

**ADMINISTRATIVE LAW, ADJUDICATORY ISSUES,
AND PRIVACY RAMIFICATIONS OF CREATING
A DEPARTMENT OF HOMELAND SECURITY**

HEARING
BEFORE THE
SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED SEVENTH CONGRESS
SECOND SESSION

—————
JULY 9, 2002
—————

Serial No. 96

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://www.house.gov/judiciary>

—————
U.S. GOVERNMENT PRINTING OFFICE

80-552 PDF

WASHINGTON : 2002

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

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., WISCONSIN, *Chairman*

HENRY J. HYDE, Illinois	JOHN CONYERS, JR., Michigan
GEORGE W. GEKAS, Pennsylvania	BARNEY FRANK, Massachusetts
HOWARD COBLE, North Carolina	HOWARD L. BERMAN, California
LAMAR SMITH, Texas	RICK BOUCHER, Virginia
ELTON GALLEGLY, California	JERROLD NADLER, New York
BOB GOODLATTE, Virginia	ROBERT C. SCOTT, Virginia
STEVE CHABOT, Ohio	MELVIN L. WATT, North Carolina
BOB BARR, Georgia	ZOE LOFGREN, California
WILLIAM L. JENKINS, Tennessee	SHEILA JACKSON LEE, Texas
CHRIS CANNON, Utah	MAXINE WATERS, California
LINDSEY O. GRAHAM, South Carolina	MARTIN T. MEEHAN, Massachusetts
SPENCER BACHUS, Alabama	WILLIAM D. DELAHUNT, Massachusetts
JOHN N. HOSTETTLER, Indiana	ROBERT WEXLER, Florida
MARK GREEN, Wisconsin	TAMMY BALDWIN, Wisconsin
RIC KELLER, Florida	ANTHONY D. WEINER, New York
DARRELL E. ISSA, California	ADAM B. SCHIFF, California
MELISSA A. HART, Pennsylvania	
JEFF FLAKE, Arizona	
MIKE PENCE, Indiana	
J. RANDY FORBES, Virginia	

PHILIP G. KIKO, *Chief of Staff-General Counsel*
PERRY H. APELBAUM, *Minority Chief Counsel*

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

BOB BARR, Georgia, *Chairman*

JEFF FLAKE, Arizona, <i>Vice Chair</i>	MELVIN L. WATT, North Carolina
GEORGE W. GEKAS, Pennsylvania	JERROLD NADLER, New York
MARK GREEN, Wisconsin	TAMMY BALDWIN, Wisconsin
DARRELL E. ISSA, California	ANTHONY D. WEINER, New York
STEVE CHABOT, Ohio	MAXINE WATERS, California
MIKE PENCE, Indiana	

RAYMOND V. SMETANKA, *Chief Counsel*
SUSAN JENSEN-CONKLIN, *Counsel*
DIANE TAYLOR, *Counsel*
PATRICIA DEMARCO, *Full Committee Counsel*
STEPHANIE MOORE, *Minority Counsel*

CONTENTS

JULY 9, 2002

OPENING STATEMENT

	Page
The Honorable Bob Barr, a Representative in Congress From the State of Georgia, and Chairman, Subcommittee on Commercial and Administrative Law	1
The Honorable Melvin L. Watt, a Representative in Congress From the State of North Carolina, and Ranking Member, Subcommittee on Commercial and Administrative Law	2
The Honorable George W. Gekas, a Representative in Congress From the State of Pennsylvania	3
The Honorable Maxine Waters, a Representative in Congress From the State of California	3
The Honorable Mark Green, a Representative in Congress From the State of Wisconsin	4
The Honorable Mike Pence, a Representative in Congress From the State of Indiana	4
The Honorable Sheila Jackson Lee, a Representative in Congress From the State of Texas	4

WITNESSES

Mr. Mark W. Everson, Controller of the Office of Federal Financial Management, Office of Management and Budget	
Oral Testimony	7
Prepared Statement	9
Professor Jeffrey S. Lubbers, Fellow in Law and Government, Washington College of Law, American University	
Oral Testimony	12
Prepared Statement	14
Professor Peter P. Swire, Professor of Law, Ohio State University, Visiting Professor at George Washington University	
Oral Testimony	19
Prepared Statement	21

ADMINISTRATIVE LAW, ADJUDICATORY ISSUES, AND PRIVACY RAMIFICATIONS OF CREATING A DEPARTMENT OF HOMELAND SECURITY

TUESDAY, JULY 9, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:45 a.m., in Room 2141, Rayburn House Office Building, Hon. Bob Barr, presiding.

Mr. BARR. I would like to call this hearing of the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary to order.

On September 11th, 2001, our Nation was shocked by attacks such as we have not witnessed since the War of 1812 and December 7, 1941. A new awareness crystallized that day, that the vast oceans surrounding our continent would no longer afford or offer the protection which they afforded in our past, even during times of world war.

President Bush and both Republican and Democrat congressional leaders are in agreement that a unified entity, the Department of Homeland Security, should be constituted to focus on the protection of our Nation from the dangers threatening us from abroad.

We in the Congress have a crucial role in scrubbing the details of this new proposed department to guarantee as smooth a launch as possible and to provide as high a likelihood of success as possible. Destined to be one of the largest in the Federal Government, the new department, and its creation, presents a host of challenges, hardly insurmountable, but certainly necessary to understand and address.

This Subcommittee is concerned primarily with issues relating to administrative law, including the issuance of agency regulations and the operation of the agency adjudicative process. The efficiency of agency procedures goes hand-in-hand with its fairness and accountability, and we have sought to ensure both. We have also sought to preserve the role of the Congress in the lawmaking process by examining whether or not agencies have, in the rulemaking process, stayed within the bounds of specific congressional intent.

Most recently, this Subcommittee considered H.R. 4561, which now has 31, make that 32, bipartisan cosponsors to ensure agencies

will consider how proposed regulations affect the privacy interests of our citizens.

As introduced, H.R. 5005, the Homeland Security Act of 2002, presents many questions of policy and detail, such as:

How will the amalgamation of the divergent entities into the new department affect their respective administrative procedures?

How will the rulemaking exceptions to the Administrative Procedure Act be interpreted and applied in the issuance of proposed rules?

Does the Congress need to examine and amend such other related provisions as the Contracts Dispute Act to ensure the new agency has the necessary discretion to properly protect matters of national security?

What steps will be taken to ensure the privacy of personally identifiable information as the new agency establishes necessary databases that coordinate with other agencies of the Government?

Does the proposed legislation deprive employees of the new department of basic protections, such as those provided for under the Whistleblower Protection Act?

Today, we will hear from witnesses who will contribute their expertise and analysis to the discussion of these ideas and assist us in making recommendations as to how H.R. 5005 can be improved.

I believe it is a fair statement to say the Members of this Subcommittee, on both sides, want to do everything in their power to ensure the new Department of Homeland Security will function administratively as intended.

I look forward to hearing from the witnesses today and to working with my colleagues afterward to make the Department of Homeland Security an agency to promote the safety and well-being of every American.

I would now like the honor to call on the distinguished Ranking Member, Mr. Watt, from the State of North Carolina, for any opening statement.

Mr. WATT. Thank you, Mr. Chairman and Members of the Committee.

Let me, first, apologize to the Chairman, and the witnesses, and the Committee Members for being late. Unfortunately, I had a group of students in my office, and I was trying to do two things at one time, and it is sometimes difficult to do that, I have found.

I want to thank the Chairman for convening this very important hearing and putting a special focus on the issue of privacy as we deal with the creation of a Homeland Security Department and tell them how important I think that focus could be.

Perhaps the most difficult issue that our country has struggled with over the years has been finding the appropriate balance between the rights of Government and the rights of individuals, including their privacy rights. The struggle has been going on for years and years. Even before there was a more concentrated focus on the issue of privacy in many different contexts, we have been dealing with this balance between the rights of Government versus the rights of individuals. The events of September 11 made that debate even more difficult because we now understand that if the Government is to provide some semblance of protection to its citizens, in some cases, that will involve sacrificing personal liberties

or could involve sacrificing personal liberties, including the privacy of its citizens.

Again, in this more general context of the debate about the rights of Government versus the rights of individual citizens, superimposed on that now is a concentration on protecting citizens from terrorism, a very, very difficult issue.

I especially thank these three witnesses for being here and being the point persons, the first people who will, at least in front of this Subcommittee, try to put a framework around some of these issues, and I look forward to hearing your testimony and look forward to working with the Chairman and other Members of the Committee as we try to craft the policies that will walk this kind of delicate line between what the Government needs to do, and must do, to protect its citizens from terrorism and protecting the rights of individual citizens, including their privacy rights and other constitutional rights guaranteed to them.

I thank the Chairman, again, for convening the hearing, and I yield back the balance of my time.

Mr. BARR. I thank the distinguished Ranking Member.

The gentleman from the Commonwealth of Pennsylvania, Mr. Gekas, the distinguished former Chairman of this body, is recognized for any opening statement he might have.

Mr. GEKAS. I thank the chair.

Several of us have been, for several years now, attempting to try to formalize an independent core of administrative law judges, much as the State of Maryland has, and other States have, implemented, so that assignments can be forthcoming to this group of individuals so that they can operate where assigned, with a blank piece of paper in front of them, so to speak, without preconceived notions of what their particular bureau or where they are employed might want them to do or have in mind.

I am interested in following through with the testimony that at least the first two gentlemen will be supplying with respect to the role of the administrative law judge and that the transfer of these functions into new Homeland Security might develop even further problems unforeseen in what the duties and responsibilities will be of the administrative law judge and whether or not that individual will be beholden to external forces in the fulfillment of their duties, et cetera.

So I believe that this particular phase of the transfer to Homeland Security is more important than we are giving it in a priority of importance. So I am eager to hear their testimony and to work with anybody and everybody to make sure that the administrative law judge is placed in a position of implementing what is to be required here.

I thank the chair.

Mr. BARR. Thank you.

The gentlelady from California, Ms. Waters, is recognized for any opening statement she might have.

Ms. WATERS. Thank you very much, Mr. Chairman.

I am simply witnessing this attempt to create this conglomerate with a lot of suspicion and questions about whether or not we are reacting in a way that would help people to feel safer or whether

or not we are actually accomplishing the ability to provide real security.

I am concerned about privacy. I am concerned about not only all of the information that Government stores now in so many different ways, but what that is going to mean now that we are moving into this Homeland Security Agency. I am concerned about how we determine the sharing of information and at the same time protect privacy.

So I am going to listen to what you have to say today and reserve my comments and actions, relative to this entire proposal, to a later date.

Thank you very much, Mr. Chairman.

Mr. BARR. Thank you.

The gentleman from Wisconsin, Mr. Green, is recognized for any opening statement he might have.

Mr. GREEN. Thank you, Mr. Chairman.

Just very briefly, the issues that are being raised today, especially with respect to privacy, in many ways are the most important issues in light of September 11. We know, looking back, that various parts of the Federal Government had information, but other parts of the Federal Government that should have didn't, and so I think that the issues that will be raised are terribly important.

I think all of us here, on both sides of the aisle, have as our objective making this newly proposed department work, and it is impossible for it to work effectively, and efficiently, and in line with our constitutional precepts, unless the issues that are being raised today are addressed.

So, Mr. Chairman, with that, I yield back. I look forward to the testimony.

Mr. BARR. I thank the gentleman.

The gentleman from the State of Indiana, Mr. Pence, is recognized for any opening statement he might have.

Mr. PENCE. Thank you, Mr. Chairman. I want to thank you and the Ranking Member for holding this hearing. I don't have any extensive opening remarks, as a new Member of this Subcommittee, other than to say how grateful I am that we are looking at these issues.

I want to assure my colleagues on the other side of this panel and the other side of the aisle that there are civil libertarians throughout this Congress and throughout this majority who share the Chairman's passion for preserving the civil liberties of Americans as we go about the business of this reorganization.

I thank the gentlelady for her passion, and I wish to assure her, and the Chairman, and the Ranking Member that I share it, and I am pleased to be here.

Mr. BARR. Thank you for that extremely eloquent opening statement. [Laughter.]

The chair is very pleased to note the presence of a Member of the full Committee, though not a Member of this Subcommittee, the gentlelady from Texas, Ms. Sheila Jackson Lee. With unanimous consent, the gentlelady from Texas is recognized for any brief opening statements she might have.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

It is to applaud both you and the Ranking Member for a very important hearing. As you well know, I joined you on a Committee that we both were on, just prior to this, on the Crime Subcommittee, and the issues of privacy were very much before us, and might I add to those issues, of course, the issues of civil liberties and due process.

The President has asked us to live life as we have lived in the past, to go on with our lives, and I think that is an important instruction for the American people. That means, to me, that we go on with our values of due process, civil liberties, the ability to secure our borders, but as well to have rights to those who are detained. Family members should be able to know where detainees are. Detained individuals should have access to legal representation, and questions of whether we use a military system or a civil judicial system, I think, Mr. Chairman, are very important as well because I have faith in our judiciary. I think our system of laws will protect us if we have the right framework.

Let me conclude, Mr. Chairman, by simply saying, in a previous hearing, we had an issue of airline pilots armed with guns, and I understand that legislation, as you indicated, will be on the floor. I will not suggest that we have a disagreement on security, but I certainly have disagreement on that particular tool and utilization of airline pilots.

But all of these themes run through the question of securing the safety of our, if you will, our bodies and the safety of our free ingress and egress throughout the United States of America, and I think this hearing is extremely important to be able to respond to that, respond to how we treat people as they go through the security entry and exit in the airports, all of that plays upon our constitutional rights and Bill of Rights.

Thank you very much, Mr. Chairman, for allowing me to be present at this hearing.

Mr. BARR. We are delighted to have you, Ms. Jackson Lee.

At this time, all Members, having had time for opening statements, we will now turn to the heart of the matter, which is to hear from our very distinguished panel of witnesses today. I would like to very briefly introduce each one of the witnesses to the Subcommittee, and to the public that is here, and to the public at large.

