R&D effort in support of homeland security is a major undertaking.
- This is a vast enterprise—companies, universities, institutes, and government labs of all sizes conduct R&D over a very broad range.

- To do this, the President asked Congress to establish a new Department of Homeland Security. It serves as the federal lead for homeland security R&D, and works with private and public entities to assure an R&D effort of sufficient size and scope to counter the threat of modern terrorism.
- The emphasis of this enterprise is on catastrophic terrorism. The goals are to prevent attacks, reduce our vulnerabilities, and mitigate and recover from the consequences of an attack should it occur. Having said that, we will not ignore the lesser threats that can nevertheless disrupt our way of life, destroy lives and property, and reduce confidence in our institutions.
- The President has stated that our efforts should to the degree possible fit in well with our National habits and infrastructures. Thus, while we will work to defend against the rare event, we will endeavor to enhance the commonplace. I will return to this point later.
- First, let me tell you a little about how the new Department is structured.
- DHS has several operational directorates:
 - Information analysis and infrastructure protection
 - Emergency management and response
 - Borders and transportation
 - “CBRN” in the President’s original proposal, but S&T in Congressional language. It is modeled on the DoD’s USD(A&T), or the old DDR&E when Bill Perry had the job. Perhaps a better analogy would be the acquisition branch of one of the military Services. It is responsible for homeland security research,

development, test and evaluation activities. It will be the resident center of system engineering expertise and systems development within the new Department.

- DHS S&T capabilities are based on those articulated in the President's National Strategy for Homeland Security.
- There is an intramural capability within the Department.
- A key component of that is a National Laboratory for Homeland Security. This single laboratory consists of components from several of the DoE laboratories.
- The idea is to have a multidisciplinary cadre of scientists and engineers who identify with the Department of Homeland Security, and, importantly, for whom the new Department feels ownership. This will provide a venue where people can have rewarding careers in addressing homeland security issues in an intellectually stimulating environment. We have chemists and biologists and mathematicians and physicists all working in the same location, eating together in the cafeteria, attending seminars, and interacting on a variety of issues facing homeland security. These people will make it their business to understand the various facets of homeland security; will establish relationships with the relevant communities, such as local law enforcement, the local port authorities, and the border patrol; and will provide the core research and system engineering expertise for the new Department's activities.
- A further part of the Department's intramural activity revolves around life sciences research—activities at NIH and CDC for developing new diagnostics, treatments and vaccines, capabilities being incorporated into the new Department from USDA that research pathogens and

diagnostics relevant to our agricultural enterprise, capabilities being incorporated from the Department of Defense to perform forensic research and threat assessment, and, of course, expertise from the National Labs.

- Finally, our intramural capability includes activities being absorbed along with their agencies, such as TSA's technology center, USCG R&D, and capabilities from US Customs.
- We also are engaging the industrial base of our Nation. As discussed in the National Strategy, we have created a capability for soliciting for innovative ideas from industry, developing, and demonstrating them. This will be done within a component modeled on the old DARPA; Congressional legislation calls it "HSARPA"—I pronounce it "SHARPA". The focus within this agency is on executing key initiatives, and on developing "disruptive" technologies.
- We have created a capability for developing and promulgating standards for equipment that might be purchased by federal agencies, or state and local governments, for homeland security purposes. The federal government would create reference standards, develop certification protocols, and then encourage the formation of certification labs that could test the equipment in question. This would not only help the agencies, but also businesses that develop these capabilities.
- We will engage in rapid prototyping, to take technologies that are off the shelf, or nearly so, and put them in the hands of the user.
- We will engage in pilot deployments of the systems and technologies we develop, to better refine their capabilities, and develop operational concepts for their use.

- We have a general mandate from Congress to support United States leadership in science and technology, and we feel it particularly important to assure that our best minds have the opportunity to enter into careers and perform research in fields that are important to the homeland security R&D enterprise. Thus, we will fund postgraduate and postdoctoral fellowship programs, and create scholarships in support of this mandate. We will establish centers of excellence in our academic institutions to create critical mass and interdisciplinary synergy. A further important element in our portfolio will be applied research carried out through grants to academic and other institutions. We will work with the NSF and the DoE Office of Science to structure an appropriate program.
- And, we will expand upon and develop new relationships with our Allies for research and development of capabilities against our common enemy—an enemy against which their experience will certainly prove to be crucial to our efforts.
- Now, it is important in all our homeland security R&D programs to maintain a systems perspective. We should always be asking how the system in question will operate in the real world. What are the consequences of an alarm? What are the potential confusers to the system? How will a particular technology affect overall system efficiency and throughput? There are many instances of technology and devices that work extremely well in the lab, but cannot tolerate the diverse environments of the real world, or introduce intolerable inefficiencies. Thus, we all must become operations analysts as well as scientists and engineers.

- Within that systems perspective, the R&D community should tell the policymaker what is possible, while being open and mindful of the costs.
- A further question we should always ask is the utility of the system in executing everyday, conventional missions unrelated to countering terrorism. We all hope that terrorist events are exceptionally infrequent, and thus a key element in any cost-benefit trade must be the additional benefits, in terms of efficiencies and performance, that a new technology brings. As I said earlier, the goal is to defend against the rare event while enhancing the commonplace.
- Now, with all this in mind, let me tell you about some of the key initiatives we have begun in the near term within the new Department. These have been laid out in the National Strategy for Homeland Security, and thus are Presidential initiatives.
- One of the highest priorities is to prevent the entry into our homeland of a nuclear device, or the illicit assembly of a working device within our borders.
- The idea is to create a multilayered capability. We are working with the Departments of State, Defense, and Energy to enhance safety and security of foreign inventories, and to monitor overseas border crossings to prevent illicit transport of materials.
- We are instituting 100% portal monitoring at our borders, beginning with existing technologies, working to enhance those capabilities in the near term with better processing and instrumentation, and eventually implementing where practical active probing for fissile material.

- We are investigating and deploying methods to monitor loading and unloading operations at overseas and domestic ports.
- We are investigating and if practical will deploy capabilities for monitoring ship and aircraft cargo holds and loaded containers, taking advantage of the long integration times available.
- We are investigating and will deploy sensors across our internal transportation infrastructure, at key river crossings, interstate nodes, and the like.
- We will work with the community of responders to develop robust concepts of operations for these systems.
- Finally, we are conducting research and demonstration efforts for novel new methods for detecting the illicit transport of nuclear weapons and materials.
- Fundamentally, the idea is to create a system so daunting that the risk as seen by the threat will deter any attempt to bring such a weapon to our homeland.
- A further key initiative is to develop a biological tactical warning and attack assessment system for the Nation. This system will be comprised of three parts. First, we are working closely with CDC to develop a surveillance system that monitors clinical laboratories, emergency rooms, sales of over-the-counter drugs, for indications of anomalous public health events. Clearly, there is a trade between the timeliness of the response and the quality of the data, and the steps we take in response to warnings from such a system will clearly depend on the reliability of the warning, and on the general threat level. Nevertheless, this is an example of a system that will help

guard against the rare event while enhancing the commonplace; the public health benefits of such a National system are clear.

- Second, we are deploying the current generation of sensors, and developing new sensors, for placement in areas of high traffic density to monitor for the release of pathogens and agents. Again, here there must be an emphasis on a systems perspective. The numbers of deployed devices could run into the thousands, and the consequences of an alarm could be profound. So, the false alarm rate for these devices must be extremely low, in a real world environment. Furthermore, these devices will perforce need to be maintained locally—they need to be turnkey. Operations and support costs need to be driven down to very low levels. Current technology, while workable, does not meet our goals in terms of cost effectiveness. However, there have been developments in microchemical devices, PCR on a chip, and the like that indicate that this capability is potentially near term.
- Finally, this system will need a command and control capability to ingest the relevant data, and provide decision support.
- Other key initiatives include developing through HHS treatments and vaccines for the panoply of pathogens that could be available today to terrorists, as well as for those pathogens that might be engineered in the future. The President's Bioshield Initiative, which creates incentives for pharmaceutical companies, and new authorities for drug approvals, provides a key framework for this research effort. We are vitally interested in information analysis tools—the idea of pulling actionable evidence of hostile intent from wiffs of information gleaned from a variety of sources is an appealing one, but not obvious how to accomplish. We need to conduct research in cybersecurity, so

that we can protect our vital information systems, and track down the perpetrators of attacks. We need to look hard at our ability to detect explosives, not just in airports, but in vehicles on the road.

- We also need to better understand our vulnerabilities and the technical capabilities of the threat, and thus prioritize our risks so that we can better allocate our resources, and plan our research agenda.

- As you can see, homeland security, and the new Department, provide a rich new focus for scientific work
- We are open to innovative thinking, and long-range R&D
- It is important to maintain an operational focus, and be aware of how the system will work in its environment day after day
- We look forward to engaging the scientific community, and in particular look forward to enlisting in this fight the capabilities of the -----
- I thus appreciate the invitation to speak here, and your attention.

Talking Points on Openness in Scientific Research

Administration Policy

- Last reviewed in early Reagan administration
 - Concerns about providing...
 - + Adversaries with cutting edge science that could enhance their capabilities
 - + Competitors with the fruits of USG investments
- Result was an affirmation of the need for openness in fundamental research – NSDD 189

Issues

- Advances in biological research aimed at understanding disease can be turned against us
 - Perception is ...
 - + Little needed infrastructure
 - + Widely available expertise, and
 - + Devastating consequences – “12 Monkeys” scenario
- Exacerbated by recent events
 - Anthrax attacks
 - Motivations of the threat, and their interest in bioweapons
 - Mousepox result
 - + “We wanted to warn the general population that this potentially dangerous technology is available...”
 - Polio virus synthesis
 - + “This work is very important to put society on alert. This is an inherent danger in biochemistry and scientific research. Society has to deal with it. ... It won't go away if we close our eyes.”
 - + Prompted some Congressional interest
- The public reasonably expects its governments to take reasonable steps to reduce the risk of bioterrorism
- Biological research is not controllable by the government
 - Heavily internationalized
 - Strong and independent commercial sector
- Lack of articulated and defensible criteria, accepted and practiced by the community, for deciding...
 - What sort of work is ab initio considered inappropriate research, or inappropriate for open publication
 - How the “hard cases” should be assessed
 - How to handle unexpected and potentially dangerous results from “benign” research projects
- This creates a vacuum
 - As events occur, public will look for a logically coherent policy, and how a particular event fits in that policy
 - The absence of a community-accepted policy invites political action
 - + Probably onerous & ineffective

Way Ahead

- Scientific community needs to develop and vet criteria for deciding what is “good” research and what is not
 - Needs ultimately to be a public debate
- There needs to be a process for assessing the “hard” cases, and for handling unexpected research results
- Processes not qualitatively unlike those created for recombinant DNA research may serve as a model
- This issue will not go away, and action is needed quickly

U.S. Senate Committee on Governmental Affairs
 Pre-hearing Questionnaire for the Nomination of
 Penrose C. Albright to be Assistant Secretary of Homeland Security
 for Plans, Programs, and Budget,
 Department of Homeland Security

I. Nomination Process, Conflicts of Interest, Qualifications

1. **Why do you believe the President nominated you to serve as Assistant Secretary of Homeland Security for Plans, Programs, and Budget within the Science and Technology Directorate at the Department of Homeland Security (DHS)?**

While I was not privy to President's decision process, I believe I was nominated by him because of my experience in this arena. I served as Assistant Director for Homeland and National Security in the White House Office of Science and Technology Policy and as Senior Director for Research and Development in the Office of Homeland Security. These positions were central in advising the Administration on scientific and technical issues surrounding homeland security, and also central toward planning for how to organize the Nation's research and development community on homeland security issues. I also led the transition activities for the Science and Technology Directorate prior to the formation of the Department. My prior positions include Program Manager for the Defense Advanced Research Projects Agency, where I initiated a number of creative projects addressing national and homeland security problems, and led or participated in a wide range studies, analyses, and planning activities focusing on national security-related science, technology, and system engineering and development efforts while at the Institute for Defense Analyses.

2. **Were any conditions, expressed or implied, attached to your nomination?**

No.

3. **The responsibilities of the Assistant Secretary of Homeland Security for Plans, Programs, and Budget within the Science and Technology Directorate include providing science and technology policy guidance and overseeing the execution of the Science and Technology Directorate budget. What specific background and experience affirmatively qualifies you for this position?**

I served as Assistant Director for Homeland and National Security in the White House Office of Science and Technology Policy and as Senior Director for Research and Development in the Office of Homeland Security. These positions were central in advising the Administration on scientific and technical issues surrounding homeland security, and also central toward planning for how to organize the Nation's research and development community on homeland security issues. I also led the transition activities for the Science and Technology Directorate prior to the formation of the Department; this position included initiating an orderly process for planning, programming, delivering, and serving as advocate for the FY04 S&T budget. My prior positions include Program Manager for the Defense Advanced Research Projects Agency, where I initiated and managed a number of creative projects

addressing national and homeland security problems, and while at the Institute for Defense Analyses led or participated in a wide range of studies, analyses, and planning, programming, and budgeting activities focusing on national security-related science, technology, and system engineering and development efforts. I hold a PhD in theoretical physics, and have an abiding and deep interest in all aspects of scientific knowledge.

4. **Have you made any commitments with respect to the policies and principles you will attempt to implement as Assistant Secretary? If so, what are they and to whom have the commitments been 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 you will use to carry out such a recusal or disqualification.**

The Homeland Security Act requires that the Science and Technology Directorate of the Department of Homeland Security establish a Federally Funded Research and Development Center (FFRDC). Until October 2002, I was employed by the Institute for Defense Analyses (IDA), an FFRDC. Pursuant to regulations, I have a "covered relationship" with IDA. That relationship will continue until one year after I resigned from IDA. IDA could be a competitor to serve as the Homeland Security FFRDC. As I indicated in my ethics agreement, for the first one year after I left IDA, I will take no action as a Government employee in this or any other matter in which IDA is or represents a party, unless I am authorized to do so by the Under Secretary for Science and Technology.