Our first witness today is Mark Everson, who appears on behalf of the Administration. Mr. Everson is the nominee for deputy director for Management at the Office of Management and Budget. OMB's main mission, of course, is to assist the President in overseeing the preparation of the Federal budget and to supervise its administration in Executive Branch agencies. In addition, OMB oversees and coordinates the Administration's information and regulatory policies. In each of these areas, OMB's role is to help improve administrative management to develop better performance measures and coordinating mechanisms and to reduce any unnecessary burdens on the public.

Mr. Everson currently serves as the controller of the Office of Federal Financial Management at OMB, which provides direction and leadership to the Executive Branch on financial management matters. He also serves as vice chairman of the President's Man-

agement Council, which is charged with improving Executive Branch management.

Obviously, just from that very, very brief and cursory introduction, it is obvious to everybody that, Mr. Everson, you are here as a very, very accomplished witness who can provide unique insights into the matters before us, and we thank you for being here.

Our second witness today will be Professor Jeffrey Lubbers. Professor Lubbers is a fellow in Law and Government at American University's Washington College of Law. He teaches courses in administrative law, Federal legal institutions, and alternative dispute resolution or ADR. Professor Lubbers has taught at the University of Miami School of Law, Washington and Lee University School of Law, and Georgetown University Law Center.

Prior to joining American University, Professor Lubbers was the research director for the Administrative Conference of the United States from 1982 until its closure in 1995. The Administrative Conference was the Government's principal advisory agency on procedural improvements in Federal programs. As research director, Professor Lubbers developed and directed various studies and spearheaded efforts to formulate recommendations on a wide variety of administrative law subjects. He worked with congressional Committees and agencies to seek implementation of administrative conference recommendations.

Professor Lubbers has coauthored a number of noteworthy works on administrative law and brings that unique background to bear on the important matters before us today.

Professor, we thank you very much for taking time and bringing your expertise here today.

Our final witness on this panel today will be Professor Peter Swire. Professor Swire is associated at the Moritz College of Law of the Ohio State University, where he teaches courses on privacy and the law of cyber space, among other subjects. He is also the editor of "Cyber Space Law Abstracts."

Prior to teaching law, Professor Swire served as the chief counselor for Privacy at OMB during the Clinton administration. In that capacity, he coordinated Administration policy regarding the use of personal information in the public and private sectors and served as the point of contact with privacy and data protection officials in other countries.

He was responsible for coordinating the Administration's policies on such matters as medical, financial and Internet privacy, issues relating to encryption technology and the treatment of public records and computer security.

Professor Swire also has written extensively on the subject of privacy and has lectured frequently on medical privacy and other topics. Professor Swire, as you can tell just from the opening statements here, I think you will find many folks here on this Subcommittee who are very much in accord with your concerns about privacy, share them, and we welcome that perspective especially in consideration of the Department of Homeland Security before us today. We appreciate your being with us.

In terms of the time limits and procedures that we will follow today, we would like each one of the witnesses, please, to limit their oral statements to 5 minutes. Your complete statements, writ-

ten statements, and any additional materials that you wish to have included as part of the official record will be so included, and the official record will be kept open—how many days, Counselor? Seven days for any additional materials that Members might request or which you believe, on reflection, is appropriate to include as part of the record.

After we have each one of the witnesses make their opening statement, then we will have the Members of the Subcommittee on both sides, alternating back and forth, provide questions. There may very well be some additional questions that we won't get to today that we will submit in writing. We would appreciate your very quick, because we are all on a short time frame on this legislation, hoping to get it to the President for his signature by September 11 of this year, so we would appreciate your very prompt response to any additional questions.

Again, thank you for being with us, and, Mr. Everson, we will begin the opening statements with yours.

Make sure that you all pull the mikes just as close as possible so that not only can everybody in the room here, but the court reporter can pick it up, too, please.

STATEMENT OF MARK W. EVERSON, CONTROLLER OF THE OFFICE OF FEDERAL FINANCIAL MANAGEMENT, OFFICE OF MANAGEMENT AND BUDGET

Mr. EVERSON. Thank you, Mr. Chairman, Members of the Committee. I am pleased to be here to discuss these important issues, as you have indicated.

The President's proposal to create a Department of Homeland Security brings together many of the elements of the Executive Branch critical to securing the homeland. To accomplish its vital mission, the Department must be agile and responsive, utilizing 21st century management techniques to respond to this 21st century threat.

The proposal gives the new Secretary wide latitude in redeploying resources, both human and financial. In addition, our proposal provides the Secretary reorganizational authority in order to enhance operational effectiveness as needed.

The Administration is also requesting flexibility in the hiring processes, compensation systems and practices, and performance management to recruit, retrain and develop a motivated, high-performance and accountable workforce. The Department needs flexible procurement policies to encourage innovation and rapid development and operation of critical technologies vital to securing the homeland.

There are sufficient legal protections in current law and in the proposed legislation to ensure that neither this Administration, nor any future Administration, will abuse the flexibilities granted the Department. The Department's personnel system will be grounded in the longstanding principles of equity, merit and fitness of title 5, and will be sufficiently flexible to meet the changing needs of our war against terrorism. Specifically, I want to assure the Subcommittee that employees of the new department will retain whistleblower protection and other basic rights like equal pay for equal work and fair and equitable treatment.

The Administration seeks to bring this same approach, preserving the rights of individuals and institutions under the law, while giving the new department enhanced flexibility to all areas of the Department's management. Under the proposed legislation, laws governing Executive Branch agencies, including those relating to administrative procedures and privacy, will apply to the components of the new department. In addition to the flexibilities we are requesting in the areas of personnel, procurement, and property management, we are requesting specific narrow exemptions from the Federal Advisory Committee Act and some relief from the Freedom of Information Act.

The APA will apply to the Department, as a whole, in the same manner as it currently applies to the Executive Branch agencies. It is worth noting that Congress, in the public interest, has already exempted certain of the component agencies from the APA. An example would be certain Coast Guard functions that are military in nature.

The Administration's proposal ensures continuity of administrative actions during the transfer of functions to the new Department. In particular, section 804 provides the completed administrative actions of an agency will not be affected by the transfer of an agency to the new department. Likewise, pending proceedings of agencies that are transferred to the new department will continue under preexisting procedures.

The Administration will pay particular attention to the integration of the adjudicative processes and personnel into the new Department of Homeland Security. We anticipate that adjudicatory and review entities transferred will continue to function as they do today, but perhaps with a new name on the door. While many of the agency functions that will be transferred to the new department do not have a substantial adjudicative element, three agencies do have significant adjudicatory components—the INS, U.S. Customs Service and the Coast Guard.

Our proposal provides for a 1-year transition period, giving the Administration time to ensure that the transfer is thorough and rational. Within the Transition Planning Office, which the President created by Executive Order on June 20, we expect there will be a team composed of lawyers that will make up the new department. They will advise on a series of legal questions pertaining to the Department, including the transfer of these functions.

The Privacy Act, which you have mentioned, is one of several statutes protecting individuals from Government misuse of private information. The Administration's proposed bill would not—would not—create any new exceptions or exemptions from the Privacy Act or any other privacy statutes. The Privacy Act will apply to specific components in the new department in the same way that it applied before those entities will have been transferred into the new department.

The Privacy Act notices previously issued by these entities will remain in force. Within that framework, the components transferred into the Department will be permitted to share records with each other when necessary to perform their functions. Additionally, information sharing with law enforcement entities will be governed by existing law.

The Administration will work to identify the steps necessary to ensure proper protection of the privacy and security of information.

Another area of interest to the Committee is the Federal Advisory Committee Act. The new department will have a significant need to establish and use the services of advisory committees on highly confidential and sensitive homeland security matters.

We are asking for some exceptions here. The exceptions are needed to enable the Department of Homeland Security to secure the services of individuals who are qualified to serve, but who might be reluctant to do so within the existing constraints of the Federal Advisory Committee Act. The complexity associated with compliance with FACA could be a deterrent to timely counsel from experts.

That concludes my remarks, Mr. Chairman.

[The prepared statement of Mr. Everson follows:]

PREPARED STATEMENT OF MARK W. EVERSON

Mr. Chairman and Members of the Committee, I am Mark Everson, Controller of the Office of Federal Financial Management in the Office of Management and Budget. I am also Chairman of the President's Management Council and the President's nominee for Deputy Director for Management in OMB. Thank you for this opportunity to appear before you today.

The President's proposal to create a Department of Homeland Security brings together many of the elements of the Executive Branch critical to securing the homeland. With the Department's creation, we will minimize redundancies and improve efficiencies so that we can respond effectively to the terrorist threat. Terrorists are opportunistic, agile, and driven. This means that as we identify and strengthen one vulnerability, terrorists will work to uncover another. Their modes of attack are inherently flexible as their only true constant is destruction and mayhem. Our response must be equally flexible. In other words, to accomplish its vital mission, the Department of Homeland Security must be agile and responsive, utilizing 21st century management techniques to respond to this 21st century threat.

The President's proposal gives the new Secretary wide latitude in re-deploying resources, both human and financial. In addition, it provides the Secretary reorganizational authority in order to enhance operational effectiveness, as needed. The Administration is also requesting flexibility in hiring processes, compensation systems and practices, and performance management to recruit, retain, and develop a motivated, high-performance, and accountable workforce. The Department needs flexible procurement policies to encourage innovation and rapid development and operation of critical technologies vital to securing the homeland.

There are sufficient legal protections in current law and in the proposed legislation to ensure that neither this Administration nor any future administration will abuse the flexibilities granted the Department. The Department's personnel system will be grounded in the longstanding principles of equity, merit and fitness of Title 5, and will be sufficiently flexible to meet the changing needs of our war against terrorism. Specifically, I want to assure the Subcommittee that employees of the new department will retain whistleblower protection and other basic rights like equal pay for equal work and fair and equitable treatment.

The Administration seeks to bring this same approach—preserving the rights of individuals and institutions under the law while giving the new Department enhanced flexibility—to all areas of the Department's management. Under the proposed legislation, laws governing Executive Branch agencies, including those relating to administrative procedures and privacy, will apply to the components of the new Department. In addition to the flexibilities we are requesting in the areas of personnel, procurement and property management, we are requesting specific narrow exemptions from the Federal Advisory Committee Act and some relief from the Freedom of Information Act.

ADMINISTRATIVE LAW ISSUES

A subject on which you specifically requested my testimony relates to "administrative law issues" and the new Department. I will therefore discuss how the Administrative Procedure Act and related law will apply to the new Department; and how

we will attempt to reconcile all the varied and unique administrative law functions of the components that will comprise the Department.

The Administrative Procedure Act

The Administrative Procedure Act (the “APA”) requires that Executive Branch agencies follow a set of basic procedures to ensure that they receive adequate public input when they issue regulations. The statute’s procedures ensure appropriate public oversight, if you will, of the Executive Branch’s regulatory function. The APA will apply to the Department as a whole in the same manner as it currently applies to Executive Branch agencies. It is worth noting that Congress, in the public interest, has already exempted certain of the component agencies from the APA. Thus, those administrative functions that are currently exempt from the APA will remain exempt when they are transferred to the new Department. For example, certain U.S. Coast Guard functions are exempt from the APA because they involve “a military or foreign affairs function of the United States” under §553(a)(1).¹ Because the Coast Guard will continue to perform the same functions after it is transferred to the new Department, the exemption for its functions will remain unchanged.

The Administration’s proposal ensures continuity of administrative actions during the transfer of functions to the new Department. In particular, Section 804 provides that completed administrative actions of an agency will not be affected by the transfer of an agency to the new Department. Likewise, pending proceedings of agencies that are transferred to the new Department will continue under pre-existing procedures. With its traditional expertise in administrative law and management, OMB is well-positioned to facilitate the new Department’s transition in this regard. DHS will have to work with OMB to ensure proper compliance with the regulatory regime Congress has established in the APA.

ADJUDICATIVE PROCESSES AND PERSONNEL

The Administration will pay particular attention to the integration of the adjudicative processes and personnel into the Department of Homeland Security. We will work to ensure that the new Department has the necessary adjudicatory processes and personnel to support the entities and functions that are transferred to the new Department. In addition, we will seek to ensure that ongoing adjudicative processes are disrupted as little as possible during the transition. We anticipate that adjudicatory and review entities transferred will continue to function as they do today, but perhaps with a new name on the door.

While many of the agency functions that will be transferred to the new Department do not have a substantial adjudicative element, three agencies do have significant adjudicatory components—the Immigration and Naturalization Service (INS), the U.S. Customs Service, and the U.S. Coast Guard.

The Immigration and Naturalization Service: INS’s Immigration Court system adjudicates benefits claims, waivers, and other cases regarding immigration status, including deportation proceedings. Aggrieved persons may appeal these cases to the Executive Office of Immigration Review (EOIR). Both INS’s Immigration Court system and EOIR will be transferred to the new Department.

The U.S. Coast Guard: Under 15 U.S.C. § 1541, Administrative Law Judges of the U.S. Coast Guard decide cases concerning marine resource conservation law, among other issues. These decisions are appealed first to the Commandant of the Coast Guard, then to the National Transportation Safety Board. This situation will remain the same under the President’s proposal.

The U.S. Customs Service: Generally speaking, the U.S. Customs Service offices resolve many legal claims relating to imported merchandise. Appeals of decisions related to imported merchandise are currently made to Customs Officers, and ultimately to the Commissioner of Customs. The transition of these functions will be relatively straight-forward. As in the previous examples, the rights of appeal granted in the Customs Service’s administrative procedures will transfer to the new Department.

Other entities transferred into the new Department will require ALJs. The Administration intends that the transfer of all adjudicatory and review functions will be a seamless operation, that existing procedures and practices will continue at the new Department, and that no pending matters are disrupted. In order to ensure that all of the necessary adjudicatory and review entities are transferred along with the agencies they support, Section 802 of the bill gives the President the authority

¹See, e.g., *United States v. Venture Melendez*, 186 F. Supp. 2d 55, 58 (D. P.R. 2001) (finding that “the Coast Guard’s regulations were exempt from the notice-and-comment rule making and advance publication requirements set forth in the [APA] because such requirements do not apply to the military affairs of the United States.”).

to transfer these programs to the new Department. And our proposal provides for a one-year transition period, giving the Administration time to ensure that the transfer is thorough and rational. Within the Transition Planning Office, which the President created by Executive Order on June 20th, we expect there will be a legal team comprised of lawyers from components that will make up the new Department. They will advise on a series of legal questions pertaining to the new department, including the transfer of adjudicatory and review components into the new Department.

PRIVACY RAMIFICATIONS OF CREATING THE DEPARTMENT OF HOMELAND SECURITY

The Privacy Act is only one of several federal statutes protecting individuals from government misuses of private information. Other statutes ensure the privacy of certain information, such as tax information, medical information, confidential business information, and census responses. Generally speaking, the Privacy Act restricts the government from making private information public, and requires agencies to publish notices describing any records system they maintain about individual citizens. The Act permits government agencies to use or share information with other Government entities only for specific and limited purposes, such as law enforcement.

The Administration's proposed bill would not create any new exceptions or exemptions from the Privacy Act or any other privacy statutes. The Privacy Act will apply to specific components in the new Department in the same way that it applied before those entities were transferred to the new Department. The Privacy Act notices previously issued by these entities will remain in force. Within that framework, the components transferred into the Department will be permitted to share records with each other when necessary to perform their functions. Additionally, information sharing with law enforcement entities will be governed by existing law.

An important component of the President's proposal is to establish in the new Department of Homeland Security the responsibility to receive and analyze law enforcement information, intelligence, and other information in order to understand the nature and scope of the terrorist threat to the American homeland and to detect and identify potential threats of terrorism within the United States. The President's proposal recognizes the importance of privacy protections with respect to this function, and therefore, the Administration's proposal includes a specific provision requiring the Secretary to "ensure that any material received pursuant to this section is protected from unauthorized disclosure and handled only for the performance of official duties."

The Administration will work to identify the steps necessary to ensure proper protection of the privacy and security of information. Although the general counsel of an agency often handles privacy issues, we recognize the special importance of these issues in the homeland security context and are examining options for establishing a specialized privacy officer within the new Department.

Finally, I would like to note the important role that OMB will occupy in ensuring that the new Department safeguards the privacy of the information that it collects and maintains. OMB issues implementing guidance for the Privacy Act (available at <http://www.whitehouse.gov/omb/inforeg/infopoltech.html>) and assists the agencies on an ongoing basis as they carry out the Act's requirements. OMB also reviews agency implementation of the Privacy Act through OMB's review under the Paperwork Reduction Act of the agencies' proposed collections of information. The Act also provides OMB with Executive Branch-wide authority with respect to information security—i.e., the protection of federal information from loss, misuse, or unauthorized access or modification. OMB's information security role was strengthened in 2000 with the enactment of the Government Information Security Reform Act, which amended the Paperwork Reduction Act by adding a separate subchapter dedicated solely to information security. Improving the federal government's information security practices has been a management priority at OMB, and we have been working with the agencies to improve their information security programs and plans.

FEDERAL ADVISORY COMMITTEE ACT

Another area of interest to this Subcommittee, where the Administration is seeking flexibility, is in the requirements of the Federal Advisory Committee Act. The new Department will have a significant need to establish and use the services of advisory committees on highly confidential and sensitive homeland security matters. The Central Intelligence Agency and the Federal Reserve Board have similar requirements to maintain confidentiality regarding the sensitive areas in which they work, and they were specifically exempted from the Federal Advisory Committee Act for this very purpose. The Administration's proposal makes clear that public notice

be given for the establishment of such committees. These exceptions are needed to enable the Department of Homeland Security to secure the services of individuals on its advisory committees who are highly qualified to serve, but who might be reluctant to do so within the constraints of the Federal Advisory Committee Act. The complexity associated with compliance with FACA could be a deterrent to timely counsel from experts. I would note, however, that any individuals serving on advisory committees for the new department would remain subject to criminal conflict-of-interest prohibitions within Title 18 with respect to any particular matter that directly involves the Department.

CONCLUSION

Balancing the needs and mandates of a new Department of Homeland Security will pose a substantial challenge. We believe that the planning must begin immediately. Accordingly, we have already begun constructing a transition team to prepare a detailed plan for transition. As I am sure you appreciate, this process will take several months, and will require significant work with each of the agencies involved. In that effort, we will ask our team to study your questions and recommendations carefully in the areas we are discussing today. We will also seek assistance from experts in many relevant areas and will seek input from agency general counsels on matters unique to particular agencies. The transition team will study the many issues regarding administrative law, adjudication, and privacy that will arise during the Department of Homeland Security's transition and beyond. I wish to thank the Chairman and the Members of the Subcommittee for the opportunity to address these important issues, and I look forward to working with you on these and other important questions regarding the creation of the Department of Homeland Security.

Mr. BARR. Thank you very much, Mr. Everson.
Professor Lubbers, please?

STATEMENT OF JEFFREY S. LUBBERS, FELLOW IN LAW AND GOVERNMENT, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

Mr. LUBBERS. Thank you, Mr. Chairman. It is an honor to be back before this Committee once again.

I share the general consensus that this initiative is vital to our national security, and 20 years from now I suspect we will look at this department as a natural part of our Government, just as we now do the Departments of Defense, Transportation and Energy, which were products of similar reorganizations, but there will certainly be some growing pains. It is healthy to acknowledge that any attempt to reorganize and consolidate so many diverse aspects of our Executive Branch into a new entity will undoubtedly raise complex issues of Administration and administrative law that, if not handled appropriately, could cause severe problems down the line.

Mr. BARR. Could you pull your mike a little bit closer to you, please.

Mr. LUBBERS. Sure. Major agencies to be transferred to the new Department of Homeland Security which I will call DHS, include the U.S. Customs Service, the INS, Secret Service, Animal Plant Health Inspection Service or APHIS, the Coast Guard, the new Transportation Security Agency, and FEMA, along with numerous smaller parts of various departments.

I do not address the policy choices that were made, as far as transferring certain agencies or programs and not others, but I would like to make eight basic points in my summary testimony this morning.

First, the mundane details are sometimes the most important ones. An expert on the creation of the Transportation Department,

Alan Dean, has said that in addition to setting up an organizational structure, lines of authority, staffing and clear missions, “We made a great point of having a complete and accurate phone book on people’s desks. We also made sure to have a messenger and routing system in place early on. These things sound very mundane, but things won’t work without them.”

Second, some of the agencies to be transferred clearly have some functions that are unrelated to homeland security, and Congress should think about ways for the DHS to spin off or send these functions back to the transferring agencies, when appropriate, so they don’t get short shrift.

Third, it should be remembered that each of the major administrative agencies that are to be transferred to the DHS have their own special organizational rules and rules of practice and procedure. Some of these are formal and are codified in a Code of Federal Regulations, others are memorialized in agency memoranda and guidance documents. Extracting these and redoing them under the auspices of the DHS will be a big job.

Fourth, as several people have mentioned, there are some issues involving administrative adjudication. The agencies to be transferred have a number of different types of adjudicative responsibilities. The Coast Guard and APHIS conduct formal, on-the-record adjudications and have the need for administrative law judges and formal rules of practice. The Transportation Security Agency has authority to assess civil money penalties, as does the Customs Service, which has a large number of adjudications, but does not use administrative law judges. The INS employs about 300 asylum officers, along with an Administrative Appeals Unit for some cases, and the related, but independent, unit in the Department of Justice, the Executive Office of Immigration Review, employs 220 immigration judges, 3 administrative law judges for certain types of cases, and a 23-member Board of Immigration Appeals.

The bill seems to intend that all of these immigration-related adjudicators be transferred to the new department. This raises some special issues since the Executive Office of Immigration Review was established in 1983 as a means of creating a nationwide system of immigration courts and an appeal structure that was independent of the INS.

So, whether, and to what extent, these adjudicatory programs should be combined will require careful decisions about staffing and procedures.

Fifth, there are some issues involving administrative rulemaking. The bill simply provides that the Secretary has the power to promulgate regulations hereunder. This means, as Mr. Everson said, that the APA’s notice-and-comment procedures, and their exemptions, would apply to DHS rulemaking. However, all of the agencies to be transferred have their own statutory and administrative requirements for rulemaking that will have to be integrated, and the parent departments of these agencies have their own ways of clearing regulations internally and with OMB. So I think there needs to be a central regulatory oversight within the Office of the Secretary of the new department. A good model is the similar unit that is within the Department of Transportation.

Sixth, some issues relating to the Office of General Counsel. The bill provides for a general counsel to be the chief legal officer of the Department. I think there will be some special challenges in organizing this office, due to its central importance and in view of the need to integrate the various OGCs within the various agencies that are being transferred. One thing I will note is that the appointment of the DHS general counsel is not subject to Senate confirmation, unlike all of the other Cabinet Secretary's general counsels. So I think that that should probably be done here as well.

Seventh, all I will say about privacy is that, given its importance, I think it would be wise for the bill to mandate that one of the specified officials to be appointed under the bill take the lead on privacy issues within the Department's jurisdiction.

My last suggestion is for a Transition Task Force, and it sounds, from Mr. Everson's testimony, that they are moving in that direction, but I think that given all of the potential problems that might arise, I would hope that the bill would authorize or even instruct the Secretary to establish an Interagency Transition Task Force made up of designees of the Departments that will be transferring agencies to DHS.

If I can close with analogy, Mr. Chairman, I think that extracting and moving these agencies is somewhat similar to a kidney transplant. The recipient will be much stronger if the operation goes well, but the surgeons must great pains not to harm the donor, the recipient or the organ itself.

So thank you for the opportunity to discuss these issues, and I would be pleased to work with the Committee or the Committee staff as you move forward with this bill.

Thank you.

[The prepared statement of Mr. Lubbers follows:]

PREPARED STATEMENT OF JEFFREY S. LUBBERS

Mr. Chairman and Members of the Committee:

I am pleased to be here this morning to discuss potential administrative law concerns that might arise in consideration of and implementation of the Homeland Security Act of 2002. I share the general consensus that this initiative is vital to our national security. Twenty years from now, I suspect we will look at this Department as a natural part of our government, just as we now do the Departments of Defense, Transportation and Energy, but there will certainly be some growing pains. And it is healthy to acknowledge that any attempt to reorganize and consolidate so many diverse aspects of our executive branch into a new entity will undoubtedly raise complex issues of administration and administrative law that, if not handled appropriately, could cause severe problems down the line.

My perspective is based on a long involvement in administrative law issues. At my former agency, the Administrative Conference of the United States, where I served for 20 years, we conducted many studies of administrative procedure problems in various federal agencies and tried to keep a government-wide perspective about these concerns. We appeared often before this Subcommittee and always appreciated its genuine interest in "good government" reforms.

Background

The draft bill, entitled the "Homeland Security Act of 2002," creates a new Cabinet-level Department of Homeland Security (DHS), which places under one roof numerous agencies, offices, and programs or parts thereof that relate to four general missions, each with its own Undersecretary: (1) Information Analysis and Infrastructure Protection, (2) Chemical, Biological, Radiological, and Nuclear Countermeasures, (3) Border and Transportation Security, and (4) Emergency Preparedness and Response. It also creates a fifth Undersecretary for Management.

Major agencies to be transferred include the U.S. Customs Service, Immigration and Naturalization Service (INS), Secret Service, Animal Plant Health Inspection Service (APHIS), Coast Guard, the new Transportation Security Agency (TSA), Fed-

eral Emergency Management Agency (FEMA), along with numerous smaller parts of the Departments of Commerce, Defense, Energy, Health & Human Services, and Justice. These transfers shall take place when the President directs, but no later than the “transitional period” of twelve months after the effective date of the Act, (which is 30 days after enactment). I do not address the policy choices that were made as far as transferring certain agencies or programs and not others. However, as others have noted, some of the agencies to be transferred clearly have some functions that are unrelated to homeland security and the Congress should think about ways for the DHS to spin off or send these functions back to the transferring agencies when appropriate.

The bill gives the new Secretary of DHS broad authority. Section 102(a)(1)(3) provides that “All functions of all officers, employees and organizational units of the Department are vested in the Secretary.” But in § 102(b)(1), the bill also provides that the Secretary may delegate any of his functions to any officer, employee, or organizational unit of the Department. Thus, for the most part, although these various agencies are transferred to DHS with their current statutory authorizations intact, the Secretary is “vested” with all the functions of these agencies, except to the extent he chooses to delegate his authority to the subordinate officers. In addition, under § 733, he may reallocate functions among the offices of the Department (including transferred statutory entities if he gives Congress 90 days’ notice). The only transferred offices that, according to the bill, must remain intact in the Department are the Secret Service and Coast Guard. Moreover, all high-level appointees (those serving at the Executive Levels II-V) in the transferred agencies are to lose their positions at the time of transfer.

Other than the Secretary and the five Under Secretaries, the only officers specifically provided for in the bill include not more than six Assistant Secretaries who are to be Presidentially appointed/Senate-confirmed, an Inspector General, the Commandant of the Coast Guard, and the following Presidentially appointed (but not Senate-confirmed) officials: a General Counsel, not more than 10 (additional) Assistant Secretaries, a Director of the Secret Service, a Chief Financial Officer, and a Chief Information Officer. In view of the heightened concerns about privacy issues relating to collection of information, it may be wise for the bill to mandate that one of these officials take the lead on privacy issues within the Department’s jurisdiction.

The bill contains very few procedural provisions. It gives the Secretary the power to “promulgate regulations hereunder” [§ 102(b)(2)], and to “make contracts, grants, and cooperative agreements, and to enter into agreements with other executive agencies . . .” [§ 102(b)(3)]. It provides a broad exemption from the Freedom of Information Act for “Information provided voluntarily by non-Federal entities or individuals that relates to infrastructure vulnerabilities or other vulnerabilities to terrorism and is or has been in the possession of the Department” [§ 204]. And it authorizes the Secretary to establish advisory committees without regard to the requirements of the Federal Advisory Committee Act as long as their establishment, purpose, and membership is announced in the Federal Register. Finally, the bill [§ 804] provides that completed administrative actions of a transferred agency shall not be affected, and that pending proceedings in an agency shall continue to the same extent that they would have if transfer had not occurred.