II. Role and Responsibilities of Assistant Secretary of Homeland Security

1. **How do you view the role of Assistant Secretary of Homeland Security for Plans, Programs, and Budget?**

A key role is to be responsible for the Directorate's planning, programming, budgeting, and execution oversight process. This involves annually developing, subject to the approval of the Under Secretary, the Department's Science and Technology Planning Guidance, which documents the activities the Directorate will undertake in the near and long term to meet its responsibilities as stated in Section 302 of the Act, to meet the missions, responsibilities, and policy guidance provided by the Under Secretary, the Secretary and the President, and establishes schedules and performance measures for these activities. The Assistant Secretary then develops (pursuant to the oversight of the Secretary and Under Secretary) the S&T program portfolio that responds to the Science and Technology Planning Guidance and other guidance that may be provided by the Secretary or Under Secretary, prepares the S&T Directorate budget, and acts as principal for the Directorate in the Department's planning, programming, and budgeting activities. Finally, the Assistant Secretary oversees the execution of the S&T Directorate's budget, serves as the Directorate's principal point of contact with the Department's Chief Financial Officer and the Office of Management and Budget, and approve expenditures of the Directorate's funds.

A further role for the Assistant Secretary is to develop and execute the Directorate's policies associated with setting and promulgating standards for homeland security equipment and technologies in coordination with other entities of the Department as appropriate, and to make recommendations to the Under Secretary with regard to Safety Act designations.

Additionally, the Assistant Secretary develops for the Under Secretary policy options associated with the external research and development community, with state, local, and other federal agencies, and with the international community, and acts as the principal deputy to the Under Secretary for S&T

2. How do you plan to communicate to the staff in the Science and Technology Directorate on efforts to address relevant issues?

If confirmed, I intend to publish an annual planning guidance, approved by the Under Secretary, that lays out the activities the Directorate would undertake in the near and long term. In addition, the Science and Technology Directorate is an appropriate size for effective communications via staff meetings, feedback provided through program reviews, and informal discussions.

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

Key responsibilities include partnering with operational end-users to identify requirements, developing and promulgating policies for efficiently building and fielding capabilities to counter threats and enhance mission operations; developing policies that facilitate the engagement of government, academic and private sectors in innovative research, development, rapid prototyping and systems development; and providing the nation with an enduring research and development capability dedicated to homeland security. These are clearly challenging responsibilities, with perhaps the greatest being the scope of activities required.

4. What objectives would you like to achieve in your tenure as Assistant Secretary? Why do you believe these objectives are important to DHS and to the government?

If confirmed, my objectives are to develop and see deployed state-of-the-art, high-performance, low-operating cost systems to prevent the illicit traffic of radiological and nuclear materials and weapons into and within the United States; provide state-of-the-art, high-performance, low-operating cost systems to detect rapidly and mitigate the consequences of the release of biological and chemical agents; provide state-of-the-art, high-performance, low-operating cost systems to detect and prevent illicit high explosives transiting to and within the United States; enhance conventional missions of all DHS operational units (i.e. B&TS, IA&IP, EP&R) through targeted RDT&E and systems engineering and development; working with the IA&IP Directorate to develop and provide new capabilities for protecting cyber and other critical infrastructures, and to develop scientific capabilities to prevent technological surprise by anticipating emerging threats, such as those due to genetically modified organisms; and develop, coordinate and implement

technical standards for equipment used to counter the biological, nuclear, radiological, chemical, or other threats—these include radiation detector standards, and standards for devices that detect anthrax in suspicious powders. A further key objective is to create and implement a disciplined planning, programming, and budgeting process for the Directorate that links up to the Department’s processes and provides these capabilities efficiently and cost effectively. Clearly, achievement of these objectives would greatly enhance the security of the homeland.

5. **What role do you expect to play in coordinating the bioterrorism R&D activities in the Directorate with those of the Department of Health and Human Services and the Department of Defense?**

Section 302(2) of the Homeland Security Act requires the development of a national policy and strategic plan for federal civilian homeland security research and development. Furthermore, it is evident that a great deal of research and development relevant to homeland security occurs within the Department of Defense, which must be accounted for in the development of the national policy and strategy. Thus, the responsibility the Assistant Secretary has in developing that national strategy requires close coordination with the civilian federal agencies, of which the Department of Health and Human Services has a crucial homeland security role, as well as close coordination with the Department of Defense. If confirmed, I would expect that coordination to occur through my participation in such fora as HSC Policy Coordinating Committees, the OSTP-managed National Science and Technology Council, through interagency groups established by interdepartmental memoranda of agreement, and through informal contacts with my peers in these Departments.

III. Policy Questions

TIA and Privacy

1. **As Assistant Secretary for Plans, Programs and Budget within the Science and Technology Directorate, you will likely be involved in the development of technology used to foster information sharing between federal agencies, and between federal, state, and local authorities. You also may be involved in the development of “data-mining” technologies. From your experience at DARPA, you are likely familiar with the controversy surrounding the Total Information Awareness program.**

• **What steps will you take to ensure that information-sharing programs developed by DHS do not raise the same concerns as TIA?**

• **What role will the DHS Privacy Officer have in your office?**

The legislation establishing the Department of Homeland Security establishes within the Department (sec 222) a privacy officer, who among other things assures that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection, and disclosure of private information. Furthermore, an annual report to Congress is required on all activities of the Department (including RDT&E activities) that affect privacy. Clearly, senior policymakers must understand what the “art of the possible” is in terms of information

analysis tools and algorithms, so that informed debates can occur with regard to the employment of these technologies. Thus, research activities that make use of commercially available databases, for example, ought to be explored, while at the same time assuring that officials charged with the responsibility of advocating for privacy protections, such as the DHS Privacy Officer, are kept informed and able to influence the research efforts. If confirmed, I will assure that the DHS Privacy Officer is part of all relevant planning discussions for these types of activities, and plays a central role in the formulation of policies associated with such programs.

2. **As you know, CAPPs II is currently being developed by the Transportation Security Administration. What role will your office have in the development and deployment of CAPPs II? What will you do to monitor the development and deployment of CAPPs II?**

The S&T Directorate has not to my knowledge been asked to participate in the development and deployment of CAPPs II. Were the Directorate to be asked to participate, I, if confirmed, would be guided by the requirements of the customer (in this case, TSA) as well as by the policies articulated by the DHS Privacy Officer.

3. **As you know, CAPPs II has been criticized by a number of civil liberties advocates. Do you believe that CAPPs II could infringe upon the privacy of airline passengers? If so, describe the safeguards the Department will have in place to prevent the privacy of airline passengers.**

I have not studied in any depth the details of the CAPPs II program, except to note that the DHS Privacy Officer is deeply involved in the policy making for this program. If confirmed, and should the Science and Technology Directorate become involved in the development and deployment of CAPPs II, I would be pleased to work with Congress on these issues.

Organizational Issues

4. **The Homeland Security Act has transferred a number of science and technology programs from other agencies and creates several new ones. Combining these programs together into a single functioning entity is a challenge. What role will you play in accomplishing this goal? What do you anticipate to be the major challenges associated with those efforts, and how will you meet them?**

The Science and Technology Directorate has essentially been created from transferred programs, not agencies. This makes the integration job immeasurably simpler than the problem of integrating disparate agencies and associated cultures that other Directorates within the new Department must solve. The Science and Technology Directorate has chosen to organize itself in terms of planning, programming, and budgeting along product lines: there are separate planning processes for biological and for nuclear countermeasures, for example. Thus, a single planning staff serves to integrate all activities associated with a product line, regardless of origin, into a single coherent plan, and ultimately a coherent set of programs and budget. My role, if confirmed, will be to develop the overall plan and strategy, cutting across all the product lines, in coordination with other federal agencies, with input

from the federal, state, and local user communities, and based on guidance from the President, the Secretary and Under Secretary, and working closely with Congress. The major challenges will be the daunting scope of activities, which are greatly alleviated by the organization of the planning, programming, and budgeting staff along product lines, and the inherent interagency nature of the effort, which will be met through deliberate formal interagency activities formed by the White House and through interdepartmental agreements. A further challenge is to prioritize among product lines; this will be greatly aided by the guidance received from leadership and assessments of risk.

5. **Please describe your specific duties in relation to the organization of the S&T Directorate. As part of your response, please also provide the Committee with a detailed description of how the Directorate has been organized and the rationale for that organization, to the extent that it differs from those elements created by the Homeland Security Act.**

The specific duties of the Assistant Secretary are to develop, and through the planning, programming, budgeting and evaluation process and other means, promulgate the policies of the Directorate, the Department and the Administration. To that end, in addition to the product line organization described in the previous question, the management Homeland Security Science and Technology Council and of the Federally Funded Research and Development Centers (such as the Homeland Security Institute) authorized in the Homeland Security Act fall under the management control of the Assistant Secretary. Furthermore, the Assistant Secretary acts as principal deputy to the Under Secretary. The actual execution of programs occurs within the Homeland Security Advanced Research Projects Agency (HSARPA), which is focused on the execution of research and development projects through the private sector, and also includes the management of the Technology Clearinghouse; and within the Office of Research and Development, which manages and provides stewardship for the intramural capabilities of the Directorate: the University Centers of Excellence, the federal laboratories and facilities, and, through the Office of National Laboratories, the capabilities provided to DHS from the laboratory complex that had been devoted to the Department of Energy. Finally, for well defined projects that require disciplined systems engineering oversight, execution will occur under an Office for Systems Engineering and Development. The Office of Research and Development, HSARPA, and the Office of Systems Engineering and Development all report directly to the Under Secretary, as does the Assistant Secretary.

6. **What will be your working relationship with other principals within the Directorate? For example, will the Director of HSARPA report to you, to Undersecretary McQueary, or to someone else?**

The other principals report to the Under Secretary. The Director of HSARPA, for example, is a direct report to the Under Secretary.

7. **How will your responsibilities differ from those of other components of the Directorate in carrying out the Department's S&T program? For example, since HSARPA cuts across the Directorate's topical program areas, what does that mean for program planning and budgeting? How will the monies for this agency be divided across the**

different research portfolios?

Programming, planning, and budgeting are along topical product lines, or portfolios. It is the responsibility of HSARPA to develop programs with the private sector that are responsive to the planning guidance associated with these portfolios, and monies will be apportioned based on the soundness and responsiveness of the proposed programs. Monies will be divided across the research portfolios based on prioritization guidance from the President, the Secretary, the Under Secretary, Congressional direction, and, importantly, net technical assessments conducted within the office of the Assistant Secretary.

8. **How is the Department going about establishing the Homeland Security Institute? The law requires it to be administered by the Secretary as a separate entity. What will be the Directorate's role? The Institute sunsets in January 2006 – less than 3 years from now. Do you believe that it can accomplish its legislative mission during that time?**

A Request for Proposals (RFP) is currently in preparation for the Homeland Security Institute (HSI). The Institute will be available to the entire Department for various study and analysis activities. The issuance of the RFP and management oversight will be conducted through an Office for Studies and Analyses within the Science and Technology Directorate, reporting to the Assistant Secretary. This management construct is modeled on that within the Department of Defense, where management of the FFRDCs occurs within the Office of the Under Secretary for Acquisition, Technology, and Logistics. The mission of the HSI is seen by the Department as an enduring mission, and the three year sunset provision is expected to make it difficult to attract qualified responses to the RFP.

9. **The Homeland Security Act authorizes the Department to use federal government laboratories, including the DOE national laboratories, and to establish a lead laboratory. How do you plan to use the laboratories?**

The laboratories will provide an enduring programmatic capability for the Department. They will provide a stimulating intellectual environment where the Nation's best scientists and engineers can have rewarding careers working on problems associated with homeland security. This work will often be sensitive in nature, and not always made available to the general public. The laboratories will work on architectural and systems engineering issues, assist the Department in the development of technical requirements, explore trades between technical options, and prove out technical options through brassboard prototypes. The laboratories will develop innovative solutions and where appropriate transition them to industry for further development and commercialization. The laboratories will study the emerging threat, and provide technical support for the Directorate's assessment of the viable technical options available to future threats. The laboratories will provide in-house technical and engineering support to system development efforts. Finally, the laboratories will provide a venue for rapid turnaround, "skunk works" developments to address rapidly developing threats. In general, the laboratories will maintain a programmatic focus, with personnel focused over the course

of their careers on specific issues; this is in distinction to the efforts executed through HSARPA, which will be project-oriented, and amenable to solicitation.

10. **Department documents cluster most Directorate activities into several portfolios, such as “Biological Countermeasures” and “Chemical Countermeasures.” How will you manage these different portfolios? Will there be a separate management structure for each or will you use another approach? How do these portfolios relate to the authorizations set forth by the Homeland Security Act?**

Each portfolio will be utilize independent assessments of current capabilities available to the threat along with trends in that threat (developed by, e.g., the Homeland Security Institute), and relevant intelligence analytic products. Based on that information, along with guidance supplied by leadership, a strategic plan will be developed for each portfolio that is coordinated with programs in other agencies, focused on the needs of the user community, and cognizant of research in process at the laboratories and HSARPA. The plans for each portfolio will be integrated at the Assistant Secretary level (utilizing such analytic infrastructure as the Homeland Security Institute, the Homeland Security Science and Technology Advisory Council) and the overall strategic plan published as required by Sec 302(2) of the Homeland Security Act. The portfolio managers will then develop program concepts and draft budgets that address the plan. HSARPA and the intramural laboratories develop specific programs addressing the guidance, with activities amenable to project-oriented solicitation to the private sector being executed through HSARPA. The portfolio managers periodically assess the progress of these efforts, and restart the planning cycle.

11. **What is the status of hiring in the Directorate? Who is on board and which major positions remain to be filled? Has the hiring process been at all problematic? When do you expect the positions to be filled?**

The HSARPA director position has been offered, and will be filled shortly pending acceptance of the offer. The Deputy Director of HSARPA has been filled. The Office of Research and Development is currently filled with an acting Director, and the position is expected to become permanent shortly. The Director of the Office of National Laboratories has been filled. Virtually all subordinate direct reports to the Assistant Secretary have either been filled, or offers have been made and accepted; these positions are not contingent on my confirmation. The hiring process has been challenging, as Under Secretary McQueary has testified; finding qualified technical personnel and bringing them into government service is a pandemic problem. However, the personnel brought into the Directorate to date are first rate, a testimony to the patriotism of the scientific community and its commitment to homeland security.

University-Based Centers

12. **The Homeland Security Act requires the creation of one or more university-based centers for homeland security. Some concerns were raised with respect to the Homeland Security Act that the criteria for selecting university centers as originally set forth in section 308 would have tended to favor one particular candidate institution.**

- a. **How many centers do you expect the Department to establish, and how will the decision of where to establish them be made?**

The President's FY04 budget submission, and subsequent appropriations bills passed by the House and the Senate, imply roughly 6-9 Centers. Establishment of these Centers will be through a competitive process and independently evaluated.

- b. **Do you believe that the criteria, as subsequently amended by P.L. 108-7, provide flexibility to ensure sufficient competitiveness among potential candidates?**

It is expected that the Centers will be focused in nature, with each Center conducting research in closely related disciplines (rather than the very broad span specified in the Homeland Security Act prior to amendment). The amended criteria provides sufficient flexibility.

- c. **How do you believe the criteria should be weighted?**

It is important that each Center demonstrate the ability to conduct the research activities envisioned for the particular Center, that each Center demonstrate an ability to involve regional and local institutions (e.g. other academic institutions, state and local public safety and response entities, the private sector). Detailed evaluation criteria are in preparation.

- d. **Do you feel that the legislation's mandate can be met by creating several centers that in sum meet these criteria?**

Yes—that is in fact the current vision.

- e. **Do you believe that geographic diversity is an important goal to seek to achieve in selecting university-based centers?**

Yes—the various regions of the Nation have differing homeland security issues, and the Department is in need of diversely developed solutions.

- f. **The Senate Appropriations Committee-passed Homeland Security Appropriations bill includes \$55 million for university-based centers. How do you believe these funds should be spent?**

This appropriation is in excess of the President's proposal, and hence detailed plans have not been developed in the event the amount in the Senate bill becomes law.

13. **When will DHS designate the first and subsequent university-based centers?**

The first Center, utilizing FY03 funding, is expected to be awarded this calendar year. A solicitation is expected in the next few weeks. Solicitations for subsequent Centers will occur in the fall.

14. What roles do you see for universities and other institutions of higher learning in the work of the Directorate?

Academic institutions will be involved in several ways. First, the Department will establish Centers of Excellence aimed at conducting focused research and providing the fundamental science in a variety of areas, potentially including (but not limited to) such fields as risk assessment, social and behavioral sciences, maritime security, and food safety. Second, the academic sector will be able to team with the Directorate's intramural laboratory capacity in addressing enduring problems in homeland security; examples include pathogen forensics, or assisting in red teaming. Finally, the academic sector will partner with industry, or bid separately, for projects conducted under the auspices of HSARPA.

Setting Priorities

15. The Directorate's legislatively mandated mission is set forth in Section 302 of the Homeland Security Act. Which elements of that mission will you be directly responsible for, and how will you prioritize them?

If confirmed, I will be directly responsible for developing, under the supervision of the Under Secretary, policies, planning, programming, and budgeting for all of the activities specified in Sec 302. All the missions detailed in Sec 302 are deeply important to the Department and to the development of capabilities that enhance the security of the homeland; I will treat all of them as high priority. As noted earlier, execution of various programs and projects in support of the policies and plans developed by my office and approved by the Under Secretary will occur within the Office of Research and Development, HSARPA, and the Office of Systems Development and Engineering.

16. As established in the Homeland Security Act, the Homeland Security Advanced Research Projects Agency (HSARPA) is designed to support basic and applied research, advance the development, testing and evaluation, and deployment of critical homeland security technologies; and accelerate the prototyping and deployment of technologies. The Department's summarized budget request for FY 2004 says that HSARPA "will direct \$350 million in new funding to address immediate gaps in high-priority operational areas like protecting critical infrastructure and securing our borders." Yet the detailed plans for Science and Technology spending do not provide further information on the priorities for this \$350 million.

- a. Please clarify the amount of funding HSARPA will have for FY2004 in your budget and how it will be allotted by program areas.

At least \$350M is expected to be executed through HSARPA in FY04. As noted earlier, the planning, programming, and budgeting of the Directorate is organized along topical portfolios; the detailed allocation of funds within each portfolio toward HSARPA has not yet occurred. The \$350M figure is a lower bound arrived at through estimates made by the portfolio managers for the portions of their budget request that would be executed through project-oriented solicitations to the private sector.

- b. **How will HSARPA be used to achieve overall programmatic goals in countermeasures for weapons of mass destruction and support of other DHS units? What will the HSARPA priorities be?**

The priorities of HSARPA will be the same as those for the Department and the Directorate, and will focus on the most catastrophic threats (biological and nuclear) while maintaining robust programs in support of the other threats and other Directorates (in such areas as information analysis, explosive detection, chemical remediation). HSARPA will solicit from the private sector solutions for new nuclear, biological and chemical detectors and remediation capabilities, cybersecurity capabilities such as insider threat detection, advanced biometric techniques, and other capabilities sufficiently amenable to definition to allow solicitation from the private sector.

17. **To what extent were you involved, or will you be involved, in establishing priorities for the seven R&D portfolios described in Department budget documents? Who else was involved? What were some of the major factors that were considered? How did the Department arrive at specific funding levels for the various activities? Do you regard these as the major priority areas for the Directorate for the foreseeable future? If not, what changes do you expect, and why?**

I led the transition planning effort for the Directorate prior to its formation, and thus developed the draft FY04 budget for the S&T Directorate, which was subsequently approved by the Under Secretary and the Secretary. The priorities were guided by the President's National Strategy for Homeland Security, and the funding levels determined in large part the need to initiate programs dictated by that strategy, and by an evaluation of the state of technology for supporting near term improvements to the security of the homeland. These priorities could change because of success (current priorities get addressed), changes in the threat, or technological breakthroughs that allow transition from research to development and deployment. It should be noted that low funding levels do not necessarily imply low priority, but rather that the needed capability does not yet exist, and that research on various approaches is needed before more substantial development activities can ensue.

18. **Please describe specifically what role you will play in setting priorities and making decisions about funding for S&T activities within the Directorate, including HSARPA and federally operated research centers at the national laboratories and elsewhere, and in other parts of the Department? What do you anticipate as your most important priorities for the next year? The next five years?**

If confirmed, my role will be to develop the Directorate's plan and budget, and hence to recommend to leadership a prioritization of activities. Furthermore, my role will include an evaluation of the state of the technology, and hence a recommendation for which work should be executed through project-oriented solicitations in HSARPA, and which work is more appropriately addressed within the national laboratories or elsewhere. However, it is envisioned that HSARPA will also have, through the emerging threats budget line, discretionary funds to perform undirected research and development. Furthermore, the laboratories will have, through lab directed research and development (LDRD) funds, an equivalent capacity for undirected R&D. The most important priorities for the next year and

the next several years are to develop and deploy state-of-the-art, high-performance, low-operating cost systems to prevent the illicit traffic of R/N materials and weapons into and within the United States; provide state-of-the-art, high-performance, low-operating cost systems to detect rapidly and mitigate the consequences of the release of biological and chemical agents; provide state-of-the-art, high-performance, low-operating cost systems to detect and prevent illicit high explosives transit to and within the United States; enhance the conventional missions of all DHS operational units through targeted RDT&E and systems engineering and development; develop and provide capabilities for protecting cyber and other critical infrastructures; develop capabilities to prevent technology surprise by anticipating emerging threats; and develop, coordinate and implement technical standards for CBRN countermeasures.

19. **In setting priorities, how do you plan to use vulnerability, threat, and risk assessments? What methodologies will you use in making such assessments and translating them into priorities? What potential pitfalls do you anticipate with the approaches used and how do you expect to avoid them?**

The planning process relies on several key inputs. First, there may be analytic intelligence, such as imagery, HUMINT, or communications intercepts, indicating a particular threat. Such information would come from the IA&IP Directorate. However, many of the threats to the homeland are easily hidden, and the consequences of not being prepared for them large. Thus, a second input is an independent technical assessment of the potential threat, in terms of the sophistication needed by the threat for development and deployment, and the consequences of that deployment. This assessment will come from an independent net technical assessment activity within the S&T Directorate, utilizing the Homeland Security Institute, University-based Centers of Excellence, the National Biodefense Analysis and Countermeasures Center, the laboratories, and other capabilities. Finally, to determine risk, we must also understand the potential consequences of an attack, our current capability to counter or mitigate it, the programs we have in place to develop improved capabilities and their likelihood of success. This understanding of risk will be performed with IA&IP, along with, as before, the Homeland Security Institute, University-based Centers of Excellence, the National Biodefense Analysis and Countermeasures Center, the laboratories, and other capabilities. In addition, working with IA&IP and other available assets such as the national labs, we must constantly reexamine our assumptions and red team our defenses to assure that we have done as comprehensive a job as is possible. This breadth of activity is expected to address the greatest potential pitfall to conducting these assessments, which is to restrict the diversity of views and analyses and hence miss vulnerabilities and threats that a threat employs.

20. **The Directorate has the responsibility to discover and develop a wide range of countermeasures to terrorist threats. How do you decide which threats to focus on? For example, biodefense appears to be a major priority of the Directorate, but NIH is also spending a considerable amount of money in that area – several times what the DHS requested for FY2004. So far, the most destructive terrorist attacks have used high explosives, but they receive a much lower emphasis in the budget request. Has DHS chosen an appropriate balance for R&D on conventional versus unconventional threats?**

As noted in the President's National Strategy for Homeland Security, the biological threat presents an enormous risk. The budget at NIH addresses an important aspect of the problem, which is the need to research and develop medical countermeasures for bioterror agents. However, there are other important activities not addressed by NIH or HHS. For example, there is a pressing need for environmental monitors that are cheap to operate, with extremely low system false alarm probability, and good detection probability. A further need is for facilities monitoring, and for researching and developing new decontamination and remediation technologies. Capabilities need to be developed for attribution and forensics. Similar needs exist in the agricultural domain. Finally, the Department has a responsibility to work with HHS in setting goals and priorities for the medical countermeasures work, and for assessing the progress of that work. As noted in the answer to the previous question, analytic intelligence from IA&IP represents an important, but partial, input to that process, and hence the Directorate must develop scientific capability to assess the emerging biological threat, such as engineered pathogens, assess the capability of the threat to effectively deploy the current and emerging threat, and assess the risks associated with an attack. The threats the directorate focuses on are determined by a variety of sources, such as the vulnerability, threat, and risk analyses discussed in the prior question, and on guidance from leadership. A further crucial input is an assessment of the current state of technology, and the level of funding in other agencies. Thus, explosive detection is a well-studied area, with substantial funding within the TSA R&D budget; given that level of funding, and the dearth of novel ideas that have not already been well studied and tested, the small S&T budget is aimed at the specific issue of detecting transit of large amounts of explosives, such as was employed in the Oklahoma City bombing. This latter area has not been to our knowledge studied in depth.

21. How do you anticipate balancing federal versus state and local needs in prioritizing R&D?

The state and local community is a crucial customer for the S&T Directorate. The overall prioritization of R&D will be dictated by risk assessments, guidance from leadership, technical feasibility, and the existence of gaps in the national R&D effort. The requirements for solutions to those priorities will be dictated by the user community, and to that end we are involving the state and local community with seats on the Homeland Security Science and Technology Advisory Council, and through our program for developing standards for homeland security equipment.

22. In most cases, new technologies are based on principles derived from basic scientific research. To what extent do you expect the Directorate to be engaged in that type of research as part of its mission? To what extent will you be working with other agencies to ensure that such research gets done, and how will you do that?

It is expected that the bulk of research conducted within the Directorate will be applied research, aimed at addressing particular issues. However, discovering fundamental scientific principles, such as new biometric signatures, can still be considered "applied". The extent of the Directorate's involvement will be on a case by case basis, with, as noted, biometrics a clear example, along with work in the behavioral and social sciences. We expect to work closely with NSF, and an NSF detailee sits in the Office of the Assistant Secretary. In

addition, we are working closely with the DoE's Office of Science and the National Nuclear Security Administration, with NIST, and DoD. Of course, there is a close relationship with NIH, CDC, and USDA. In most of these cases there exist formal interdepartmental memoranda, as well as formal coordination activities through the Office of Science and Technology Policy (e.g. the National Science and Technology Council). In addition, there are frequent informal contacts between the heads of these agencies and S&T Directorate leadership, and between researchers at the working level.

23. **Little information about the Directorate's program priorities appears to be readily available to the public. Do you intend to make planning and budget documents available on the Department website? If so, when? If not, why not?**

Yes, it is intended to publish these priorities annually. Publication this year is expected late this summer or early in the fall.

24. **Do you expect that some areas will require more extramural research than others? If so, what are those areas? What kinds of products will need to be developed through intramural research? Do you view the main R&D role of the Directorate as promoting extramural or intramural homeland security R&D?**

The strength of the nation's research and development enterprise resides in the private sector and academic community. Hence, it is expected that extramural research will dominate. However, it should be noted that the national laboratories made substantial and unique investments over the past several years on countering the chemical, biological, radiological, nuclear, and cyber threats, and on systems analytic capabilities associated with homeland security. Thus, many of the near term capabilities are expected to originate within the intramural capability of the Directorate. The intramural capacity will provide an enduring programmatic capability for the Department. This work will often be sensitive in nature, and not always made available to the general public. The laboratories will work on architectural and systems engineering issues, assist the Department in the development of technical requirements, explore trades between technical options, and prove out technical options through brassboard prototypes. The laboratories will develop innovative solutions and where appropriate transition them to industry for further development and commercialization. The laboratories will study the emerging threat, and provide technical support for the Directorate's assessment of the viable technical options available to future threats. The laboratories will provide in-house technical and engineering support to system development efforts. Finally, the laboratories will provide a venue for rapid turnaround, "skunk works" developments to address rapidly developing threats. In general, the laboratories will maintain a programmatic focus, with personnel focused over the course of their careers on specific issues.