General considerations

Obviously, there are many details to think about in these sorts of major reorganizations. In preparing for this hearing, I read an article quoting an expert on the creation of the Transportation Department in 1966, Alan Dean, a senior fellow at the National Academy of Public Administration, who served as Assistant Secretary for Administration during that Department’s first four years. He said that in addition to setting up an organizational structure, lines of authority, staffing and clear missions, executives are well-advised to focus on smaller things, too. “We made a great point of having a complete and accurate phone book on people’s desks. We also made sure to have a messenger and routing system in place early on. These things sound very mundane, but things won’t work without them.”

Beyond these vital day-to-day matters, each of the major administrative agencies that are to be transferred to the DHS (Customs Service, INS, Secret Service, APHIS, Coast Guard, TSA, and FEMA) have their own special organizational rules, and rules of practice and procedure. Some of these are formal and are codified in the Code of Federal Regulations, others are memorialized in agency memoranda and guidance documents. Extracting these and redoing them under the auspices of the DHS will be a big job. Moreover, this will not just be a paperwork exercise. Three quick examples may illustrate some of the problems here.

1. The Animal Plant Health Inspection Service (APHIS) now in the U.S. Department of Agriculture enforces several statutes including the Plant Protection Act and the Lacey Act. Hearings held under these statutes are required to be heard by Administrative Law Judges (ALJs), and the Department currently maintains a small staff of ALJs to hear these cases and those that arise under many other statutes enforced by other components of USDA. Appeals from ALJ decisions go to a special Judicial Officer who hears cases on behalf of the Secretary. After transfer to the DHS, new hearing and appeal procedures for these cases would have to be devised.
2. The Coast Guard, now a part of the U.S. Department of Transportation, issues rules and decides enforcement adjudications (both formal and informal). The dockets for these actions are maintained by DOT's central computerized docket system—one of the most advanced in the federal government. Although the Coast Guard is supposed to be transferred intact to the DHS, what will happen to its dockets? Will these electronic files have to be extracted somehow from the DOT docket system? Or will DHS ask DOT to continue to maintain these dockets (as well as those of the just-created Transportation Security Agency (TSA))?
3. The legislation for the TSA, [Pub. L. 107-71] placed it within the U.S. Department of Transportation and, (in § 115) established in that Department a Transportation Security Oversight Board, chaired by the Secretary of Transportation. Will this Board now be moved to the DHS and will its makeup have to be changed?

These examples are symptomatic of the challenges involved in extracting sub-agencies from larger agencies. Many of these agencies have shared functions with their parent departments. Many of them also have been delegated certain functions that could have been delegated elsewhere in their department. For example another of DOT's modal agencies, the Research and Special Programs Administration, has regulatory jurisdiction over the transportation of hazardous materials. This agency must work closely with the Coast Guard and TSA, and extracting the latter two agencies from DOT might require new arrangements or delegations.

I am quite sure that many of these agencies currently have responsibilities based not only on statute, but on Secretarial delegations. If the DOT Secretary, within his discretion, has delegated certain functions to either the Coast Guard or to the TSA, will those delegations remain in effect after the transfer? Are they "frozen" at that point? Or can such delegations be revoked, either before or after transfer? I note that there is a provision in the bill, (§ 804(d)) which states:

References relating to an agency that is transferred to the Department in statutes, Executive orders, rules, regulations, directives, or *delegations of authority* that precede such transfer or the effective date of this Act shall be deemed to refer, as appropriate, to the Department, to its officers, employees, or agents, or to its corresponding organizational units or functions. (emphasis added).

But this provision will probably not resolve the many delegation problems that are likely to arise, as the transfers become imminent.

Issues involving administrative adjudication

As indicated above, the agencies to be transferred have a number of different types of adjudicative responsibilities. The Coast Guard and APHIS conduct formal on-the-record adjudications, and thus have the need for ALJs and formal rules of practice. The TSA has authority to assess civil money penalties, as does the Customs Service, which has a large number of adjudications, but none that require ALJs. The INS employs about 300 asylum officers-non-ALJ adjudicators—along with an Administrative Appeals Unit for some cases. And INS' related but independent unit in the Department of Justice—the Executive Office of Immigration Review (EOIR)—employs 220 so-called "immigration judges," three ALJs for certain types of cases, and a 23-member Board of Immigration Appeals. The bill seems to intend that all of these immigration-related adjudicators be transferred to DHS. This raises some special issues since the EOIR was established in 1983 as a means of creating a nationwide system of "immigration courts" and an appeals structure that is independent of the INS.

Moreover, the bill (§ 802) provides that "When an agency is transferred, the President may also transfer to the Department any agency established to carry out or support adjudicatory or review functions in relation to the agency." The scope of this provision is unclear. It would seem to apply to DOJ's Board of Immigration Appeals, but will this Board and the rest of EOIR continue to be independent of the INS (or of DHS)? And does this provision also apply to the USDA's Judicial Officer?

In short, whether and to what extent, these adjudicatory programs should be combined will require careful decisions about staffing and procedures.

Issues involving administrative rulemaking

The bill simply provides that the Secretary has the power to “promulgate regulations hereunder” [§ 102(b)(2)]. This means that the APA’s notice-and-comment procedures would apply to DHS rulemaking, absent other statutory requirements. However, the agencies to be transferred all have their own statutory or administrative requirements for rulemaking that will have to be integrated. For example, the TSA’s statute contains a number of specific and unusual rulemaking provisions. The Coast Guard’s regulations, in 33 C.F.R. subpart 1.05, set forth that agency’s policies and procedures regarding rulemaking. Moreover, the parent departments of these agencies (DOT, USDA, DOJ and Treasury) all have their own ways of clearing regulations internally, with OMB, and with the Regulatory Information Service Center (which publishes the semi-annual *Unified Agenda of Federal and Deregulatory Actions*).

These problems are hardly insuperable, but they will also require careful planning. Given the complexity of the rulemaking process, with the many applicable statutory and Executive Order requirements, a central regulatory oversight office, within the Office of the Secretary, would be beneficial. A good model is the office within the Office of the Secretary of the Department of Transportation, which serves as the clearance and oversight point, as well as a source of expert guidance, for all regulations issued by the various modal units within DOT (including the TSA and Coast Guard).

The Office of General Counsel

Section 103(d) provides for a General Counsel to be the chief legal officer of the Department. There will be special challenges in organizing this office, due to its central importance in advising the Secretary, and in view of the need to integrate the various offices of general counsel (OGCs) within the agencies to be transferred.

First, I note that the appointment of the DHS General Counsel is by the President but is not subject to Senate confirmation. The appointment of every other Cabinet Department General Counsel (or equivalent), plus some sub-cabinet GCs, is currently subject to Senate confirmation, and in view of the importance of this office, I think this one should be too.

Second, a decision will need to be made as to how to organize this office. Will the subagencies maintain their own OGCs (with only a small central office) or will the responsibility be centralized entirely within a DHS Office that has various functional divisions? The Departments of HHS and Labor currently use a highly centralized approach, while DOT has a more decentralized structure with “chief counsels” in the various modal units and a smaller OGC within headquarters. I don’t have a strong view on this matter; the different departments should be consulted on this for advice. But in either case, there will be a need for a highly qualified group of lawyers in the headquarters office to deal with the sensitive privacy, disclosure, rulemaking, and personnel issues that are sure to arise.

Suggestion: A Transition Task Force

Given all of the administrative, procedural, strategic, and technical issues that will inevitably come up during such a major consolidation, I would suggest that this bill authorize or even instruct the Secretary to establish an interagency Transition Task Force, made up of designees of the departments that will be transferring agencies (which I will call “donor departments”) to the DHS. Experts from each of these departments should be convened to advise the Secretary on the transition. Of course, the Secretary and the Task Force should also consult with officials from the agencies that are being transferred, but to minimize turf battles I would suggest that the Task Force be made up of representatives of the donor departments instead of the *transferring* agencies. It will be inevitable that officials and staffs of the transferred agencies will jockey for attention and power within DHS, especially since, except for the Secret Service and the Coast Guard, these agencies will be subject to reallocation and reorganization. But the experts from the donor agencies, lawyers and administrators alike, can be a more objective source of advice to the DHS Secretary and General Counsel about the many “sunken logs” that are out there.

Miscellaneous comments, arranged by section of bill:

Section 2(5)—The definition of “Executive agency” incorporates the definition in 5 U.S.C § 105: “an Executive department, a Government corporation, and an independent establishment.” “Independent establishment” is defined in 5 U.S.C § 104, as “(1) an establishment in the executive branch (other than the United States Postal

Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and (2) the General Accounting Office.” Thus, it would seem to cover independent regulatory agencies as well as the GAO. This may be important, given the Secretary’s authority to demand information from executive agencies. Section 203 specifies that:

The Secretary shall have access to all reports, assessments, and analytical information relating to threats of terrorism in the United States and to other areas of responsibility described in section 101(b), and to all information concerning infrastructure or other vulnerabilities of the United States to terrorism, whether or not such information has been analyzed, that may be collected, possessed, or prepared by any *executive agency*, except as otherwise directed by the President. (emphasis added).

The term “executive agency” might otherwise be read to exclude certain relevant independent agencies. Three that come to mind are the Nuclear Regulatory Commission, the National Transportation Safety Board, and the United States Chemical Safety and Hazard Investigation Board. It might still be wise to mention those specifically if that is the Committee’s intent.

Nevertheless, the use of the definition of 5 U.S.C § 105 raises a few problems. Does Congress really want the GAO to be included as an executive agency for this purpose? Furthermore, this definition would exclude the U.S. Postal Service, a curious omission in light of the anthrax scare. It may be preferable to use the more familiar broad definition of “agency” in the Freedom of Information Act, 5 U.S.C. § 552(f)(1):

“agency” as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency

Section 103—Why are two classes of Assistant Secretaries created? This section provides for not more than six Assistant Secretaries who are to be Presidentially appointed/Senate-confirmed, and not more than 10 (additional) Assistant Secretaries who are to be Presidentially appointed, but not Senate-confirmed.

Section 204—This section provides that “Information provided voluntarily by non-Federal entities or individuals that relates to infrastructure vulnerabilities or other vulnerabilities to terrorism and is or has been in the possession of the Department shall not be subject to [the FOIA].” This phrase “that relates to” seems too broad. It might provide an exemption from all of FOIA for a 100-page document that has only one page relating to security concerns. I would change the wording to “to the extent that it relates to infrastructure vulnerabilities . . .” “This would accord with the usual FOIA principle that exempt material be segregated, to the extent feasible, from non-exempt, releasable material.

Section 402(4). I believe the Coast Guard becomes part of the military during time of war. I assume that this is not supposed to change, but perhaps that needs to be clarified.

Section 403(b)—This section provides that “[t]he Secretary of State may refuse a visa to an alien if the Secretary of State deems such refusal necessary or advisable in the interests of the United States.” This seems to provide almost limitless discretion, and could allow refusals for cultural, political, or completely arbitrary reasons. It would seem more appropriate to add the word “security” before “interests.”

Section 731—This section exempts advisory committees from the provisions of the Federal Advisory Committee Act (FACA). It may raise questions about such committees already chartered under FACA by the transferred agencies. Would such committees receive an immediate exemption from FACA at the time of charter? Or would they continue to have to operate under FACA because they were not established by “the Secretary.”

Section 803(d)(2). This provision seeks to eliminate the need for a second confirmation hearing for someone assuming the same or similar position in an agency after it is transferred to the Department. However there seems to be a drafting glitch here because it refers to “any officer whose agency is transferred to the Department pursuant to this Act” without also specifying that such officer has previously been confirmed by the Senate for the earlier position.

If I can close with an analogy Mr. Chairman, extracting and moving these agencies is somewhat similar to a kidney transplant. The recipient will be much stronger if the operation goes well, but the surgeons must take great pains not to harm the donor, the recipient, or the organ itself.

Thank you for your opportunity to discuss these issues with you. I would be pleased to try to answer any questions or to work with your staff as you continue to consider this important legislation.

Mr. BARR. Thank you. The chair presumes that you have a medical degree in that case.

Mr. LUBBERS. No, sir. [Laughter.]

Mr. BARR. The chair is pleased to recognize, for the final opening statement of this hearing, Professor Swire.

STATEMENT OF PETER P. SWIRE, PROFESSOR OF LAW, OHIO STATE UNIVERSITY, VISITING PROFESSOR AT GEORGE WASHINGTON UNIVERSITY

Mr. SWIRE. Thank you, Chairman Barr, Congressman Watt and other distinguished Members of this Committee. It is an honor and a serious responsibility to testify today here on this subject.

I share the views of many Americans that it is vital to take new measures to protect against terrorism, including by improving the security of our critical infrastructures and other computer systems. Indeed, a major focus of my current academic research has been in the area of improving computer security and network systems. In the time available to testify today, however, I will focus on my concerns with the recent Administration proposal. A more detailed written statement and a list of my specific recommendations is available for the record and copies are available on the tables here.

As you said, Mr. Chairman, I am a professor of law at the Moritz College of Law of the Ohio State University. I live in the Washington, D.C., area and head the new summer program of that law school. From March 1999 until January 2001, I served as the Clinton administration's chief counselor for Privacy in the U.S. Office of Management and Budget.

I have studied the Homeland Security Act of 2002, as proposed by the Administration, and offer two metaphors for what I have found.

First, the truck metaphor. When it comes the information sharing, I believe the proposal is all accelerator, but with no brakes. The bill puts the pedal down when it comes to spreading around sensitive personal information in hopes of reducing terrorism, but the bill has essentially no safeguards to put on the brakes—either to prevent harm to individuals or to stop a power grab over time by an unaccountable agency. For a vehicle as big as the new Homeland Security Department, nonstop acceleration and no brakes may lead to a mighty big crash in the future.

Second, the haystack metaphor. I share the concern expressed in this Committee recently that the new information sharing proposals are like piling more hay on top of an already enormous haystack. All of that new hay makes it that much harder to find the needle. Better analysis of existing data is likely the keys to success here, and the Congress should probe hard to learn whether adding new piles of information and reshuffling the bureaucratic boxes will really add to the quality of the analysis.

In the time available for my oral statement, I will make three types of points.

First, the bill needs better institutional checks and balances for privacy and other issues. These safeguards should be added both

within the Department and also in OMB or other parts of the Executive Office of the President.

Second, the bill should be amended to add language that allows the Department, in the future, to be effective in carrying out its missions other than antiterrorism, such as Emergency Management and the Customs Service, and to give due consideration to other values, such as privacy, freedom of information, commerce and others.

Third, the safeguard described by Mr. Everson in his testimony, in his written testimony, turn out to be considerably weaker than they might appear.

Turning to the institutional checks and balances, I believe a senior official should be appointed within the Executive Office of the President to coordinate policymaking and privacy issues, including as they relate to homeland security. I believe H.R. 5005 should explicitly require appointment of a privacy official within the Department of Homeland Security. This will promote congressional oversight over time. And I also support this Committee's efforts to build privacy impact assessments into agency actions.

Based on my 2 years as essentially the chief privacy officer for the Federal Government, it is perhaps not surprising that I believe that having an official tasked with privacy protection offers significant benefits. The goal is emphatically not to have privacy trump other values. Instead, the goal is to help ensure that issues of proper handling of personal information are well-vetted in the decision-making process.

Many of the worst surveillance proposals occur when no one in the process has rigorously considered the potential negative effects of a proposal that also offers some advantages. If everyone in the process is concerned, for instance, with short-term gains to homeland security, then who will air the long-time concerns about erosions of civil liberties? Who will make sure that the process considers alternatives that are effective on the security side, while also respecting privacy and other values.

Next, there are specific and achievable amendments that can build missions and values other than antiterrorism into the bill. The current text says that the Department's primary mission concerns antiterrorism. This language has pernicious effects. For instance, in the event of floods or hurricanes, any FEMA activities related to terrorism will be stated by statute to be more important than saving American's lives and properties threatened by these other sorts of disasters.

Similarly, this bill dictates that values such as privacy and civil liberties and so on are secondary, by statute, to antiterrorism efforts. Section 101 of the bill can be amended to make antiterrorism one mission of the Department without denigrating these other missions.

A related point applies to section 201, concerning the Under Secretary for Information Analysis. He is tasked to oversee the Nation's information infrastructure without any consideration of matters other than security. Entirely absent is discussion of the educational and commercial benefits that result from the Internet, the protection of privacy, the values of an open society and Government

accountability and so on. The bill can, and should, avoid this one-sided charter for how to build our infrastructure for the future.

Briefly turning to the privacy safeguards explained in Mr. Everson's written testimony, I offer four observations.

First, I note that OMB currently has exactly one civil servant and no privacy official tasked with the Privacy Act and privacy policy, generally.

Second, I commend President Bush for deciding not to cancel the Medical Privacy Protections, but I have not been able to find a single example where his Administration has taken any initiative to strengthen privacy protections when it comes to Government information gathering and surveillance.

Third, consolidating all of the many activities into this new department will weaken Privacy Act protection. That act applies primarily to transfers of personal data from one agency to another.

And, fourth, section 203 of the bill does, indeed, require the Department to protect against unauthorized disclosures and use outside of the performance official duties. My written testimony explains in detail, however, why this language permits a practically unlimited expansion of authorized disclosures and disclosures for official duties.

In conclusion, I thank the Committee for the opportunity to testify and to present my views on this issue. Today, less than a year after the horrific events of September 11, there is likely no issue on the national agenda more important than deciding how we will change practices within our borders to assure both security and the other important values that define our Nation.

As an academic who has studied the histories of Government's institutions, I wonder whether the war of terrorism will be as defining a mission 10, 20 or 30 years from now when the Department of Homeland Security will quite possibly still be governed by the charter you will enact this year.

You are writing the charter for an agency with unprecedented powers to keep watch on every American, powers that will endure long after this election cycle is forgotten. I commend this Committee for its careful attention to the issues in the hearing today, and I welcome any questions you may have.

[The prepared statement of Mr. Swire follows:]

PREPARED STATEMENT OF PROFESSOR PETER P. SWIRE

INTRODUCTION

Chairman Barr, Congressman Watt, and other distinguished members of the Committee on the Judiciary, it is an honor and a serious responsibility to be asked to testify today on the topic of "Administrative Law, Adjudicatory Issues, and Privacy Ramifications of Creating the Department of Homeland Security." I share the views of many Americans that it is vital to take new measures to protect against terrorism, including by improving the security of our critical infrastructures and other computer systems. Indeed, a major focus of my recent academic research has been in the area of improving computer security in networked systems. In the time available to testify today, however, I will focus on my concerns with the recent Administration proposal of the Homeland Security Act of 2002, introduced as H.R. 5005. An attachment at the end of this testimony summarizes my recommendations. I also look forward to responding to any questions you may have where I can be of assistance.

BACKGROUND OF THE WITNESS.

I am Professor of Law at the Moritz College of Law of the Ohio State University. I reside in the Washington, D.C. area and head the new summer program of the law school. As a professor, I teach courses on privacy, the law of cyberspace, and other subjects, and serve as the editor of the Cyberspace Law Abstracts. My web page is at www.osu.edu/units/law/swire.htm, and many of my writings are available there. My e-mail is swire.1@osu.edu, and phone at (240) 994-4142.

Relevant to today's topic, I am currently researching privacy and technology issues for the Liberty and Security Initiative of the Constitution Project. This Initiative is a bipartisan effort of prominent citizens who are seeking ways to achieve both security and civil liberties in the wake of the events of September 11. I also act as a consultant to the law firm of Morrison & Foerster, primarily on issues of medical privacy. In my testimony today I am reflecting solely my personal views, and I have not been paid in any way to prepare this testimony.

From March, 1999 until January, 2001 I served as the Clinton Administration's Chief Counselor for Privacy, in the U.S. Office of Management and Budget. This position was in OMB's Office of Information and Regulatory Affairs ("OIRA"), which has long had important responsibilities under the Privacy Act, the various computer security statutes, and for federal information policy more generally. Relevant to today's topic, I played a lead role in coordinating federal agency practices with respect to privacy and personal information. I served on the White House E-Commerce Working Group, worked extensively on critical infrastructure issues including the Federal Intrusion Detection Network (FIDNet), and worked more generally at the intersection of computer security and privacy issues. In 2000 I chaired a White House Working Group on how to update wiretap and surveillance laws for the Internet age.

GENERAL COMMENTS ON THE HOMELAND SECURITY ACT OF 2002.

I have studied the Homeland Security Act of 2002, H.R. 5005 as proposed by the Administration, and offer two metaphors for what I have found.

First, the truck metaphor. When it comes to information sharing, I believe the proposal is all accelerator but with no brakes. The bill puts the pedal down when it comes to spreading around sensitive personal information in hopes of reducing terrorism. But the bill has essentially no safeguards that put on the brakes—either to prevent harm to individuals or to stop a power grab by an unaccountable anti-terror agency. For a vehicle as big as the new Homeland Security Department, non-stop acceleration and no brakes may lead to a mighty big crash in the future.

Second, the haystack metaphor. I share the concern, expressed in this Committee recently, that the new information sharing proposals are like piling more hay on top of an already enormous haystack. All that new hay makes it that much harder to find the needle. Better analysis of existing data is likely the key to success here, and the Congress should probe hard to learn whether adding new piles of information and reshuffling the bureaucratic boxes will really add to the quality of the analysis.

Taking the haystack image a bit further, the extra-big piles of hay (all that personal information) can get very old and dried-up sitting in those government storage facilities. When a drought or dry season comes around, as it inevitably will, the fires will be far worse than otherwise. Lots and lots of Americans may get burned if there is careless storage or handling of all that additional hay. The unprecedented collection and dissemination of personal information about Americans puts us at new risk when there is next a drought of self-control or common sense in the Department of Homeland Security.

THE DEPARTMENT'S SKEWED INCENTIVES AND LACK OF INSTITUTIONAL SAFEGUARDS.

Moving from metaphors to the usual language of Washington policy debates, my central point today concerns the skewed incentives of the new Department when it comes to information gathering and sharing. Having served in the federal government, I am acutely aware that where one sits often determines where one stands. For instance, the CIA thinks that intelligence information is paramount, the FBI stresses effective law enforcement above all other values, and the Commerce Department instinctively understands the effects of a policy proposal on business. For employees of the new Homeland Security Department, a simple look at the name of their department will tell them all they need to know about how their success or failure will be measured. Why would any rational person in the Department fall on their sword to protect privacy, civil liberties, commerce, the rights of immigrants, or any other value except for anti-terrorism? All of the incentives are to place anti-

terrorism efforts at the pinnacle. And that mandate will continue for many years, until a future Congress one day takes up the arduous task of reorganization.

A related, key point is the lack of institutional safeguards to keep the instincts of the new Department in check. In my specific comments below, I suggest a number of ways to create institutional safeguards both within the Department and in other parts of the federal government. At this point in the testimony, I highlight two proposals. *First, a senior official should be appointed within the Executive Office of the President to coordinate policymaking on privacy issues, including as they relate to homeland security. Second, a Chief Privacy Officer should be included among the statutory offices in the new Homeland Security Department, alongside the Chief Financial Officer and Chief Information Officer.*

Based on my two years as essentially the Chief Privacy Officer for the federal government, (perhaps not surprisingly) I believe that having an official tasked with privacy protection offers significant benefits. The goal is emphatically not to have privacy trump all other values. Instead, the goal is to help ensure that issues of proper handling of personal information are well vetted in the decisionmaking process. Many of the worst surveillance proposals occur when no one in the process has rigorously considered the potential negative effects of a proposal that also offers some advantages. If everyone in the process is concerned, for instance, with short-term gains to homeland security, then who will air the long-term concerns about erosion of civil liberties? Who will make sure that the process considers alternatives that are effective on the security side while also respecting privacy and other values? To take one example, there is little or no evidence in H.R. 5005 itself that privacy values were even discussed among the drafters. If privacy had been discussed, then there were numerous places where clarifying language, of the sort I propose below, might easily have been included.

With the Office of Management and Budget testifying here today, I hope they will not take it amiss if I suggest that OMB, and especially its Office of Information and Regulatory Affairs, is likely the single best place to house this sort of privacy official. OMB has long had responsibility for overseeing agency compliance with the Privacy Act. Its responsibility for the clearance of agency Congressional testimony and other statements gives OMB important leverage in ensuring that single-mission agencies, such as Homeland Defense, make policy while considering a broader range of concerns. OMB also has, in my experience, an exceptionally dedicated and capable group of civil servants. For these reasons and others, I believe OMB can play a constructive role going forward in checking the runaway tendencies of the Department of Homeland Security. Privacy and other values can be considered better in the OMB setting, where there is longstanding experience in balancing competing concerns. OMB's role in the budget process and its oversight of agency regulations also mean that an agency will have less success seeking only the narrow interests of that single agency without regard for other concerns.

One particular reform to consider is whether proposed Homeland Security changes in data flows within the federal government or especially outside of the federal government should be subjected to cost/benefit requirements along the lines of Executive Order 12, 291 (issued by President Reagan) and Executive Order 12,866 (issued by President Clinton). The current Administration has insisted on rigorous cost/benefit analysis of other federal agency proposed actions, and we deserve to hear the Administration's views on whether this sort of careful analysis should be skipped for issues of Homeland Security. Aspects of such analysis would presumably include the direct economic burdens created by new Homeland Security initiatives, as well as the burdens placed on privacy, commerce, civil liberties, and other values of an open society.

COMMISSION ON PRIVACY AND PERSONAL FREEDOM

The last comprehensive review of privacy issues at the federal level was conducted in the mid-1970s, resulting in passage of the Privacy Act and the creation of the Privacy Protection Study Commission, which issued its report in 1977. *The President or the Congress should create a new Commission on Privacy and Personal Freedom to review privacy issues in the context of homeland security and new information technologies and recommend changes in law and policy.* I have previously had my doubts about the usefulness of proposals to create privacy study commissions, in part due to my perception that such commissions could be used as an excuse to delay implementation of effective privacy protections. In light of the events of September 11, however, and the pressing issues those events have posed for homeland security, surveillance, and privacy, I believe this sort of study commission is now appropriate.

ADMINISTRATIVE LAW AND RULE OF LAW CONCERNS

Before turning to some specific textual concerns with H.R. 5005, permit me to comment briefly on some *administrative law aspects of the proposal*. I am concerned that this major reorganization would reduce the effectiveness of the legislation that Congress has enacted over time to specify how the various agencies should carry out their functions. Even if we assume that officials in the new Department wish to follow every Congressional enactment to the letter, there will inevitably be some play in the joints as the officials seek to make old language work in new settings. The scope of agency discretion is likely to increase as a result of the reorganization.

The reorganization thus poses risks to the effectiveness of existing legislation and of judicial review to assure the rule of law within the new Department. For instance, the famous *Chevron* case requires judges to give deference to an agency that adopts any “permissible” interpretation of a statute. Under the proposed bill, the scope of *Chevron* deference would seem to increase due to the agency’s need to adapt pre-existing statutory language to the setting of the new Department. The scope of that deference would seem to increase even more because H.R. 5005 treats anti-terrorism to be the “primary” mission of the Department. The agency would thus have a statutory basis for arguing that an especially broad set of interpretations is “permissible” when pursuing any anti-terrorism goal. *If the Committee does not wish to grant the new Department this especially sweeping ability to interpret existing statutes as it sees fit, the Committee may wish to consider amendments that limit the degree of deference owed to the Department’s statutory interpretations. Notably, language could be inserted in the savings provision in Section 804(d). The new language might directly state that courts, in reviewing the Department’s actions, are to give the same degree of deference to the Department as they would have to the predecessor components of the Department under existing law.* In this way, the Congress could assure that the same degree of judicial review and rule of law will continue to apply to the Department’s interpretations of existing statutes. Without such language, the Department may take the position that it deserves significantly enhanced deference from courts in the interpretation of the governing statutes.