25. **What is the status of the Science and Technology Advisory Committee established in the Homeland Security Act? How do you see that committee working with you to help set priorities? Would a set of specific technical advisory committees be useful for individual programs within the S&T Directorate?**

A draft list of potential Committee members has been prepared, and the Committee is

expected to hold its first meeting in the late summer or early fall. It is expected that it will serve as a "board of directors" for the Directorate, and will clearly be asked to provide advice on priorities. Specific technical advisory committees are often a useful tool for programs and projects, and the Directorate will utilize such constructs as appropriate.

26. Do you believe that the development of effective biological and chemical sensors should be a priority for the Science and Technology Directorate? If so, how much of a priority?

Yes, this is a high priority, as discussed in the President's National Strategy for Homeland Security, and within the Directorate's budget request.

Coordination within the DHS and with Other Federal Agencies

27. Since many other agencies have homeland security R&D programs, how will you interact with these agencies to coordinate priorities and programs? What are the major agencies with which the Directorate needs to coordinate and what mechanisms will you use to facilitate that?

Major agencies that we expect to work closely with are the DoE's Office of Science and the National Nuclear Security Administration, NIST, DoD, NIH, CDC, USDA. In most of these cases there exist formal interdepartmental memoranda, as well as formal coordination activities through the Office of Science and Technology Policy (e.g. the National Science and Technology Council), and the Homeland Security Council (e.g. Biodefense Policy Coordinating Committee). In addition, there are frequent informal contacts between the heads of these agencies and S&T Directorate leadership, and between researchers at the working level.

28. Full and efficient coordination within the Department between the various Directorates and their Under Secretaries will be critical to the effective prosecution of the overall homeland security mission, as well as the individual missions of each Directorate. This proposition holds especially true for the Directorate of S&T given that it will bear primary responsibility for developing new technologies, or mapping available technologies, to the needs of other Departmental entities and first responders. For example, in the context of border and port security, the Directorate of Border and Transportation Security will have an acute need to rapidly acquire new technologies for detecting and tracking cargo that may contain nuclear, radiological, biological, or chemical agents. This need will require the Directorate of S&T to support the development of innovative sensor and tracking technologies, or to identify and acquire commercial available technologies capable of providing the requisite functionalities.
- a. What are the S&T Directorate's plans to pursue technology R&D in the areas of border and port security, and what do you believe would be appropriate future for funding levels?

On the staff is a portfolio manager for addressing issues associated with the B&TS Directorate not addressed elsewhere in other portfolios (such as the radiological and

nuclear countermeasures portfolio). She has been engaged this summer in a strategic planning exercise with the user groups in that Directorate to develop detailed programs. These will include efforts in counter drug, surveillance, higher throughput container scanning. The S&T Directorate is also working closely with the USCG, through our USCG portfolio manager, to develop specific programs in port security. Overall combined funding for B&TS and USCG efforts not included within other portfolios is \$30M in the President's FY04 request.

- b. Please describe what steps you will take to ensure that the S&T activities of the various Directorates are coordinated with those of the other Directorates, both during the transition phase and after full implementation.**

The S&T Directorate has oversight responsibility for the Department's S&T activities. In FY03 this was mainly a deconfliction effort, aimed at assuring that work done at TSA, Customs, INS, USCG, USSS, ODP, and NCS was not duplicated within the S&T plan. In FY04 S&T will be expected to provide more detailed oversight, and some activities may be moved to S&T management. Also, there have been several meetings of a Federal Homeland Security Laboratory Director's council instituted under S&T leadership that has resulted in significant information sharing and coordination of activities.

- c. With respect to the Directorate of S&T, please describe how you will ensure that it's R&D, funding, and technology acquisition efforts are tightly coordinated and aligned with the needs of the other Directorates?**

There are portfolio managers (with subordinate staff in most cases) within the S&T planning, programming, and budgeting office for IA&IP, B&TS, EP&R, USSS, and USCG, and State/Local. Their job is to be deeply familiar with the needs and problems associated with the Directorate they have been assigned, and to work closely with leadership in those Directorates to develop programs that address priority issues. In some cases personnel have been detailed to S&T from these other Directorates. Furthermore, there are frequent meetings between senior management of the S&T Directorate with peers in the other Directorates to assure alignment and coordination.

- 29. Many organizations -- national laboratories, universities, private companies, and foreign entities -- are developing technologies for homeland security. What will you do to ensure that the Department keeps adequate track of these activities? If several governmental organizations were developing similar technologies with homeland security applications, would you see it as your role to try to have them coordinate so as to avoid duplication of effort? At present, the Department of Energy laboratories often turn to private companies to commercialize the technologies they develop. Do you see any role for the Directorate in this process?**

Each portfolio manager is responsible for being knowledgeable in their particular area of responsibility. The Homeland Security Act assigns a coordination role to the Directorate, which is greatly aided by explicit coordination activities conducted through the White House, and through formal interagency memoranda and informal contacts between leadership of the various agencies. The Science and Technology Directorate has an important role in assuring

the commercialization of technologies developed within its intramural infrastructure.

30. **Does a formal process exist that aides the Directorate in identifying promising technologies already in development at federal research facilities?**

There are formal coordination activities conducted through the White House, and through formal interagency memoranda and informal contacts between leadership of the various agencies.

31. **The Coast Guard is one of only two agencies that was brought into the new Department fully intact as a distinct entity and retaining all of its missions. The Coast Guard has traditionally conducted its own research and development. As Under Secretary for Science and Technology, how will you coordinate with and support the efforts of the Coast Guard's Research and Development Center in Groton, CT, for all projects, and especially for those not related to homeland security? What determines whether a particular project is more appropriate for HSARPA or for the Coast Guard's own program?**

We are working closely with the USCG research and development efforts. The USCG has detailed to S&T their former Program Manager for R&D to act as portfolio manager for the USCG S&T programs, with the express responsibility for planning, programming, and budgeting activities within S&T addressing USCG needs. We will oversee the USCG R&D program at Groton to assure their coordination with the Department's overall efforts, and address through HSARPA those efforts that require sustained scientific and engineering program management, and longer term, higher risk development.

32. **One of the Coast Guard's projects is an ongoing study of potential management practices that could be used to control the spread of non-indigenous aquatic nuisance species that enter U. S. waters through the discharge of ship ballast water. Invasive aquatic plant and animal species are one of the greatest ecological threats to U.S. waters. The Coast Guard is searching for more effective regulatory and technological control methods than voluntary ballast water exchange, which has proven minimally effective. How do you plan to support the Coast Guard in this important endeavor?**

I am not deeply familiar with this important initiative, although I am aware of it. I will be happy to work with the USCG, and bring to bear the significant technical resources available to the Directorate on this problem.

33. **Beyond identifying the technological needs of the Department and its Directorates, the Department must coordinate with extra-Departmental entities to initiate and fund appropriate R&D, and to assist in the identification, acquisition, and deployment of technologies developed in the private sector. Such external coordination takes on paramount significance given that the vast majority of research and technology efforts relevant to homeland security will continue to occur outside the direct control of the Department – in other agencies and in corporate or university laboratories.**

- a. **With respect to other federal agencies, how do you plan to promote interagency collaboration on homeland security R&D, particularly in areas that may fall outside traditional agency missions or scientific disciplines?**

The Homeland Security Act assigns a coordination role to the Directorate, which is greatly aided by explicit coordination activities conducted through the White House, and through formal interagency memoranda and informal contacts between leadership of the various agencies. Non-traditional scientific fields of interest, such as the social and behavioral sciences, are being discussed with NSF, and the Secret Service, and in general terms coordination occurs through the organization of the S&T Directorate into topical portfolios with responsibility, among other things, to be familiar with relevant efforts across the federal government.

- b. **If the Department plans to let the National Science and Technology Council (NSTC) lead on interagency coordination, why does the Department believe that NSTC is better able to handle coordination of technology between the many government departments and agencies than the Department itself? What steps will the Department take to ensure that NSTC is up to the task?**

The NSTC is not the sole coordination activity. However, the NSTC provides a valuable forum that has a direct impact on the development of the President's budget. The Department can greatly assist the various White House coordination efforts by developing a national plan and strategy for homeland security research and development as required by Sec 302(2) of the Homeland Security Act, although the White House mechanism is invaluable in assuring agency budgets are fully coordinated with that strategy.

34. **Please describe the extent to which the Directorate and the Under Secretary for S&T will have substantive influence over, and support from, the Department's Secretary and Under Secretaries, and what will be the reporting and authority arrangements for the line DHS operating elements of the Department on R & D and technology development issues. What steps you will undertake to ensure that S&T priorities and needs are actively solicited, afforded a high level of institutional focus, and integrated into the Department's larger plans and activities, including those related to budgeting and resource allocations?**

There are portfolio managers (with subordinate staff in most cases) within the S&T planning, programming, and budgeting office for IA&IP, B&TS, EP&R, USSS, and USCG, and State/Local. Their job is to be deeply familiar with the needs and problems associated with the Directorate they have been assigned, and to work closely with leadership in those Directorates to develop programs that address priority issues. In some cases personnel have been detailed to S&T from these other Directorates. The portfolio managers have an explicit role in developing the Directorate's plans and budget. Furthermore, there are frequent meetings between senior management of the S&T Directorate with peers in the other Directorates to assure alignment and coordination.

Standards

35. If confirmed, one of your tasks would be to “[d]evelop and execute the Directorate’s policies associated with setting and promulgating standards for homeland security equipment and technologies.” What are the Department of Homeland Security’s plans to provide guidance and standards to first responders on critical equipment such as communications and protective gear?

A set of standards and protocols for homeland security technology is urgently needed to ensure the effectiveness of all of the components of the homeland security system. Special emphasis on standards for use by federal, state, and local first responders is critical to their ability to acquire equipment to detect and prevent transport of weapons of mass destruction or other means of attack against the nation, to respond to incidents, to manage crisis situations effectively, and to provide defensible evidence for prosecution.

The philosophy of the Department of Homeland Security Science and Technology Standards organization is that developing and sustaining an integrated technology and standards backbone for first responders will greatly enhance the day-to-day activities of the first responders. At the present time, no consensus national standards exist for homeland security applications. The present national system for countering radiological and nuclear threats relies on a patchwork of commercial off-the-shelf and government off-the-shelf systems, most of which were originally designed for military, commercial nuclear power or Department of Energy nuclear weapons facility operations and security. Bio-agent detection and decontamination technologies are represent new and rapidly evolving capabilities. Tools for use in the event of chemical attacks are available, but have not been rigorously proven against chemical warfare agents in non-military applications. All homeland security providers must work with a basic ability to communicate in crisis situations. Communication requires appropriately trained individuals using common terminology and units, interoperable devices, and tools that are appropriate to the task. The S&T Directorate has been given management authority for the SAFECOM project, which is designed to work with state, local, and federal entities to establish interoperable communications standards.

The lack of consensus national standards for systems for homeland security applications has led to confusion in the private sector (equipment manufacturers, shippers) and the government sector (Customs; Border Patrol; Coast Guard; state and local emergency planners; and emergency response organizations). The Standards Program will provide consistent and verifiable measures of effectiveness in terms of basic functionality, appropriateness and adequacy for the task, interoperability, efficiency, and sustainability. The Program will facilitate the development of guidelines, in conjunction with the users and the developers. The guidelines will encompass the user needs and operating conditions, as well as the capabilities and the limitations of the technologies. Using these guidelines, the Standards Program within the S&T Directorate will develop performance measures, testing protocols, certification methods, and a reassessment process appropriate to each technology.

36. How do you anticipate working with the National Institute of Standards and Technology, the American National Standards Institute (ANSI), and other entities in establishing standards for homeland security equipment and technologies? What are the major policy issues that you anticipate, and how do you expect to address them? Do

you anticipate the need to establish mandatory standards in any particular area, or do you believe that voluntary consensus standards will always be the best approach? Will any of these standards require the participation of international organizations, such as the International Standards Organization (ISO)? If so, how will you work with them?

The S&T Directorate is already working closely with NIST and ANSI on a variety of topics, and has recently issued with their assistance draft standards for radiation detection equipment. An MOU exists between the S&T Directorate and NIST to facilitate what is expected to be an enduring cooperative effort. The key policy issues are likely to revolve around minimum acceptable performance criteria, and will be addressed by working closely with the user community. The ability to sell in the marketplace homeland security technology will be determined to a large degree by ability to meet voluntary standards, and thus it is our expectation that mandatory standards will be generally unnecessary. Of course, many standards issues require international cooperation, and thus we would expect to work with the ISO and other international entities through usual channels, such as through our partnership with NIST.

37. **Active research and development programs to produce new cybersecurity tools and techniques are necessary to enable us to maintain the performance of important networks and systems and improve our ability to defend against cyber and physical terrorism. Within DHS, the Directorate of Science and Technology (S&T) will have responsibility for managing research and development programs relevant to cybersecurity.**
- a. **What do you believe the Science and Technology Directorate should be doing to help develop and implement the tools needed to improve the nation's cybersecurity? Does the directorate have enough resources to carry out these tasks? Will the department's science and technology directorate develop in-house cybersecurity expertise and programs? How will it coordinate with the department's operational cybersecurity programs?**

The S&T Directorate has a cybersecurity portfolio manager who is responsible for planning, programming, and budgeting the Directorate's research and development activities in this area. It is fully coordinated with the cybersecurity activities within the IA&IP Directorate. Recently, the Under Secretary announced his intention to create a Cybersecurity R&D center utilizing expertise from the academic community, federal laboratories, national laboratories, and the private sector. Furthermore, we are working closely with NSF, NIST, and DoD to coordinate our activities in this area. Resources are adequate for this effort, particularly in the context of the substantial federal efforts in cybersecurity R&D.