SOME LESSONS FROM CURRENT RESEARCH INTO HOMELAND SECURITY AND PRIVACY.

Current research for the Liberty and Security Initiative of the Constitution Project sheds light on possible pitfalls from the current version of the Homeland Security Act of 2002.

One of my efforts with the Constitution Project has been to study the way that wiretap laws operate at the state level. A preliminary survey of state wiretap laws and current proposals to amend the laws is now available at the web page of the Constitution Project, www.constitutionproject.org. A substantially more detailed 50-state survey will be available there shortly. *For the topic of homeland security, my research to date on state wiretap laws indicates systematic weaknesses in protecting information at the state level as well as the importance of creating institutional checks and balances within an information-sharing process.*

The study of state wiretaps is illuminating because the standards for a judge issuing a wiretap order are the same for federal and state wiretaps under the Electronic Communications Privacy Act. The major difference in practice appears to be due to the greater institutional checks and balances at the federal level. There, we have a history of scrutiny of wiretap orders by the Congress, the press, and civil liberties groups and we have had institutional protections such as approval by senior Justice Department officials and significant training required of the agents and prosecutors who seek such wiretaps. In many states, our survey shows that these institutional safeguards are lacking.

Given the absence of institutional safeguards, authorization of state wiretaps and information derived from those wiretaps is often handled less carefully than for federal wiretaps. Previous researchers, such as Susan Landau and Whitfield Diffie in their book “Privacy on the Line”, have found that many required state wiretap reports are missing or apparently quite inaccurate. These shortcomings are important, because a majority of all domestic wiretaps take place under state law, under orders signed by state judges. These shortcomings take on new importance in light of a study released this spring finding that the number of state wiretaps has jumped a startling 50 percent in the past year alone.

Proposals to amend state wiretap laws should seek effective ways to build institutional checks and balances into the surveillance process. Effective institutional checks, beginning but not ending with strong Congressional oversight, will be needed for the new Department of Homeland Security. New proposals for information sharing with state and local officials also need to contain institutional safeguards for the sensitive information that is being shared.

Another ongoing topic for the Constitution Project concerns national ID proposals and the history of why the federal government has repeatedly decided not to create such an identification system. My current view is that our lack of a national ID card today is due partly to popular sentiment (which has opposed such cards) and partly due to a political dynamic where the proponents faced a heavy burden in creating such a system. My preliminary view is that creation of a Department of Homeland Security would change the political dynamic. The new Department will be under strong internal and external pressure to adopt new biometric and other identification systems. The heavy burden may thus shift to those who are skeptical of a new national identification system. If the large and powerful new Department puts its muscle behind such a system, who inside or outside of the federal government will be similarly well organized to oppose it?

Many reasons have been given to date for doubting the desirability of creating a national ID card or national ID system. For instance, there are concerns about cost, discriminatory treatment of minorities, the inability to create a system that would actually identify individuals in a trustworthy way, and the likely mission creep over time as the card was used for an ever-expanding number of applications. To the extent the Members are concerned about a shift to a national ID system, then there is greater reason to oppose or be more cautious in support of the new Department of Homeland Security. The Congress may wish to consider ways to reduce this concern, such as by stating that no funds shall be spent to create or advocate for a national identification system.

COMMENTS ON SPECIFIC SECTIONS OF THE HOMELAND SECURITY ACT OF 2002, H.R. 5005.

Section 101(b)(1), anti-terrorism as the “primary” mission of the Department. The current text says that the Department’s “primary” mission will be duties connected to preventing, minimizing the damage from, and assisting in the recovery from terrorist attacks. One problem with this formulation is that it necessarily makes “secondary” all the other functions of the agency components that are transferred into the new Department. As one notable example, administration of the entire enormous body of immigration laws is secondary under this statute to the activities of the INS with respect to terrorism. Similarly, the many domestic responsibilities of FEMA will now all be subordinated, according to this statute, to FEMA’s terrorism-related activities. In the event of floods, hurricanes, fires, and the rest, any FEMA activities related to terrorism will be stated by statute to be more important than saving Americans’ lives and property threatened by these other sorts of disasters.

The new Department would contain a wide range of important government functions, including the INS, FEMA, the Coast Guard, the Customs Service, and many others. Making terrorism the “primary” mission, with the other tasks of these agencies as “secondary,” will have some predictable consequences. First, the proposed reorganization will likely result in less leadership focus, and likely less effective implementation, of the non-terrorism goals in these areas. By statute and by the organizational form of the new Department, there would be less leadership focus on goals such as administering the immigration laws, responding to natural disasters, assuring search and rescue and other coastal priorities, and achieving revenue-raising and commercial goals in the customs area. Second, the Administration insistence that there will be zero budget effect from the reorganization will accelerate this loss of focus on the INS, FEMA, Coast Guard, Customs and other missions of the new Department. Based on my experience working at OMB, I simply do not believe that a steady-state budget can pay for all of the new anti-terrorist activities and also maintain current ability to achieve existing missions. *I believe honesty compels us all to recognize a choice: the Department will either reduce the Government’s ability to achieve existing missions, or cost a lot more money, or both.*

The current language, with anti-terrorism as “primary” and everything else as “secondary,” would also affect privacy, civil liberties, and other values. This hierarchy of values, with terrorism more important than all the other missions of the Department and all the other values implicated by the Department’s ongoing activities, is made a permanent part of the statutory charter of the Department. Future Secretaries of the Department may feel constrained to treat these “secondary” activities and values in a “secondary” way according to the Congressional intent as reflected in the text of Section 101(b)(1).

My strong recommendation is thus to rewrite Section 101 to make clear that anti-terrorist activities are one mission of the Department. The “primary”/“secondary” language, however, should be deleted. This amendment would avoid a threat to the rule of law, where future Secretaries of the Department might appeal to the “primary” mission of the Department to trump contrary missions as created by other statutes, such as in the areas of immigration, emergency preparedness, and privacy.

This amendment would also provide greater flexibility in future budgets, permitting the Department and Congress to respond to the needs of that year rather than seeking to constrain future Congresses to the priorities of this year. *The bill should also likely contain authorization for new funds, unless the Congress specifically wishes to reduce the budget available to the INS, FEMA, Coast Guard, Customs Service, and other existing functions.*

Section 103, Other Officers. The current text specifies the creation by statute of various officers, including a Chief Financial Officer and a Chief Information Officer. *Due to the special responsibilities of this Department, I believe the statute should also require creation of the office of Chief Privacy Officer.* This step would not take the place of effective inter-agency oversight by OMB or some other part of the Executive Office of the President. Having a Chief Privacy Officer, however, would help create a better vetting process within the Department. Proponents of new surveillance plans and data sharing would more consistently have to explain both the benefits of their proposals and why their proposals cannot be carried out in ways that are more consistent with privacy and similar values. Creation of the Chief Privacy Officer position by statute would also increase the likely effectiveness of Congressional oversight of the Homeland Security Department on privacy and related issues. It would be more difficult for the Department to bury these concerns many layers deep in the bureaucracy, and the Chief Privacy Officer would be available to testify before the oversight committees.

In considering the creation of the Chief Privacy Officer (“CPO”) position, I have heard the suggestion that the existing Chief Information Officer (“CIO”) position would address privacy concerns. I do not agree. I have great respect for the role and capabilities of CIOs, based on my participation in CIO Council activities while in OMB, my writing for CIO Magazine, and similar activities. The functions of the CPO and CIO positions, however, are entirely different. The CIO oversees the crucial task of ensuring that an organization’s hardware and software effectively carry out the missions of that organization. In my experience, however, CIOs and their staff do not feel that it is their responsibility or particular competence to lead a process for deciding how to weigh concerns such as effects on Homeland Security vs. effects on privacy and civil liberties values. The CIO plays a primarily technological role, rather than the primarily policy role taken by a CPO.

Section 201, Under Secretary for Information Analysis and Infrastructure Protection. The current text defines seven responsibilities of the Under Secretary for Information Analysis and Infrastructure Protection. I have myself worked extensively on infrastructure protection issues, as a government official, as a private citizen, and as an academic researcher on encryption, firewall, and other topics. I agree wholeheartedly that the United States government and the private sector must continue to strive mightily to improve all aspects of infrastructure protection and computer security.

With that said, the current statutory text addresses only a fraction of the crucial issues that the new Under Secretary should consider. The current text essentially focuses on assessing and correcting the vulnerabilities of the critical infrastructure and increasing information flow among those involved in computer security. Entirely absent is any discussion of the many other values at stake in the construction of the information infrastructure. For instance, there is no concern stated for educational or commercial benefits that result from the Internet or other information technologies. There is no mention of the importance of protecting individual privacy in the exchange of all this information. There is no mention of the values of government accountability, the Freedom of Information Act, or the many other ways that well-designed information structures can enhance an open society and the preservation of civil liberties.

In response, supporters of the current text might say “that’s not my Department.” The bill concerns the Department of Homeland Security, and the concerns about education, commerce, privacy, government accountability, and civil liberties should simply be handled elsewhere in the government. I respond, however, that the Department centrally tasked with “a comprehensive national plan” for information infrastructure should clearly be tasked to include those other issues and values in the process.

My recommendation is to rewrite Section 201 to take explicit account of these and similar values in defining the mission of the Under Secretary for Information Analysis and Infrastructure Protection. Consideration of the values mentioned here should be included explicitly within the definition of what the Under Secretary should consider. The Under Secretary might also be tasked, for instance, to consult with the other relevant agencies (Commerce, Education, Justice, etc.) when making plans for critical infrastructure and information sharing. The new language should not reduce the existing responsibilities of other agencies to take action in these areas. As the

Committee looks for language that achieves these goals, one helpful source would be the National Plan for infrastructure protection released in early 2000. That Plan was prepared under the supervision of Dick Clarke, who now leads the Bush Administration's cyber-security efforts. In both the Plan's overview and in its chapter on privacy and civil liberties, there is extensive discussion of the ways that multiple values should be considered in decisions about how to construct the Internet of the future and the nation's critical infrastructures more generally.

Section 203, Access to Information. The current text, in Section 203(3), states that "the Secretary shall ensure that any material received pursuant to this section is protected from unauthorized disclosure and handled and used only for the performance of official duties." The text also discusses the importance of protecting intelligence sources and sensitive law enforcement information.

At first read, it might appear that the language about "unauthorized disclosure" and "performance of official duties" might offer protections for individual privacy, by limiting the ways that data in the hands of the Department might be used. Upon a closer read, however, protections are almost entirely lacking. First, the limit on "unauthorized disclosure" does nothing to limit "authorized disclosure." Because the bill in general places few or no limits on authorized disclosure, the Department in the future would be essentially free to authorize almost any information sharing. Second, the requirement that data be used "for the performance of official duties" is similarly weak. Persons working in the Department, seeking in some way to fight terrorism, could justify almost any use or disclosure of information as part of the performance of official duties. For example, releasing data to a state or local official might in some way help detect a terrorist, justifying almost any release of data. Third, the bill provides no apparent remedy or enforcement action if releases are made beyond those permitted under Section 203(3). Fourth, as discussed elsewhere in this testimony, the Department is currently proposed in a form where essentially all the incentives are in the direction of sharing sensitive personal information widely, in hopes that the sharing may incrementally help detect or prevent terrorist action. These incentives are likely to push in the direction of expanding what counts as "authorized" use and "performance of officials duties" over time.

Taking these factors together, Section 203(3) becomes a recipe for essentially unrestricted sharing of sensitive personal information, with no apparent incentives to limit such sharing and no remedies if the sharing goes too far. My recommendation is that language be added to the text that says that the Secretary "shall ensure that any material received pursuant to this section be used or disclosed in order to minimize the risk of harm to individuals from inappropriate use or disclosure of personally identified information."

Because this sort of language will not in itself create remedies or change the incentive structure facing the Department, additional steps are likely warranted to assure careful handling of sensitive personal information. One approach to create accountability is given by H.R. 4561, the "Federal Agency Protection of Privacy Act," which has been introduced by Chairman Barr and supported by the Ranking Member Representative Watt, as well as by a considerable number of other Members of Congress. I support the use of privacy impact assessments, which are the central provision of H.R. 4561, and hope that they will become standard practice within a Department of Homeland Security and in other settings where there is significant use or disclosure of personally identifiable information.

Other parts of this testimony discuss ways to create accountability for the handling of personally identifiable information through actions by the Office of Management and Budget. This role for OMB might be spelled out in Section 203 or elsewhere in the bill.

Section 204, Information Voluntarily Provided. Section 204 of the bill states that "information provided voluntarily by non-Federal entities or individuals that relates to infrastructure vulnerabilities or other vulnerabilities to terrorism and is or has been in the possession of the Department shall not be subject to section 552 of title 5, United States Code." This provision would create an enormous and unjustified exception to the Freedom of Information Act (FOIA), and should be deleted from the bill.

The question of how, if at all, to craft a FOIA exception for critical infrastructure protection information has been the subject of heated debate for the past several years. I worked on this issue while serving in OMB, and have followed the debate in the time since. The text of Section 204 reads like the fantasy of one fringe of the debate—the fringe most dedicated to limiting disclosure of information to the public. For instance, information that would clearly be open to the public through FOIA requests to other Federal agencies would be hidden away if the Department happened to receive it. The secrecy would be permanent. There are no procedural limits or review procedures for whether the benefits of releasing the data outweigh the risks.

The broad scope of the “relates to” language in the text deserves particular attention. Many Members of Congress will recognize that this same “relates to” language has been at the heart of the ongoing debates about a Patients’ Bill of Rights. In that setting, application of state law remedies has been preempted in many instances because the state laws “relate to” ERISA benefits. Under the current proposal, FOIA would no longer apply to “information that *relates* to infrastructure vulnerabilities or other vulnerabilities to terrorism.” The scope of this FOIA exception is almost unimaginably vast.

The text of Section 204 is troubling not only because its substance is so extreme compared to the extensive debate that has already occurred on this topic, in both Houses of Congress. It is troubling as well because of the apparently slipshod manner in which such an important topic was inserted into the Homeland Security bill. Inclusion of this extreme text, without any of the nuance that many federal offices have gained during previous rounds of discussions on the issues, suggests one of two possibilities: Either the text was inserted without the benefit of learning from the experts in the Executive Branch on the subject, or else those with expertise were simply overruled by the drafters. It would be useful to learn, for instance, what role the OMB Office of Information and Regulatory Affairs, the Commerce Department Critical Infrastructure Assurance Office, and the FOIA office in the Department of Justice played in the vetting of this most amazing legislative language.

My recommendation is that Section 204 be deleted in its entirety.

CONCLUSION.

In conclusion, I thank the Committee for the opportunity to testify and present my views on these issues. Today, less than a year after the horrific events at the World Trade Center and the Pentagon, there is likely no issue on the national agenda more important than deciding how we will change practices within our borders to assure both security and the other important values that define our Nation. As an academic who has studied the history of government institutions, I wonder whether the War on Terrorism will be as defining a mission ten, twenty, or thirty years from now, when the Department of Homeland Security will quite possibly still be governed by the charter that Congress enacts this year. You are writing the charter for an agency with unprecedented powers to keep watch on every American, powers that will endure long after this election cycle is forgotten. I commend this Committee for its careful attention to the issues in the hearing today, and I welcome any questions you may have.

Mr. BARR. Thank you very much, Professor, and I do appreciate the amount of detail that you have in your written statement, expounding on these privacy concerns. We appreciate the research you have done in that area and sharing the results with this Subcommittee. We will use that and anything else you care to submit to us.

Mr. SWIRE. Thank you, sir.

Mr. BARR. At this time, I would like to take a brief recess from the work on H.R. 5005. The witnesses are excused for a few minutes. What we are going to do, since we have a reporting quorum here at the Subcommittee, is take up the Federal Protection of the Privacy Act very briefly to report that out. So the witnesses may relax for a few minutes. And then we’ll come back—as soon as we take care of this, reporting this bill out—we’ll then come back and take care of questions.

[Recess.]

Mr. BARR. Obviously, the efficiency of the Subcommittee surprises them. It surprised me, too.

While we’re waiting for Mr. Everson, I’d like to recognize the distinguished Vice Chairman of the Subcommittee, the gentleman from Arizona, Mr. Flake, for any opening statement he might have.

Mr. FLAKE. No statement, Mr. Chairman. I just appreciate being here and listening to the testimony, and I’ll have some questions. Thank you for—

Mr. BARR. We appreciate your attendance and your leadership.

[Pause.]

Mr. BARR. The efficiency—this is a new day in terms of the efficiency of the Subcommittee on Commercial and Administrative Law. Let the world beware.

We'll now turn to questions, which will be asked in 5-minute increments by Members, alternating back and forth from one side to the other. The Chair recognizes himself for 5 minutes.

Mr. Everson, in your prepared remarks, you stated that employees of the new department would retain whistleblower protection, along with other basic rights. Although not specifically within the jurisdiction of this Subcommittee, this is an area that has generated some controversy and concern.

Where in the proposed legislation are these protections set out?

Mr. EVERSON. Mr. Chairman, if you go to the section that deals with the human resource management system, which is section 730 of the bill, it says—it's very brief—"Notwithstanding any other provision of this title, the Secretary of Homeland Security may, in regulations prescribed jointly with the Director of the Office of Personnel Management, establish and from time to time adjust a human resources management system for some or all of the organizational units of the Department of Homeland Security, which shall be flexible, contemporary"—and here are the key words—"and grounded in the public employment principles of merit and fitness."

Those are specific principles that are articulated in title 5, and we chose deliberately to place this personnel management section within title 5 in our proposal. And as you may or may not know, there are nine specifically delineated protections in title 5 in this area, and one of them is the whistleblower protection.

Mr. BARR. Should we be concerned with the use of the term "may" in line 6? That's line 6 on page 35 of the bill that I have before me. I don't know whether your language is exactly the same.

Mr. EVERSON. No, I—this is simply indicating that as—when the department takes—springs to life, everything is going to be transferred over as is, so the various systems that you have, the same rights and protections will be in place for the employees as they're coming over from Customs or APHIS or wherever. This is simply saying may in the future or at the time of creation, time of effect, make proposals to make changes along these lines. I don't think you need to be concerned about "may."

Mr. BARR. So it is the—I mean, we certainly will take, as you have also, a very close look at this language. But it is your testimony on behalf of the Administration that those full protections, whatever protections there are in current law, will be transferred in toto to the offices and the employees in the new Department of Homeland Security?

Mr. EVERSON. Absolutely. That is—that is correct.

Now, the way—you would have specific ramifications if you changed the way the hiring practice works. It's not to say that the hiring practices wouldn't be a little bit different if instead of having to pick the top—from the top three people, if you had a broader category where you could pick from a larger pool, there would be changes, of course. But that's—that has nothing to do with the nine core principles, as I said, of protection for a whistleblower or—and in terms of drawing people regardless of race or sexual orientation,

all the various issues that are out there. So, no, there won't be any changes.

Mr. BARR. Okay. In other words, absent any specific changes to existing laws or procedures regarding hiring, transfer, firing, or whatever—

Mr. EVERSON. Right.

Mr. BARR [continuing]. You know, the full panoply of rights that now are enjoyed by and adhered to employees of any of these departments will not be changed.

Mr. EVERSON. That's correct, sir.

Mr. BARR. Okay. If, in fact, any of us, when we look at this language with even more carefulness than we have and we see anything that we want to make a little bit more directive in that regard, would you object to that?

Mr. EVERSON. We'd be happy to work with the Congress on that. It's very important to us. Somehow this has been mischaracterized as an attempt to shut off these rights, and it couldn't be further from the truth. So we'd be happy to work with you.

Mr. BARR. Thank you. We appreciate that assurance very much.

Professor Swire, if you could—and, again, I appreciate your including a great deal more detail in your written testimony since we didn't have time to go into it today. But could you touch on one aspect of it that is of concern to many of us, and that is a national ID card? I notice you talk about that in your written testimony. Do you see a back door open somewhere here that would facilitate and move us further in the direction of a national identification card for U.S. citizens?

Mr. SWIRE. I said in my testimony I think that this could really shift the institutional weight of the political process in that direction. If you imagine yourself being a senior official in this new department and your job is homeland security and you're supposed to track down and keep track of every darn thing that happens inside the homeland, it's going to be awfully tempting to have biometric identifiers, very strong ID, very strong cards of a lot of sorts. And up until now, that instinct has been scattered through a lot of different parts of the Government. But now national ID will seem like a natural outgrowth, I believe, of this department's mission. And I think over time, perhaps helped by vendors who want to sell this system, perhaps helped by all the other conveniences that can come by a standard ID, we could get a bigger and bigger push, and we won't have some of the institutional roadblocks we've had up until now for that.

Mr. BARR. And I'd like unanimous consent to process for one additional minute. Thank you.

Mr. Everson, you've heard the concern, and I know you've followed testimony and proceedings in the past where we've dealt with the issue of a national ID. Does the Administration have any intent to move forward with a national ID card in any of the legislation or authorities that they're submitting here?

Mr. EVERSON. It is not specifically contemplated in terms of the proposal, but I think it's undoubtedly something that will be looked at as all various vehicles to secure the border and make our country safer need to be looked at. Clearly, though, the very real con-

cerns that this Committee has spoken to this morning need to be addressed in any consideration of that issue.

Mr. BARR. Moving to a national ID is—it's not just a procedural or a regulatory mechanism. It's very much substantive.

Mr. EVERSON. Yes.

Mr. BARR. Would it be appropriate—would you agree that if, in fact, the Administration at some point decides that it wants to move down that road in some fashion that it would be best to do so by a specific legislative proposal?

Mr. EVERSON. I'm not sure, sir, that I know all the details of the law that would govern that. I can only say to you that, clearly, any proposal of that sort would—important as it is, would clearly need to be publicly aired and very—it would engender a very real debate because of the many issues that you and your colleagues have spoken to. I'm not sure whether it would require legislation or not.

Mr. BARR. Would the Administration be opposed to any specific amendments to this piece of legislation to at least maintain the status quo currently, in other words, not use this legislation setting up the Department of Homeland Security as a vehicle to move us down that road, for example, a prohibition on any funds being used for that?

Mr. EVERSON. I'm not sure that that wouldn't carve out a very narrow area that would be inconsistent with the approach we've taken in the overall crafting of the legislation. What we've tried to do, as I indicate in the testimony, is bring things over, and intact. The approach we took in terms of constructing the department, getting to this issue of non-homeland responsibilities, was very much to say bring in the entities, and then over time if you needed to deal with the issues of perhaps transferring pieces back, as my panelists talked about, address those over time.

I would be reluctant to advise you to already carve out specific prohibitions when what we—all we've tried to do here is have a very broad statement recognizing that specifics will clearly be delineated as time goes on.

Mr. BARR. This is clearly an area that we'll have to devote some attention to.

I appreciate the indulgence of the Committee and the witnesses for additional time and at this point would recognize the distinguished Ranking Member for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

The positions of the Administration, Mr. Everson, and the positions of Professor Swire seem to be substantially at odds in a number of respects, and what I'd like to do is use this time to try to reconcile them to the extent that they are reconcilable.

Mr. EVERSON. Certainly.

Mr. WATT. And ask you and him a couple of questions, if I could.

First of all, the issue that he raises, Professor Swire raises on page 7 of his testimony, may be more semantic than real, but I think is an issue that we need to address in the mock-up of this bill; and, that is, to the extent that anti-terrorism is the primary mission of this new agency, everything else obviously becomes the secondary or tertiary or some other "ary" mission.

Do you see—is that intentional? Or is this just semantic as you see it? Is there a real substantive problem here as you see it? Or is this just something we're dealing with words on?

Mr. EVERSON. I think it's a point that needs to be considered and understood, but there was a clear feeling on the part of the Administration as we worked to develop the proposal that we wanted to have a large department accountable to the American people for having a primary mission of securing the homeland. That means that when you have a Secretary in front of you or an Under Secretary or an Assistant Secretary, they know that first and foremost they are responsible for protecting the homeland.

It does not mean in any way, shape, or form that the other areas entrusted to those officials under law will not be executed. But right now, as you know, there are over a hundred different agencies and units that are working on this, and many of them, they don't have homeland security as the primary role.

We are suggesting that that needs to be—there needs to be a tipping, if you will, of their focus so that that is being considered.

Mr. WATT. They don't have that as their primary role because it's not their primary role. I mean, FEMA's primary role is not homeland security. It is addressing natural and other disasters.

Mr. EVERSON. Yes.

Mr. WATT. I would hate to think that, for example—and, again, I'm trying to figure out the extent to which this is substantive rather than just semantic. But I would hate to think that at the height of a hurricane in this country, when the resources of the Government should be focused at dealing with the devastating impact of that hurricane, that somebody from FEMA would call anybody in the Department of Homeland Security and get a response, well, you know, that just ain't my job.

Mr. EVERSON. Sure.

Mr. WATT. Well, it's ain't my job 360 days of the year, but for those 5 that the hurricane is uppermost in people's mind, I would like to think that the hurricane would be the most important priority of this thing—not to the exclusion of terrorism. I mean, we don't want somebody to walk in the back door and engage in a terrorist attack in the middle of a hurricane either.

Mr. EVERSON. Right.

Mr. WATT. But it does seem to me that this could be reconciled simply by emphasizing the importance of all of these missions, which from time to time, day to day, hour to hour, one might have a higher priority; the other one might have a secondary priority.

Mr. EVERSON. Right. We agree entirely with that. It's just simply a question—

Mr. WATT. Finding the right words.

Mr. EVERSON. I'm sorry?

Mr. WATT. Finding the right words, then, maybe—

Mr. EVERSON. That's right. Maybe that's it. And the example you cite, it brings me to one other point, if I might indulge—if the Committee would indulge me for just a moment.

We've requested in here rather significant transfer authority for the Secretary to be able to respond to exactly what you're talking about. There may be an absolute imperative for homeland programs to be retained within Coast Guard or within Customs or

some particular unit, and there would be a likely squeeze if something happened if you weren't able to replenish resources to do just what you're talking about, serve both missions. Because if you look at our proposal, the analysis we did, budgetarily it's about \$37.5 billion is the request in 2003 for all these pieces. Only about two-thirds of it is homeland-related. So you're exactly right.

Mr. WATT. I guess bottom line, though, the question I'm asking is, if we start messing with the words in this bill, is the Administration going to go ballistic on whether we think at this moment in time the political rhetoric of anti-terrorism being the primary mission—

Mr. EVERSON. Right.

Mr. WATT [continuing]. Is the politics of that going to outweigh the practicality of what we're talking about here? Can we get this back to some realistic phraseology that takes all of these things into account as priorities?

Mr. EVERSON. I'm confident that we'd be happy to look at any language you propose there, because it goes back to the same point you made earlier about balance on the issues of privacy and everything else. Clearly, there's a balance here about the very mission, delivery of the mission and the other statutory areas. So we'd be happy to work with you on that.

Mr. WATT. I think Professor Swire wants to respond to that. I know I'm over time but—

Mr. BARR. We'd be happy to hear briefly from Professor Swire, and then we'll move on. We'll probably have time for another round of questions.

Mr. SWIRE. The name of the department will be the Department of Homeland Security. That sends a very big message. And my concern is at the level of statutory mandate of what each official is allowed to consider or supposed to consider, you don't need the primary down there. You've already got the title. You've got the message. You don't, I don't think, need to say that everything else is secondary.