- b. **How will the Science and Technology Directorate work with the operational cybersecurity efforts of the Information Analysis and Infrastructure Protection, particularly the new National Cyber Security Division?**

The S&T Directorate is already consulting with the IA&IP Directorate to determine R&D priorities, and assure alignment with their efforts. IA&IP will assist in the management of

the R&D center.

- c. **How will the Department interact with cybersecurity research and development efforts underway in industry? How will it interact with university-based cybersecurity programs?**

Recently, the Under Secretary announced his intention to create a Cybersecurity R&D center that will bring together expertise from the academic community, federal laboratories, national laboratories, and the private sector. We are also working closely with NSF as we develop the overall research agenda.

38. **ANSI has established a homeland security standards panel that will develop consensus standards, initially focusing on ten areas that the Department has identified as immediate needs. What role did you play in determining those areas? How were they chosen? What alternatives did you consider and eliminate, and why?**

This effort was instigated by the Directorate, based on a planning activity that included consultation with the federal, state, and local user communities, along with an assessment of urgent needs.

39. **How should the Department use the standards that are developed through this process and other means? How will you encourage the development and use of products, which meet the standards? Do you anticipate that the Department will assess and report on how well technologies meet the standards? Do you anticipate maintaining a database of such products, and, if so, will it include only domestic U.S. products, and how will you make it available?**

The Directorate will develop technical reference standards, protocols for using those reference standards, and will encourage the development of private laboratories for evaluation of equipment against those standards using the defined protocols. The Directorate will in addition develop certification criteria for those laboratories, and certify them. Furthermore, information about equipment that meets those standards would be made available through a variety of means, such as the technology clearinghouse specified in the Homeland Security Act. It is envisioned that such equipment could be internationally or domestically produced.

Interactions with the Private Sector and Other Nonfederal Entities

40. **Members of Congress have received numerous inquiries from businesses and individuals interested in working with the Department to improve our nation's security. Under Secretary McQueary has suggested that all interested parties share their proposals with the Department by contacting them via e-mail at Science.technology@dhs.gov. What happens to these proposals once they are received, and what role will you play in making sure that those products and ideas receive serious consideration?**

Unsolicited proposals with sufficient technical detail to allow evaluation are forwarded to the Technical Support Working Group for evaluation, where interested agencies and components

are made aware through that evaluative process of the technology. Furthermore, people submitting information to the email site are made aware of the various solicitations that may be relevant. In general, unsolicited proposals are only funded by diverting funds from a current priority, and hence a compelling case must generally exist. It is expected that as the Directorate issues solicitations that are reflective of the Department's R&D priorities businesses and individuals will be provided focal points to which their creative energies can be directed. The recent TSWG BAA generated over 3000 responses across a wide variety of specific priorities for near-term development and prototyping.

41. Do you anticipate other means of proposing projects?

Yes. HSARPA will very shortly begin soliciting for proposals in a variety of areas reflective of the priorities of the Department. The recent TSWG BAA solicited for near-term development and prototyping technologies across a wide variety of specific priorities determined by the user community; it is expected that such a BAA will be generated each year.

42. Small businesses face unique challenges in proposing ideas to the Department, but often have some of the best ideas for homeland security efforts. To what extent is the Department working with the small business community to secure their input? How might the lines of communication with the small business community be improved?

The Directorate is enthusiastic about working with the small business community. The Directorate will participate in the Small Business Innovative Research (SBIR) program. In addition, the TSWG solicitation process is friendly to small businesses, in that it provides a series of steps that allow evaluation of a concept at increasing levels of detail, thus deferring the significant expense of detailed proposal generation only after the business has been encouraged to do so. Furthermore, the Department has been granted Other Transactions Authority, which allows the government significant latitude in negotiating research and development contracts with respect to intellectual property and financial management standards—two issues that create a barrier for non-traditional contractors wanting to develop for the federal government new homeland security capabilities. Finally, we are working closely with the Special Assistant to the Secretary for the private sector to further encourage small business to interact with the Department, and will work with the Homeland Security Science and Technology Advisory Council to assess and develop policies that encourage the participation of small business.

43. The majority of U.S. R&D is conducted by industry. How will the Department capitalize on this? Do you plan to seek the services of private-sector laboratories as well as the DOE labs?

The private sector research and development community is vast, and a crucial component of the job of the Science and Technology Directorate is to marshal this resource in support of the homeland security mission. To this end the Directorate will issue solicitations for projects through HSARPA and through the Technology Clearinghouse (the TSWG) addressing the research and development priorities of the Department. These solicitations will serve as a focal point for the private sector. Furthermore, the Directorate will publish annually its plan

and strategy for homeland security R&D, thus informing industry how best to focus its creative talents. Finally, as noted above, the Department has been granted significant contracting flexibilities to remove for non-traditional government contractors impediments to participation in this enterprise. The entire national research and development infrastructure needs to be mobilized in this effort, including private sector laboratories.

44. **The Homeland Security Act establishes mechanisms to facilitate coordination with the private sector. For example, there's the Technology Clearinghouse, the Science and Technology Advisory Council, and the Special Assistant to the Secretary, Mr. Martinez-Fonts. What role will you play in making sure that these various mechanisms work well together? How do they coordinate their efforts currently?**

As noted above, we are working closely with Mr. Martinez-Fonts to assure that our policies encourage as much as possible the involvement of the nation's R&D private sector capacity in the homeland security mission. In addition, we expect to utilize the Advisory Council as a board of directors for the Directorate, and hence it will have as a key role frequent examination of our relationship with the private sector, and provide advice on this issue to the leadership of the Directorate. Furthermore, the Directorate will issue solicitations for projects through HSARPA and through the Technology Clearinghouse (the TSWG) addressing the research and development priorities of the Department. It is clearly important to assure that the focusing effect of these solicitations is enhanced by enlightened policies developed with the advice of the Advisory Council, Mr. Martinez-Fonts, and other avenues, and, if confirmed, I will work with them and with Congress to assure that this occurs.

45. **Will extramural programs in the Directorate use contracts or grants as the primary funding mechanism?**

In general the preferred mode is contracts, as that allows the greatest degree of government control. However, procuring research and development from academic and other non-profit institutions is often done through grant mechanisms, and we expect the Directorate to make use of that mechanism as well.

46. **What mechanisms will the Science and technology Directorate employ to provide targeted research monies to specific universities or companies? What percentage of the Directorate's funding will be devoted to providing research monies to entities outside the Department? Please describe how the process will work. What controls will you use to ensure that such efforts are adequately justified by need and meet all legal requirements?**

In general all research funds will be competed, and thus sole source funding will be a rare event that occurs out of necessity and in compliance with the Federal Acquisition Regulations. It is currently impossible to know the precise percentage of funds going outside the Department, but at least \$350M of the FY04 funds will be executed through HSARPA with the private sector. Furthermore, much of the funding of the National Biodefense Analysis and Countermeasures Center will be extramural, as will, of course, the University-based Centers of Excellence. All extramural research and development procurements will be

executed in compliance with the FAR and other supplemental procurement policies developed by the Department.

47. **The Homeland Security Act (Act) calls for a contract with Federally Funded Research and Development Centers (FFRDCs) and the creation of a Homeland Security Institute to provide specialized advice and expertise with regard to assessing, analyzing, and mitigating homeland security threats, vulnerabilities, and risks.**

- a. **How do you plan to take advantage of the resources provided by these sources?**

These institutions will provide unquestioned independent, objective analytic support to the Department of Homeland Security. They will focus their efforts on: providing analytic support for planning activities, including threat, vulnerability and risk assessments; systems analyses; requirements analyses; assessments of competing technical and operational approaches; and support to Red/Blue Team efforts. These FFRDCs will in addition provide outreach to regional, state, and local homeland security efforts by conducting independent analyses of operations, field exercises and demonstrations. In addition they will provide technical support to the Directorate's Safety Act designation and certification responsibilities. They should be allowed to undertake long range projects, should have access to sensitive government and proprietary data, including intelligence assessments, and should be of unquestioned objectivity, free from conflicts of interest with other government institutions and the private sector. They will provide state of the art analytic capabilities and the best scientific and technical talent available.

- b. **What is the status of standing up the institute and will it be assigned threat and risk analysis tasks as envisioned by the Act?**

The current effort is focused on developing an RFP for the Homeland Security Institute, and releasing it by late summer or early fall. It will be assigned threat and risk analysis tasks as envisioned by the Act, as well as the other activities noted above where appropriate. Other FFRDCs may be established at a later time as needed.

48. **The legislation intended to confer on the Under Secretary for S&T authority over both the Department's and subagencies Testing and Evaluation process, in order to assure technology coherence and interoperability throughout the Department. Is this being implemented? If not, why not?**

It is being implemented through the development of standards for homeland security technologies, and the certification of laboratories that test against those standards.

Developing and Deploying Products

49. **Some technologies will be easy to develop and will be affordable to end users – the so-called “low-hanging fruit.” However, technologies that address the largest threats will likely be more difficult to develop and more expensive for end users. Given such choices, how do you decide where the Directorate's efforts and funds will best be spent?**

The planning process relies on several key inputs. First, there may be analytic intelligence, such as imagery, HUMINT, or communications intercepts, indicating a particular threat. Such information would come from the IA&IP Directorate. However, many of the threats to the homeland are easily hidden, and the consequences of not being prepared for them large. Thus, a second input is an independent technical assessment of the potential threat, in terms of the sophistication needed by the threat for development and deployment, and the consequences of that deployment. This assessment will come from an independent net technical assessment activity within the S&T Directorate, utilizing the Homeland Security Institute, University-based Centers of Excellence, the National Biodefense Analysis and Countermeasures Center, the laboratories, and other capabilities. Finally, to determine risk, we must also understand the potential consequences of an attack, our current capability to counter or mitigate it, the programs we have in place to develop improved capabilities and their likelihood of success. This understanding of risk will be performed with IA&IP, along with, as before, the Homeland Security Institute, University-based Centers of Excellence, the National Biodefense Analysis and Countermeasures Center, the laboratories, and other capabilities. The priorities are also guided by the President's National Strategy for Homeland Security, guidance from senior Department leadership, and by the Directorate's customer base: the state, local, and federal user community. The funding levels are determined in large part by the need to initiate programs dictated by that plan, and by an evaluation of the state of technology for supporting near term improvements to the security of the homeland. These priorities could change because of success (current priorities get addressed), changes in the threat, or technological breakthroughs that allow transition from research to development and deployment. It should be noted that low funding levels do not necessarily imply low priority, but rather that the needed capability does not yet exist, and that research on various approaches is needed before more substantial development activities can ensue.

A key philosophy of the Directorate is to deploy as rapidly as possible capabilities that improve the security of the homeland, address the priorities discussed above, and are cost effective. The Directorate would then work where practical to improve these near term deployments. Finally, the Directorate will perform long range research to ultimately put into development capabilities that meet the full set of requirements and address those priorities that cannot be met with current technology. This concept assures rapid deployment of capability to better protect the homeland while keeping in mind the need to allocate resources for the ultimate capabilities needed.

50. What specific kinds of products do you see coming out of the Directorate's R&D efforts over the next couple of years?

Radiation sensors that discriminate benign sources of radiation and hence allow more widespread deployment of measures to protect the homeland from the radiological and nuclear threat at greater sensitivity. Cost effective improved environmental and facilities monitors for biological and chemical threats. Better decontamination technologies, and forensic tools. Information analysis capabilities for use in, e.g., TTIC, that better organize for the analyst the disparate sources of information available. Analytic techniques to better assess vulnerabilities and risks to the infrastructure, and assess interdependencies among them. Standards for a wide variety of homeland security technologies, including interoperable

communications. A deeper and more robust understanding of the emerging biological threat. More robust biometric identification techniques. These are but a few examples of the delivered capabilities expected in the next few years.

Cargo Container Security

51. In March, following the Committee's hearing on Cargo Container Security, Senator Collins asked Under Secretary Hutchinson about the Department's ability to differentiate between naturally-occurring radiation from legitimate shipments and actual radiation emitted from a potential terrorist threat. This Naturally Occurring Radioactive Material, or NORMs, can result in false positive readings from the detection equipment used by DHS inspectors. These incidents have resulted in shipping delays and loss of resource hours for federal enforcement officers. The Committee was told that the Department's Science and Technology Directorate would be working with BCBP to evaluate and improve technology to enable rapid discrimination of NORMs from potentially threatening materials, eliminating false positives. Can you provide an update on the progress being made on this initiative?

In the near term the Directorate is evaluating technology for rapidly discriminating NORMs, and for improved reach back procedures to expert knowledge. The Directorate is also bringing out of the laboratories and commercializing technologies for discriminating these NORMs on the initial inspection. The Directorate has also issued standards for spectral discriminating sensors to better guide industry in their development, and in particular guide software improvements.

52. Specifically, can you tell us whether the Department is considering the use of high purity germanium (HPGe) detectors, which are designed to eliminate false positives and have recently been engineered with battery-operated mechanical coolers so they can be deployed in the field?

This is among the technologies being considered.

BioShield and Bioterror Countermeasure Research

52. One of the most urgent tasks of the Department is to fashion an effective R&D strategy to develop bioterror countermeasures. Some believe that the Department will only succeed if it enlists the active involvement of the best biopharma companies, which are extremely reluctant to risk their capital or investor's capital on research where the government is the sole or principal market. Senators Lieberman and Hatch have introduced legislation, S. 666, to provide comprehensive incentives to engage the biopharma companies in this research and the Administration has proposed legislation known as "Bio-Shield" (S. 15 and H.R. 2214).

Nature of the threat

- a. What is your assessment of the seriousness of the threat we face with bioterrorism? Is this potentially the most damaging type of terrorism? With the advances in bioscience

occurring at a prodigious pace could bioweapons become increasingly powerful, diversified, accessible and appealing as terrorist weapons of mass lethality? How far is the offense ahead of the defense in bioterror?

The biological threat is perhaps the most serious threat we face in terms of ease of development, deployment, and the consequences to the public. The emerging threat, such as genetically engineered pathogens, represents a still more serious threat. Currently, the defense is poorly equipped to deal with attacks beyond a certain scale, or with certain pathogens for which the medical countermeasures suite is either non-existent or limited.

Medical Countermeasures

- b. **The Defense Science Board listed 19 priority bioterror agents and found that today we have only none of the diagnostics we need, none of the vaccines we need, and only one of the therapeutics we need to deal with them. Is this list of 19 pathogens the definitive list or do we need to prepare for these and many other pathogens, some of which may not even exist yet?**

Diagnostics in fact exist for such pathogens as anthrax and smallpox. Nevertheless, the list of 19 pathogens does not include new species that might be engineered. However, well designed diagnostics that focus in part on those properties of the pathogen that are intrinsic to their lethality may be difficult to confuse, and engineering techniques aimed at avoiding such diagnostics may affect significantly the lethality of the organism in question. It is precisely issues such as this that will be explored at the National Biodefense Analysis and Countermeasures Center within the S&T Directorate.

- c. **Do you believe we need to develop medical countermeasures to hybrid agents? The Soviets reportedly created a plague-diphtheria hybrid. Do you believe we need to develop medical countermeasures to antibiotic resistant pathogens? The Soviets reportedly created antibiotic resistant strains of anthrax and also were attempting to develop some exotic pathogens, including an antibiotic-induced toxin, an immune mimicry pathogen, and bioregulators and biomodulators. Do we need to take any of these agents seriously as we develop countermeasures?**

These agents need to be taken seriously. Development of countermeasures needs to focus on fundamental characteristics of the agents, while at the same time meeting safety requirements. This is a very difficult problem, and requires the full weight of the research capacity at NIH and the private sector, and the assessment of the risks associated with these threats researched within the S&T Directorate.

Industry interest in this research

- d. **What are the problems the government faces in trying to engage biotech and pharmaceutical companies in launching research and development projects to develop medical countermeasures? What reassurance does the government need to provide to overcome the suspicions of this industry? How do you plan to raise the industry's confidence that the government is a reliable partner over the long run?**

The biopharma industry generally operates on a high risk high payoff paradigm. One particular means for reducing the risk is to assure the reliability of the government as a purchaser by guaranteeing acquisition of a product if it meets licensure requirements. Another means is to reduce liability risk, particularly given the reduced level of confidence implicit in the inability to test efficacy of most bioterror agents in humans. There are other measures, such as the contracting flexibilities available to the Department, that reduce the barriers to working with the government. The President's Bioshield initiative provides for the assured purchase of licensed medical countermeasures, and liability relief measures within the Safety Act provide additional risk reduction. It is expected that these measures will serve to reduce the point on the risk-profit calculus of the biopharma industry will choose to operate at when dealing with the government.

- e. **We can't prepare for every pathogen, and we might see new, genetically modified pathogens for which we could not prepare. How important is it for us to engage the biotech and pharmaceutical industry in developing more powerful research tools that will enable us to quickly develop countermeasures in the middle of an attack?**

The biopharma industry is a crucial partner for developing research tools, such as new animal models, to enable rapid development of new countermeasures.

IV. Relations with Congress

53. **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, consistent with the constitutional prerogatives of the Congress and the Executive Branch, I agree if confirmed to respond to any reasonable request to appear and testify before any duly constituted committee of the Congress.

54. **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, consistent with the constitutional prerogatives of the Congress and the Executive Branch, I agree if confirmed to reply to any reasonable request for information from any duly constituted committee of the Congress.

V. Assistance

55. **Are these answers your own? Have you consulted with DHS or any interested parties? If so, please indicate which entities.**

These answers are my own, and I did not consult with DHS or other parties in their preparation.

AFFIDAVIT

I, Pearse C. Albright, 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.

Pearse C. Albright

Subscribed and sworn before me this 24 day of July, 2003.

Michelle D. Parrish
Notary Public

Michelle D. Parrish
Notary Public, District of Columbia
My Commission Expires 11-14-2007

**Additional Questions Submitted by Senator Lieberman
for the Nomination of Penrose Albright
to be Assistant Secretary of Homeland Security
for Plans, Programs, and Budget,
Department of Homeland Security**

BioShield and Bioterror Countermeasure Research

Senator's Lieberman and Hatch have introduced legislation, S. 666, to provide comprehensive incentives to engage the biopharma companies in this research and the Administration has proposed Bio-Shield (S. 15 and H.R. 2214).

1. One study finds that the operating margin for successful biopharma companies is 2.76 to 3.74 times as great as the operating margins for major defense contractors. This means that the defense contractor model will not work to engage successful biopharma companies in developing medical countermeasures for bioterror agents. With regard to biodefense R&D the issue is what operating margin successful biopharma companies seek and expect as they assess different possible lines of research to undertake. If the operating margin for biodefense research is drastically less than the operating margin for non-biodefense research, it is not likely that these companies will choose to undertake biodefense research. Do you believe it is critical that we engage the best companies with the strongest track records of success in developing products? What is the operating margin that you understand the biopharma companies need to justify undertaking this research?

It is important that the full weight of the biopharma industry be engaged in developing countermeasures to the threat of biological terrorism. It is difficult to say what operating margin is needed to engage the industry in this research and development activity; the Bioshield legislation, along with the potential for liability relief available in the Safety Act, reduces the risks for the industry, and hence will serve to reduce the point on the risk-profit curve the biopharma industry will choose to operate at when dealing with the government. This will be tested when these measures are applied, and the effect will clearly differ based on the specific issues associated with the countermeasure in question, and the overall business environment.

2. Are DHS and the Administration willing to support the House modifications of the Administration's proposal? If not, why not?

As I am not yet confirmed, I cannot speak for the Administration on this matter.

3. The legislation provides no tax incentives to help firms form capital to fund the research. It does not provide any tax incentives to reduce the cost of the research. It provides no reassurance regarding intellectual property for the countermeasure. It provides no commitments to provide liability protection to the firms that develop these countermeasures. Do you think this proposal is enough to get the job done?

It is expected that the measures taken will reduce the risks associated with the development of countermeasures to the threat of biological terrorism, and hence increase the incentive for industry to engage in the research and development of these countermeasures. If confirmed, I look forward to working with Congress to further address this important issue, and improve the nation's capability for addressing the threat of biological terrorism.

Post-hearing Questions Submitted by
 Senator Frank R. Lautenberg for the
 Nomination of Mr. Joe Whitley
 Governmental Affairs Committee
 July 29, 2003

QUESTION FOR JOE WHITLEY

1) The Homeland Security Act empowers the Secretary to establish a personnel system” for some or all of the organizational units of the Department.” Although the specifics of the personnel system are left to the discretion of Secretary Ridge, the Homeland Security Act mandates that any personnel system established by DHS must “ensure that employees may organize, bargain collectively and participate through labor organizations of their own choosing in decisions, which affect them.” Joe Whitley, as DHS’ top lawyer, will be directly involved in establishing this personnel system. This question deals with Ch. 71 of Title 5 of the U.S. Labor Code, ensuring collective bargaining rights to all federal personnel.

Currently, DHS has a joint labor management team working on personnel systems, including labor relations. Are there legal problems if Secretary Ridge applies the DHS labor management relations program to airline screeners, Secret Service, and others employees who previously benefited from the standard federal personnel system?

Response: As I understand the Homeland Security Act, it does not affect the rights of DHS employees to form unions or bargain collectively although the President does have the authority to limit these rights for national security reasons. If confirmed, I will work closely with the Under Secretary for Management and the Chief Human Capital Officer to review options proposed by the Design Team to ensure that any proposals to be implemented comply with applicable laws.

2) How would you advise the Secretary on the extent to which the federalized airport screeners technically employed by TSA can bargain collectively?

Response: I would advise the Secretary that, in enacting the Aviation and Transportation Security Act (ATSA), Congress sought to provide the Administrator with maximum flexibility in establishing the terms and conditions of employment of Federal security screeners to best meet the Agency’s security mission. Through section 111 of

ATSA the Administrator of TSA was granted full discretion to employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for screeners, notwithstanding any other provisions of law. Exercising this authority, the TSA Administrator determined that TSA security screeners could not engage in collective bargaining and could not be represented for purposes of collective bargaining by any representative or organization.

The Homeland Security Act of 2002 (HSA) did not alter this authority. Nevertheless, pursuant to the HSA, DHS may establish and from time to time adjust a human resource management system for some or all of the organizational units of the Department. 5 U.S.C. 9701(a). As an organizational unit within DHS, TSA's personnel system could be subject to all or parts of the new personnel system except to the extent aspects of the system conflict with the legal requirements of section 111 of ATSA. As I understand it, decisions as to the elements and scope of the DHS system have not yet been made.

QUESTION FOR JOE WHITLEY ON CIVIL LIBERTIES AND ARAB AND MUSLIM AMERICANS:

In your questionnaire, you wrote that you strongly believe that the Department of Homeland Security must protect and enhance the civil liberties and civil rights of all Americans. Yet many information gathering functions of the DHS might infringe on the civil rights of ethnic minorities, particularly the 3 million Arab Americans and the over 8 million Muslim Americans.

How can you guarantee that the domestic intelligence data gathering mandate of the department will not be abused with regard to the privacy rights of the 3 million Arab Americans and 8 million Muslim Americans?

Response: The Department of Homeland Security is fully committed to ensuring that our activities will not violate the privacy rights of any American, including those from ethnic communities such as the Arab-American community. Gov. Ridge has pledged that "our strategy and our actions [will be] consistent with the individual rights and civil liberties protected by the Constitution." If I am confirmed to be the General Counsel of this Department, I will work closely with the Department's Privacy Officer to closely monitor this issue. I know that senior leaders within the Department have met with representatives of the Arab-American community and will continue to do so in the future.

SENATOR DANIEL K. AKAKA
QUESTIONS FOR THE RECORD
HEARING TO CONSIDER THE NOMINATION OF
JOE D. WHITLEY TO BE GENERAL COUNSEL, AND
PENROSE C. ALBRIGHT TO BE ASSISTANT SECRETARY OF HOMELAND SECURITY
DEPARTMENT OF HOMELAND SECURITY
July 29, 2003

Questions for Joe Whitley

1. Ensuring that federal employees are protected from prohibited personnel practices and have a viable and independent appeals system is very important to me. As the chief legal officer of the Department, you will play a central role in determining the legal sufficiency of meeting the Homeland Security Act requirement for affording employees fair treatment and due process in the appeals system developed by the Department. To meet this requirement, what elements should be included to ensure that federal employees have the rights and protections noted in the legislation?

Response: Due process and fair treatment are important components of any appeals procedure. Secretary Ridge and the Director of the Office of Personnel Management (OPM) have commissioned a Design Team to explore all options for creating state-of-the-art human resource policies and processes in a careful and thoughtful manner. The current system has been criticized as too slow and unresponsive to current workplace needs. I believe that DHS should be open to modifications that are designed to enhance efficiency and expeditious resolution of matters affecting employees while ensuring that employees are treated with the fairness and respect they deserve. Design Team options will soon be presented to a Senior Review Committee composed of senior DHS and OPM managers and the heads of DHS's three major unions. If confirmed, I look forward to reviewing and studying the options of the Design Team.

2. Under section 2302 of title 5, U.S. Code, the head of each agency is responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, and for ensuring that agency employees are informed of the rights and remedies available to them. As General Counsel of the Department of Homeland Security, how do you intend to ensure these requirements will be met?

Response: If confirmed, I intend to work closely with the Under Secretary for Management and the Chief Human Capital Officer to ensure that every employee and manager in DHS is aware of these important rights and responsibilities.

3. This Committee is responsible for ensuring federal employees are not retaliated against for disclosing government waste, fraud, and abuse. Such protections are necessary for an impartial workforce and to protect the American taxpayer. You have written several articles relating to avoiding *qui tam* (whistleblower) lawsuits and have urged employers to install a compliance system to eliminate waste, fraud, and abuse in

order to avoid lawsuits based on such actions. However, one possible means of ensuring that an entity is free from fraud is to ensure a credible, independent, and transparent system for receiving, investigating, and following up on employee allegations of misconduct. That way, employees and their employers become partners in change rather than adversaries. Given your past interest in whistleblower issues, what measures will you take to ensure that the Department is free from waste, fraud, and abuse, and that employees feel free to raise such charges?

Response: If I am confirmed as General Counsel, I look forward to playing a role in developing an environment in the DHS workplace that will encourage employees to report waste, fraud, and abuse. In particular, I look forward to helping to develop programs, together with the Inspector General and the Under Secretary for Management, that will encourage employees at all levels of the Department to come forward with information without fear of retaliation.

**Post-hearing Questions Submitted by Senator Bennett
for the Nomination of Joe Whitley to be General Counsel,
Department of Homeland Security**

Questions for the Record

What is your personal view of the Defense Production Act and its applicability to critical infrastructure protection?

Response: It is my understanding that the Defense Production Act (DPA), in its present form, applies to critical infrastructure. The Department of Homeland Security (DHS), through the Director of the Preparedness Division at the Emergency Preparedness and Response Directorate recently testified to that effect before the Senate Banking Committee.

If confirmed, would you support the inclusion of language within the Defense Production Act that specifically addresses critical infrastructure protection and restoration?

Response: I have learned that the Administration is currently reviewing Senator Bennett's proposed amendment to the DPA and is likely to have a position on the amendment shortly. I look forward to working with the Committee on this proposed legislation.

On June 17, 2003, I submitted several questions to the Administration regarding the applicability of the Defense Production Act to critical infrastructure protection. (If you would like another copy of these questions please contact my office) I have not received a written response from the Administration. Please provide a date certain when the review of these issues conducted by the DHS General Counsel's office will be completed and I will receive an answer to these questions.

Response: In my role as a consultant, I have not been involved with preparing the answers to the questions of June 17, 2003. However, I understand that the Under Secretary for Emergency Preparedness and Response is currently working on responses that should be completed shortly.

Post-hearing Questions Submitted by
 Senator Susan M. Collins, Chairman
 for the Nomination of Penrose C. Albright to be
 Assistant Secretary of Homeland Security for
 Plans, Programs, and Budget
 Department of Homeland Security

University-Based Centers

1. The Homeland Security Act gives the Under Secretary for Science & Technology the responsibility for designating one or more University-Based Centers for Homeland Security. These centers are intended to help develop, test, and evaluate technologies and programs that will help the Department better carry out its mission of protecting the country. Under the law, these centers must be designated by this coming November. I understand that solicitations have recently been sent out, which I think is a very positive development.

This concept did not have an auspicious beginning. The original language in the Homeland Security Act was designed to stack the deck so that only one university could meet the detailed criteria the provision set forth. This disturbed me, and so I and some of my colleagues insisted that the provision be changed so that the Department could select more than one University-Based Center, and that all universities could compete for designation.

In your responses to the pre-hearing written questions, you stated that geographic diversity is an important consideration in designating these University-Based Centers. Could you tell us a little more about what you will be looking for in making the designations and why geographic diversity is important?

Homeland security in general does not call for a "one size fits all" solution for all the various regions of the Nation. Different parts of the country bring different problems. For example, maritime regions will naturally have a focus on port security and situational awareness of the coastal and transcontinental shipping routes, while the agricultural heartland will naturally focus on such issues as food safety and agro-terrorism. That is not to say that there are not great commonalities as well. However, it is to be expected that academic institutions in various parts of the country may have particular expertise and interest in those issues of greatest concern to the communities in which they reside. As we develop the topical areas upon which to focus each individual Center, we will be considering regional needs and organizational structures, issues which might be best addressed by a distributed network of Centers across the country.

The Directorate, in fact, expects that successful competitors for a Center of Excellence will have demonstrated an ability to partner with other academic institutions in their region and across the nation. They must have established connections with state and local public safety entities, federal agencies, and businesses, in order to effectively incorporate user needs. The ultimate goal of each Center is to successfully demonstrate and transition their research – in the context of contributing to a suite of more robust homeland security capabilities.

Border Crossings

2. The Department of Homeland Security Bureau of Customs and Border Protection recently eliminated the Form 1 Pass and the electronically-read Port Pass. Residents and land owners on Maine's western and eastern borders with Canada have grown to depend on the Form 1 pass as their method to return to the U.S. from Canada while the border crossing was not staffed. Since both of these programs have been eliminated by DHS, Maine residents have had their access to medical and religious services, family events, social activities, and other services severely limited, a situation that is mirrored in other U.S. - Canadian border communities. DHS is now using technology to speed processing at some of this nation's busiest border crossings.

- a. What plans do you have to develop technologies for use at remote border crossings so that citizens who live near these crossings can once again cross freely without compromising our nation's security?

As Secretary Tom Ridge has testified, there are two prolonged challenges in protecting our systems of commerce and transportation: to safeguard our homeland, and, at the same time, ensure that the free flow of people, goods and commerce is not disrupted. To render the border more secure, development of travel document technology should accomplish at least two things. First, when the holder has enrolled and been issued the document, that person must be checked against extant databases to ensure that admittance to the country should be allowed. From that point on, all that needs to happen at a border crossing is to assure that the person presenting the document is in fact the person to whom it was issued, and to determine (e.g. via a name check) if that person remains admissible. Technologies that accomplish this latter purpose that do not require the supervision of a border agent would, of course, be both convenient to the holder of the document and cost effective for the government. However, I have not yet investigated the specific issues related to unattended border entry.

However, the Science and Technology Directorate is utilizing the capabilities at our national laboratories as well as other Federally Funded Research and Development Centers (FFRDC) to examine all forms of border traffic. These research activities are exploring every opportunity to employ advanced technologies to speed the flow of people and goods, particularly in with respect to low risk travelers. Programs such as the US VISIT and NEXUS are identifying key technologies for use at all border crossings, including remote areas.

- b. Technologies for personal identification already exist and are being use by the Department of Defense, other branches of government, and private industry. What kind of timeline do you have to establish personal identification technology at our remote borders with Canada?

As stated above, I have not yet investigated the feasibility of unsupervised presentation of documents at the border while maintaining compliance with the requirements of the U.S. VISIT program and the security needs at the border. Nevertheless, the Science and Technology Directorate is coordinating with other agencies, including Department of Defense, to ensure we have identified advanced research for personal identification that is applicable to DHS missions, such as biometrics. The objective of this program is to develop very high confidence, high

performance biometrics for precision identification of individuals to deter attempts to deceive identity, and to accelerate recognition and access for trusted individuals. One of the key applications of this technology is in border entry/exit systems. In addition to the basic technology development, the Science and Technology Directorate is also working to establish methods and procedures for biometrics enrollment and entry check and the development of a scalable architecture for common use of biometrics. These are promising areas of research that are expected to help with the issues of concern by those US citizens crossing our nation's borders.

Coast Guard

3. The Coast Guard is one of only two agencies that was brought into the new Department fully intact retaining responsibility for all of its maritime missions. The Coast Guard has traditionally conducted its own research and development and has a well-established operation in Groton, CT. I understand that the Coast Guard has detailed its R&D program manager to the S&T directorate to manage and advise your staff on the Coast Guard's portfolio of projects. As Under Secretary for Science and Technology, how do you plan to keep the momentum going on all of the Coast Guard's important R&D projects, and especially on those not related to homeland security?

If confirmed, I expect to work closely with the Coast Guard to oversee their internally funded research and development activities and to address longer range, high payoff research and development activities within the S&T Directorate. It is precisely because of the need to assure that the "conventional" missions of the agencies with the Department of Homeland Security have claim to the vast resources of the S&T Directorate—national and federal labs, academic institutions, and the Homeland Security Advanced Research Projects Agency—that portfolio managers were created for the Coast Guard, the Secret Service, Emergency Preparedness and Response, and Border and Transportation Security; for the latter, as an example, we are creating an individual with explicit responsibilities for counter-drug R&D.

Cargo Container Security

4. In March, following the Committee's hearing on Cargo Container Security, I asked Under Secretary Hutchinson about the Department's ability to differentiate between naturally-occurring radiation from legitimate shipments and actual radiation emitted from a potential terrorist threat. Naturally Occurring Radioactive Material, or NORM, can result in false positive readings from the handheld detectors used by DHS inspectors. The outcome can be shipping delays and lost time for federal enforcement officers. The Department has assured us that available technology is being applied to localize and identify the source of a radiation alarm triggered by gross radiation detectors. However, the available technology may not be able to identify the source of an alarm in all situation. I am concerned about the Department's continued investment in technology that is not capable of positively identifying the source of radiation. I am also worried that the time lost in re-examining items as a result of NORMs is impeding the flow of commerce. What steps has your office taken to overcome this limitation of the equipment currently being used?

Naturally Occurring Radioactive Materials (NORMs) are indeed a nuisance for DHS inspectors, but they can often be handled without significantly impeding the flow of

commerce. Depending on the border scenario, it may be more cost effective to pre-screen cargo rapidly with cheap, but non-discriminating, plastic scintillators, and process the alarms through a secondary inspection with a spectrometer. In other venues, however, there may not be a suitable secondary inspection site, or other constraints. The systems engineering trade space is rather complex and the performance of the detector at the primary inspection site need to be weighed against the attendant cost and produceability issues associated with the sensors. Thus, the S&T Directorate has within its strategic plan the testing, piloting, and transitioning for deployment of sensors that allow discrimination at the primary screening site.

DHS inspectors already have several tools for addressing the nuisance alarms that arise when a NORM passes through a radiation detection portal, for example at a Customs border crossing. The Customs Inspector directs the truck that caused the alarm to a secondary inspection area, so that it does not block traffic. In the secondary inspection, the truck is scanned with equipment that provides additional information. Specifically, an x-ray radiograph provides a "shadow" image of the objects in the truck (analogous to x-ray scanning of personal at an airport), and a measurement of the gamma-ray spectrum is obtained with a hand-held instrument in order to determine the isotope. In about 90% of the cases, this information is sufficient to resolve the nuisance alarm and the truck is released in about 15 minutes or less. In the remaining 7% to 10% of the cases, additional assistance is obtained by "reach-back" to experts at Custom's Laboratory Support Services (LSS) sites. Working with the Customs Inspector, the LSS experts resolve about 98% of these reach-back cases. The remaining 2% of reach-back calls (or about 0.2% of the original alarms) require additional assistance via secondary reach-back to experts at NNSA's weapons laboratories. While this takes extra time, only one truck has been delayed. Based on current statistics at selected Customs border crossings which have been instrumented as described above, we estimate that only about 1 in 100,000 trucks with legitimate cargo will encounter such long delays.

These odds can be further improved by improving the technologies available to the DHS inspector. Specifically, DHS S&T is undertaking a program to develop near term improvements to commercially available technologies. Called Pre-Planned Product Improvement, very specific improvements to existing technologies will be funded as the next step in the ongoing "spiral of development". Also, in the slightly longer term (3-5 years), we will develop next-generation technologies that will further improve the ability of the DHS inspector to resolve nuisance alarms on the spot.

In summary, while nuisance alarms due to NORMs are a reality, they can generally be addressed by implementing operational procedures that are matched to current technological capabilities. Further improvements will come with focused technology development.

Anti-Missile Device

5. I have read with great interest the Department of Homeland Security's report to Congress describing its plan to develop an anti-missile device for protecting commercial airliners from MANPAD threats. I would like to ask you to clarify a few points and elaborate on your plan for implementing the program described in the report.

First, the report indicates that an RFP will be issued by DHS sometime around the beginning of the Government 2004 Fiscal Year, October 1st, 2003. Is the issuance of that RFP still consistent with this date?

Secondly, I would like to get an idea of how you plan to develop that RFP, and will you stand up a program office, and appoint a program manager before the RFP?

Finally, what process will you use in evaluating the proposals that are generated by that RFP?

It is expected that an RFP will be issued in the first quarter of FY04; although the Directorate is moving quickly to stand up a program office and prepare an RFP, it is impossible at this time to commit to a specific date. A program office is being created at this time, and a program manager will be in place prior to issuance of the RFP. The RFP will be developed utilizing effectiveness analyses and testing already conducted within the Department of Defense, along with reliability and maintainability needs developed in coordination with the Department of Transportation, and in consultation with, for example, the airline industry, airport operators, and pilots. It is also expected that costs—acquisition and operations and support—will be treated as an independent variable in the RFP.

Additionally, S&T has also solicited through the Technical Support Working Group (TSWG) a Broad Area Announcement for more exploratory concepts for countering the MANPAD threat. Of the more than 80 ideas received 8 appear to be sufficient to ask the respondents for additional information. Should any of these ideas turn out to be of interest, we will award a contract during the 1st quarter of 2004.

**Questions from Sen. Lieberman
for Penrose "Parney" Albright**

1) Dr. Albright, the S&T Directorate's budget for FY03 was \$561 million. Of that amount, approximately \$407 million was transferred from the Defense Threat Reduction Agency's (DTRA) chemical and biological defense account to the Department of Homeland Security's S&T Directorate. Of the \$407 million transferred from the chem-bio defense account, how much was devoted to the bio-countermeasures program. How was the \$407 million divided among the areas of research within the S&T Directorate.

In FY 2003 the Department of Defense transferred \$420M from the Defense Threat Reduction Agency's chemical and biological defense account to the Department of Homeland Security's S&T Directorate. A request was approved by both the Senate Subcommittee on Homeland Security and the House of Representatives Committee on Appropriations to reprogram \$163M of the \$420M originally appropriated for biological research. The research activities and their respective funding levels after the approved reprogramming are as follows:

- Biological Defense - \$257M
- Radiation Detection Technologies - \$65M
- Rapid Prototyping (Technical Support Working Group) - \$33M
- Threat and Vulnerability Testing - \$27M
- Technical Reference Standards and Protocols - \$15M
- Homeland Security Studies and Analysis - \$10M
- Remediation Technology - \$7M
- Homeland Security Institute - \$3M
- University Homeland Security Fellowship Programs - \$3M

2) Dr. Albright, by percentage, how much of the S&T Directorate's budget in both FY03 and FY04 (planned) will be extramural vs. intramural research. Please provide me a breakdown by research area. Of the intramural research, by percentage, how much is going to the Department of Energy laboratories of that intramural research, again, broken down by research area.

In FY03, the S&T Directorate's budget was \$561M of which approximately \$118M came from on-going Department of Energy programs. A significant portion of these programs is being performed at the Department of Energy's laboratories. The FY03 S&T budget also included the transfer of approximately \$23M from Department of Agriculture for the operations and maintenance of the Plum Island Animal Disease Research Center and the \$420M from the Department of Defense. Extramural funding (including funding for HSARPA and Rapid Prototyping) will be approximately \$150M. Planning is presently on-going for the execution of FY04 activities in each of the research areas. However, at least \$400M of the FY04 funding will be executed through extramural programs (ie. non-DOE/federal laboratories).

Post-hearing Questions Submitted by
Senator Frank R. Lautenberg for the
Nomination of Dr. Penrose Albright

QUESTION FOR PENROSE ALBRIGHT ON VULNERABILITY ASSESSMENTS AND DEPARTMENT
OF DEFENSE AND DEPARTMENT OF ENERGY FACILITIES:

The vulnerability of nuclear related Department of Defense and Energy facilities is a matter of particular worry for terrorist attacks. Issues of concern include: the security of nuclear warheads a top of missiles deployed in the Great Plains; warheads and reactors on board submarines based on the East and West Coasts; the shipment of spent naval nuclear fuel from nuclear-powered submarines by sea from Pearl Harbor to the West coast, and by rail from shipyards on the East and West Coast shipyards and the numerous Energy Department facilities that contain fissile and radioactive material.

In your opinion, Dr. Albright, do state and local first responders communities have the information they need from the Department of Defense and the Department of Energy to be able to adequately manage the consequences of a terrorist attack on a DoD or DoE nuclear-related facility in their communities?

There are extensive crisis and consequence management plans in place for the communities surrounding nuclear facilities. The state and local responders are a key component of the local emergency response plan, and the EP&R Directorate (formerly FEMA) plays a large role in coordinating the development and exercise of these plans. However, I do believe that there are many opportunities to improve the capabilities of the state and local authorities in the management of a radiological event. The availability and effectiveness of personal protective equipment for the emergency responders is one area of concern. The proper deployment of radiation detectors, the adequacy and appropriateness of decontamination technologies, and the quality of training received is a real concern that, if confirmed, I will address as a high priority.

QUESTION FOR PENROSE ALBRIGHT ON PLUM ISLAND AND ANIMAL-TRANSMITTED
BIOLOGICAL WEAPONS:

The Plum Island Animal Disease Center (located near the tip of Long Island) conducts research on animal disease agents. There has been some discussion of upgrading the facility to Bio-safety level 4 from Bio-safety level 3, to allow work on the most dangerous animal diseases, including those with no known cure. Many of these diseases could be used as germ-warfare.

Your Directorate, the Science and Technology Directorate, is in charge of the Plum Island facility. Do you plan to upgrade the Plum Island facility to Biosafety 4 in the foreseeable future?

There is no plan to upgrade the Plum Island facility to Biosafety level 4, nor do we expect to develop such a plan at any time.

If you were to do so, how would you work with local residents to address their concerns about the potential risks to their safety?

In any affected community where a facility is being developed for use by the Department, one of the first activities that would be undertaken would be development of a communications and outreach plan.

**Questions from Senator Coleman
for Penrose "Parney" Albright**

1) In your written responses to the Committee's questionnaire, you state that one of your objectives is to oversee the development and deployment of "state-of-the-art, high performance, low operating cost systems to prevent the illicit traffic of radiological and nuclear materials and weapons into and within the U.S." Can you please describe how you will accomplish this worthy goal? What is your assessment of the radiation portal monitors that Customs and Border Protection is deploying along the northern border?

It is necessary to have a robust systems analysis effort aimed at assessing the cost benefit trades associated with different technical and operational concepts. Examples include assessing the trade between spectral discriminating sensors used for primary inspection at the border and non-discriminating sensors coupled with secondary screening technologies; assessing the technical and operational trades associated with deploying sensors on our transportation network (e.g. at truck weighing stations); and assessing the issues surrounding the use of active probes for fissile materials. We also plan to develop and deploy near-term technologies to address performance limitations of commercial detection equipment; an example would be the use of sodium iodide detectors instead of plastic scintillators at primary screening sites, in order to utilize spectral information in the initial screening process. We will explore active interrogation for detecting SNM (special nuclear material) both directly and through the detection of shielding materials. Such detector technologies can be implemented into a national and/or international radiological/nuclear detection system. We are planning to develop and demonstrate advanced technologies for distributed rad/nuclear detection and tracking systems, such as those we might put in our transportation networks. And, we will perform research and development that results in detector materials advances, detector prototypes, and pilot demonstration programs to enhance the effectiveness of radiation detection systems. The portal monitoring systems deployed to the northern border are an example of the Department's philosophy of fielding available cost effective capabilities to better protect the homeland today, while funding near-term and long-term research and development activities that improve that capability. These portal monitoring systems do indeed play a valuable role in improving security at our borders.

2) If confirmed, what role will you have in Customs' continued assessment, procurement, and deployment of radiation portal monitors designed to preclude nuclear terrorism at our nation's ports and borders?

The S&T Directorate is working with the B&TS Directorate to assess the data that is accumulated from these deployments. With this data we can obtain a good understanding of the diversity of legitimate cargo crossing our borders – specifically, how often do Naturally Occurring Radioactive Materials (NORM) appear in cargo, and how does a particular portal threshold setting affect the number of trucks that will have to be sent to secondary screening. The S&T Directorate will help the B&TS Directorate answer these and other questions, leading to improvements in operational procedures at the ports-of-entry, and leading to technology requirements that will fundamentally improve the screening process. We will use these requirements to focus our investment decisions in radiation detector technology development.

**SENATOR DANIEL K. AKAKA
QUESTIONS FOR THE RECORD
HEARING TO CONSIDER THE NOMINATION OF
JOE D. WHITLEY TO BE GENERAL COUNSEL, AND
PENROSE C. ALBRIGHT TO BE ASSISTANT SECRETARY OF HOMELAND SECURITY
DEPARTMENT OF HOMELAND SECURITY
July 29, 2003**

Questions for Penrose Albright

1. I understand you are developing a strategic plan with the U.S. Department of Agriculture on the question of agricultural security. Protecting our agriculture industry from terrorist attack is of great concern to me. Agricultural activity accounts for approximately 13 percent of the U.S. gross domestic product and nearly 17 percent of domestic employment. The United States is a top producer and exporter of agricultural goods. An attack on our agriculture could have serious consequences, which is why I have introduced S.427, the Agriculture Security Assistance Act, and S. 430, the Agriculture Security Preparedness Act, to help address this problem.

I am concerned that the Department of Homeland Security is not doing enough to address the nation's vulnerabilities in this regard. Please provide information on your plans with the Department of Agriculture, not only in the arena of technologies for detection, prevention, and treatment, but in the areas of operational analysis, education, and outreach with the USDA, the Department of Transportation, the states, localities, and farmers.

DHS takes agriculture bio-security very seriously and we will play a significant role in reducing the nation's vulnerability to the threat of agriculture bio-terrorism. We are also committed to working in close partnership with the USDA to counter this very serious threat to our agricultural commodities and to animal health. The S&T Directorate is currently meeting with USDA to develop a National Strategy for agro-terrorism countermeasures research and development, and in addition has engaged a contractor, ANSER Corp., to provide analytic support for this activity. It is expected that this process will be completed within the next several weeks and, if confirmed, I will be pleased to meet with you or your staff and provide a briefing on that plan.

As noted in your question, a key component is operations analyses, to provide an analytic foundation for understanding the costs and benefits within the trade space of detection (e.g. sensors in feed lots and at processing plants; field diagnostics), prevention (e.g. new vaccines for Foot and Mouth Disease), and treatment. Our Office of Research and Development and our National Bio-defense Analysis and Countermeasures Centers has taken the lead to establish a formal working group to develop a joint DHS/USDA national program to address the most serious agriculture bio-security concerns. This effort will focus initially on the highest priority foreign animal disease threats, to include Foot and Mouth Disease. The scope of this effort will span the entire spectrum from anticipate, prevent, respond, and recovery. Joint research and development programs are being developed to speed the fielding of vaccines, anti-virals, diagnostics/detection technologies, and national surveillance systems. The joint national program will also address diagnostic laboratory capacity, threat assessment, bio-forensics, risk analysis, expanded education/training programs, operations analysis, emergency response policies, communications, and trade recovery.

The joint working group recently held its first meeting at the Plum Island Animal Disease Center on 14-15 July. Participants included scientists and research program managers from USDA and

DHS, as well as a representative from the livestock community.

In addition, education and outreach to state extension services and veterinary officials is a lynchpin of any viable strategy. To this end, we are establishing relationships with several industry and animal health groups, to include the U.S. Animal Health Association, the Dairy Producers, the Pork Producers, the American Veterinary Medical Association, and the Association of American Veterinary Diagnostic Laboratories.

2. I am concerned that the government is not doing enough to protect against a terrorist attack using a dirty bomb. In the aftermath of September 11th, I chaired a series of hearings about proliferation threats and requested several GAO studies that examined U.S. and international efforts to control and secure radioactive sealed sources. The GAO reports concluded the United States and the international community have done a poor job in tracking and controlling these sources. However, if we had better tracking and security, it might be harder for these dangerous devices to fall into the wrong hands.

Although the Department is investing time and energy into technologies for detecting nuclear and radioactive materials, how are you coordinating the work of the Nuclear Regulatory Commission, the Department of Energy, and Department of Transportation on improving the tracking and security of existing large radioactive sources? How will you develop a nationwide chain-of-custody system for large, dangerous radioactive sources?

The tracking and security of radioactive sources that could potentially be used in a Radiological Dispersal Device (RDD) or "dirty bomb" is indeed an important issue. According to the Monterey Institute there are more than 2 million commercial sources in the U.S. alone, of which about 260,000 are considered hazardous. Existing databases in DOE cover a small fraction of these sources (about 60,000), existing NRC databases cover 37,000 entries in 18 states (but only identify maximum amounts allowed in a facility, not actual amounts); 32 other states keep their own records. According to a DOE/NRC Interagency Working Group report on this subject, released in May 2003, currently no nuclear industry information system—whether government or private sector, single or collective—satisfies all the objectives of a national source tracking system. The report recommends that a national source tracking system be initiated.

A national tracking system would offer benefits including: better accountability for radioactive materials of greatest concern; verification of imports, better information on source use, location and movement; and potential elimination of existing systems. However, costs will be high, lead time will be long, and there would be many challenges associated with developing and operating a complex, national system.

There is a broad US Government and international interest in tracking radioactive sources to improve accountability and control. Coordination among key agencies is critical for such an undertaking. The White House Office of Homeland Security initiated last fall an interagency working group, led by DOE and the NRC, to develop recommendations in this area. DHS, when it formed, assumed from OHS responsibility for this activity. The Department of Homeland Security, including representation from the S&T Directorate, is continuing this effort to identify the threats posed by nuclear and radiological materials and is coordinating this work with the other federal agencies that have legislative mandates involving these materials. Specifically, DHS has established an interagency group to consider how to implement an integrated radioactive source security strategy. The goal is to establish a USG integrated source management and security strategy that covers domestic and foreign sources before the end of

this calendar year. The DHS effort will build on efforts already in progress. As an example, a DHS representative participates on the Nuclear Regulatory Commission's Materials Security Steering Committee. This steering committee includes representatives of state government organizations, specifically the Organization of Agreement States and the Conference of Radiation Control Program Directors.

The integrated security strategy that results from these discussions will most certainly include mechanisms to track radioactive material sources of greatest concern through all phases of use and disposition, to include tagging sources, database development and accessibility, and tracking capabilities, as needed. Specific system design and milestones have not been determined.

Further outreach and coordination on this subject occurred at the joint DHS and NRC workshop on State Homeland Security Outreach, which was held June 17 and 18, 2003. Senior managers from DHS, including the Under Secretary for Science and Technology, briefed the state representatives of the Conference of Radiation Control Program Directors on the programs within DHS, and NRC senior managers made similar presentations. This resulted in discussions with state officials on shipments of radioactive materials and the detection and tracking issues associated with these shipments. This work will be expanded to include coordination with the DOT.

If confirmed, I will be happy to brief your or your staff on these plans, and on the overall Departmental strategy for improving the tracking and security of large radioactive sources.

3. Regarding data mining systems such as the Terrorism Information Awareness System (TIAS) which are being developed to fight and prevent terrorism, computer scientists argue that privacy protections and accountability safeguards must be built into such systems from the beginning. What steps can be taken to build in privacy protection at the beginning? What steps can be taken to ensure the accuracy and reliability of the databases used in this effort?

We will work closely with the Department's Privacy Officer to determine what safeguards need to be built in to such systems a priori. Furthermore, precisely to address this issue, the S&T Directorate is initiating programs for privacy controls, to determine the art of the possible, and inform discussions with the Privacy Officer. If confirmed, I will be happy to brief you or your staff as these efforts mature.

In general, data correlation technologies rely on presenting the analyst with connections distributed across many disparate databases, and thus a key role of the human analyst is to recognize incongruities due to poor information in a single database (due, for example, to faulty foreign intelligence data), and to reject (and correct) that information. It should be noted that the programs developed to assist the analyst in IA&IP are not a substitute for that analyst—the key is rather to present to that analyst in an ingestible manner the wide variety of disparate information available from, e.g., foreign sources and (perhaps) public databases, and to provide tools to that analyst to drill down and see connections needing further investigation.

These advanced capabilities can be designed to protect the legal rights and privacy constraints along with the security of all data sources. Care will be taken to ensure compliance with respect to privacy, information assurance, and security according to established government policies. To ensure compliance, the design must take into account the main tenants to prohibit unlawful access and ensure the confidentiality of sensitive information. Privacy and information assurance technology is based on proven technologies already operational within the intelligence community, and we will be continue to be vigilant in investigating evolving technologies that will maintain the balance between these competing interests.

**Post-hearing Question from Senator Sununu
for the Nomination of Penrose Albright to be
Assistant Secretary of Homeland Security for
Plans, Programs, and Budget
Department of Homeland Security**

Mr. Albright, I am very interested in the issue of commercial aircraft protection from shoulder-fired missiles. My office has spoken with the Department's Legislative Affairs Office on this issue, and has requested, on more than one occasion, that the Department provide a classified brief on this issue to an appropriately cleared member of my staff. To date, no brief has been scheduled. I may also request this brief for myself at a later date. However, in the meantime, can I have your assurance that a member of my staff with appropriate security clearance will receive this brief in the next 30 days?

The S&T Directorate is concerned with the development of technological solutions to this threat. If confirmed, I will, within the next 30 days be delighted to arrange to brief you or your staff on these solutions, and will also arrange with the intelligence community for a threat briefing at that time.