Mr. LUBBERS. May I just add a word? I think there's an inevitability that there's going to be some overinclusiveness and underinclusiveness in this new department. There are some functions that are not being transferred that I wonder why they may not be. I mean, there is an agency called, for example—not to single them out, but the Defense Nuclear Facility Safety Board. It's not being transferred. And there are other agencies that you might think perhaps should be in the new department.

On the other hand, there are functions within some of these agencies, as we've discussed—horticultural functions in APHIS or boating safety in the Coast Guard or hurricane disaster relief in FEMA—that perhaps don't necessarily need to be in the new agency.

So I think maybe the answer is to try to come up with a mechanism, maybe a year down the road, if we're putting all these new functions in this new department, for a study to be transmitted to the Congress saying what things that were not put in the agency, in the new department, should be put in it and which ones should be spun off. And I think—so maybe a mechanism to sort of force

a report to the Congress somewhere down the road to think about these issues might be one way of crystallizing that issue.

Mr. BARR. Thank you, Professor.

The Vice Chairman of the Committee, the Subcommittee, the gentleman from Arizona, is recognized for 5 minutes.

Mr. FLAKE. Thank you, Mr. Chairman. Thank you for all your testimony.

Mr. Swire, you talk a lot about an officer within the new department to look at privacy, and that was a role that you served in the Clinton administration. Can you give me some concrete examples of what you were able to stop or ways you were able to intervene without divulging anything that need not be divulged? But give me some examples of where—what this officer might do?

Mr. SWIRE. Well, I promise you I was busy. My wife reports to me that I was busy during the 2 years there, sir.

One example that comes to mind that was reported in the press was something called the Federal Intrusion Detection Network—FIDNet. And as originally conceived and reported in the New York Times, this was going to be a great vacuum cleaner for data around the Internet that was going to get sent straight to the FBI.

I don't think that was ever the proposal, but by working the privacy people and the tech people and the security people together, we came up with an amended proposal that was adopted, and that was able to meet the Government computer security needs without raising all these privacy, civil liberties alarms. And that one was put into effect.

So by having someone in the room to talk about how we can watch our Government computer systems without at the same time spying on citizens, that's an example.

Another example would be cookies on Federal websites. There was a problem with the National Drug Control Office creating a database that potentially could have been used to scan which 15-year-olds did searches on the Internet for marijuana and cocaine and stuff, even though they said they weren't doing it. And we were able to work a policy for the Federal Government that's still in effect that the Government would not use these cookies to track people at Federal websites unless very good safeguards were in place.

Mr. FLAKE. Is it enough to have someone within that agency appointed by the President who, some might argue, might not want to contradict the objectives of the office? Or does this need to be somebody outside?

Mr. SWIRE. I think both are very helpful. Having someone in the inside, there can be a certain frankness of discussions, and you can look at options when they're still in a very early flexible stage within the department or within the Administration. And often we could find ways in the clearance to meet the goals of the agency or the people who are proposing a project and avoid the explosions on privacy that might otherwise have happened. That's the internal role.

An external role, by Congress through oversight, by other watchdog groups, by the press, is absolutely essential. But having someone on the inside allows you to avoid problems before they become big problems.

Mr. FLAKE. Professor Lubbers, do you have any thoughts on that as someone within the agency as opposed to someone with an oversight reporting role elsewhere that's not necessarily within? Or do you need both?

Mr. LUBBERS. Well, I think that if a presidentially appointed official in the department were assigned that responsibility, that would be a big help. And I don't know if it's necessary to do more or not. But I think if that were—if that person were instructed that that was his or her prime responsibility in the department and had a reporting responsibility to Congress on those matters, that would go a long way.

Mr. FLAKE. Back to Professor Swire for a minute. You mentioned the metaphor of a car, all accelerator, no brake. Who needs to put on the brakes? Do the brakes need to be here within the legislation or we can forget it after that? Is this the place where it has to happen? I realize you talk about some controls by having someone within, the privacy officer or what-not. But is this the place? Is it now or never?

Mr. SWIRE. No. Congress will be here next year, and the press will be here next year, and lots of people trying to do good things.

In this statute, I tried to read it very carefully and find a variety of places where you could tweak the statute, meet the worthy goals the Administration's pursuing, and still build some reassurance that this wouldn't drift into too much surveillance over time.

If we imagine this 30 years from now, when people can authorize all sorts of disclosures and have all sorts of uses, how do we keep building institutions, Congress and inside, how do we keep doing that? This statute is one chance to do some of that, and I tried to give some suggestions that I thought would be helpful.

Mr. FLAKE. I thank the Chair.

Mr. BARR. I thank the gentleman.

The gentlelady from California is recognized for 5 minutes.

Ms. WATERS. Well, thank you very much, Mr. Chairman, and to our Ranking Member, I'm very appreciative for this hearing. Despite the fact this seems like a simple, ordinary thing to do, in light of the proposed agency, still I believe a little—some of our Members are a little bit squeamish about challenging homeland security anything following this attack that we've had. And so I think it's very good for this Subcommittee to provide the leadership to look at these issues. This is very important. And I want to thank all of our witnesses for being here today.

You know, on the one hand, I recognize that there may be a need to do extraordinary things in order to prevent and respond to terrorism. But I just jealously guard my freedom and my privacy, and I'm just not—I'm just not willing to start to get flexible. It's been too hard getting some of these freedoms and some of these protections.

And so I'm very suspicious when people start to talk about flexibility and new powers that won't be abused by this President or this Administration. What people don't say is what's going to happen with the next Administration and the next Administration who was not here when we had all these lofty goals?

And so, you know, I don't agree with Mr. Barr on very much, but I kind of like him heading this Subcommittee because he is a pro-

tector of privacy and civil liberties, and that makes up for all of the other stuff he's not. [Laughter.]

And so at this Committee level, I think we have got to press hard, and I appreciate some of the recommendations here today. I have to look a little bit closer at, you know, this flexibility and start to pull out why—you know, just on procurement, for example. I don't know if you know how many years it's been to just get fairness and justice and equality in procurement. And to talk about flexibility, I know what that means. The good old boys get together and they pass around the contracts, and women, minorities, you know, just are not in the picture unless we, you know, have a little enforcement here. And the other kinds of protections against discrimination I worry about.

So I have to watch that very closely and rail against, you know, giving up those hard-fought gains. And I think it would be very important, if we're going to have this homeland security agency, to have someone who's dedicated to be the watchdog on privacy. That makes me feel a little bit more comfortable. And I think that reasonable people could all agree that that's something that would serve us all well. I mean, if we want to talk about a few checks and balances here as we also look at this flexibility, I think that would be worth having.

Let me just say this: I think I've—you know, your testimony has been very good. I particularly want to get Professor Swire to talk about tweaking the legislation, and we have to do it very quickly because, you know, we're going to mark this up. But I think we should not wait and think about what we do next year and next year and next year. You know, we're still going to have to improve it. We're going to find problems, loopholes, but we should go after it now, and we should create a record on our problems and our concerns.

So thank you all very much, and if you have a few minutes afterwards, I'd like very much to get with you.

Mr. BARR. I thank the gentlelady from California.

The gentleman from Indiana, Mr. Pence, is recognized for 5 minutes.

Mr. PENCE. I thank the Chairman and to our panelists for their testimony today. I'm particularly intrigued by some of the comments Professor Swire made, and I want to direct at least my questions to some of his prepared remarks, but I want to ask the panel to respond, if you'd be comfortable.

I also want to commend my colleagues for focusing the section 101(b)(1) debate over the use of the term "primary" and "secondary." You know, Confucius said, "When words lose their meaning, men lose their liberty." And I feel that those words, Mr. Chairman, should be etched above the debate of 5005 and would commend my colleagues on the other side of the aisle for their, what some might consider, pedantic focus on words. It is precisely about these words that our children and our grandchildren will experience either the survival or the decline of their liberties.

With that said, I wanted to ask the panel to talk about that, the debate over anti-terrorism as a primary mission of the department. Is it your understanding—and I'd just begin with Professor Swire. Is it your understanding that for FEMA and other agencies that

fall under the new DHS, that they are to understand that the mission of the Federal Emergency Management is first and foremost—according to the way this statute is currently drafted, is first and foremost anti-terrorism and secondarily would have to do with emergency management relief and hurricanes and forest fires?

Mr. SWIRE. I think a dramatic reading of the statute supports that, sir. Section 101(a), the beginning, says establish a department. Section 101(b) says the primary mission of the department is to prevent terrorist attacks, reduce the vulnerability to terrorism, and minimize damage and assist in recovery from terrorist attacks.

And then at the end of that section, after they've gone through these things, they say, oh, they remembers in (3)—101(b)(3)—the department shall also be responsible for carrying out other functions of entities transferred. We create a department. We said what it's primarily about, and any responsible official honoring congressional intent who reads that section, if that's what you enact, I think would have to say primary job one is homeland security/terrorism; everything else comes second. Or, in fact, in this statute it comes third.

Mr. PENCE. Mr. Everson?

Mr. EVERSON. I think that as we look to configure the proposal, we truly wanted to create an entity that did have as its primary mission securing the homeland, to provide that accountability, to provide that institutional presence, that coordination.

I don't think we shy away from saying that. I think that's the very centerpiece of our proposal. But I do believe that the words in section (3) that were just—point (3) that were just read indicate that we give very great importance to the other activities that will come into the department. We're not shirking those responsibilities. Those are established in law. And we will meet those responsibilities.

But as you know, across Government there are many overlapping programs and a multitude of missions that are executed within departments, be they the Department of Commerce or be they the Department of the Treasury or Interior. Any department you can drill down and see things that are grouped, and oftentimes there is one, let's say, primary mission that exists or co-exists successfully with other missions. The correct way, we think, to deal with this is on a very considered basis. We tried to craft a proposal where we would move everything in at once. We felt that the worst way to deal with it would be to sever some of those non-homeland responsibilities right at this time when you were trying to execute these very difficult challenges, but instead to look at, perhaps over time, if there were tear lines and you felt that after a period of analysis you wanted to bring something back, be it to Agriculture or Treasury or some other department, maybe that's the way you would go. But, absolutely, we expect to meet both challenges.

Mr. PENCE. Well, I want to commend to the panel and to my colleagues' attention a book entitled "Crisis and Leviathan." Two weeks after 9/11, I distributed a "Dear Colleague" letter to every Member of Congress based upon this little known book from 1978 that chronicles, Mr. Chairman, the fact that in the wake of emergencies, beginning with the Civil War, that two things have hap-

pened in American society: number one, Government has become bigger at the Federal level, and liberties have become smaller, and both of those things became permanent.

And I'm hoping as we go forward, Mr. Chairman, with these hearings and with this debate that we can make it our effort to constrain and to limit this new agency and its powers with an eye toward preventing that historic trend.

Thank you.

Mr. BARR. I thank the gentleman from Indiana.

I'd like to ask unanimous consent that the gentlelady from Texas, a Member of the full Judiciary Committee, be granted 5 minutes for questions. Without objection.

Ms. JACKSON LEE. Again, Mr. Chairman, I thank you and Mr. Watt for your leadership on this issue. Both of you have certainly been particularly eloquent and effective on these questions dealing with privacy. And I'm delighted to join this Committee and also join in cosponsorship of your legislation.

This is a difficult travail, a difficult road on which we must travel, and so I think the important parts of these hearings is to convey our sentiments back to the Administration, Mr. Everson, and as well to see how quickly we can intervene as this rolling train is speeding along. And that's what I'd like to probe today.

One, I'd like to understand whether the Administration has a position on the national ID card that was raised earlier today. And, Mr. Swire, I'd like to know, do we need to be definitive and amend the legislation in order to be assured that we express opposition, concern, however we can write the language should we be clear on a national ID card? Let me ask a series of questions, and then I'd like to have you answer.

The other thing is I have constantly quarreled with this name, "Homeland Security." I'm not sure where we pulled it from, but it has some negative connotations as it relates to South Africa. And I have been hearing Mr. Swire talk about and we all talk about when you're under Homeland Security you can't do anything but homeland security. And so I'm not sure whether or not in this time frame a name change—a National Internal Security Department, but I'd be interested in—if anyone is familiar with the negative connotation, they'll know the difficulty many of us have had with this concept of homeland, though we know semantics are not necessarily keep us from saving lives or doing the job that we have to do.

The last question is, in your testimony, Mr. Swire, on page 5, in reading it let me not capture what was said; let me capture what I think I have interest in, and that is wiretapping. I have voted in the past on issues dealing with child pornography and issues dealing with child predators, and so I want to put that on the record so I won't be inconsistent. I find that distinctive because that is a narrowly focused area and I abhor those who victimize children. Wiretapping as it relates to homeland security is so broad because what is it? What are we trying to get? Do we need some restraints as relates to wiretapping under this broad department that we have? Do we need some specific language dealing with wiretapping because it is so broad?

And my last question is this combining of civilian and military agencies such as the Coast Guard, are we getting into, again, dangerous ground by combining military and civilian, particularly as it relates to privacy? And I'd start with the Administration.

Thank you very much, Mr. Chairman, for allowing me to raise these questions, and forgive me for having a somewhat, if you will, troubled voice here. This room is at a temperature below reason, and it may be to keep us functioning on homeland security.

I will yield to the witnesses. I, again, think this is a very important—

Mr. BARR. If the gentlelady would yield?

Ms. JACKSON LEE. I'd be happy to yield to the gentleman.

Mr. BARR. We have many Waffle House restaurants in Georgia, being a Georgia corporation, and people always wonder why the temperatures in the Waffle Houses are always so cold. It's so people don't stay there too long. [Laughter.]

Ms. JACKSON LEE. And they make a big profit. And I will say if you're headquartered in Georgia, we enjoy the Waffle Houses that are in Texas. So we thank you for that.

Mr. BARR. We thank you.

Mr. EVERSON. I lived in Texas for 3 years until I came up here in 1998—or, rather, came up here last year, and I think it's just as hot here as it is in Texas.

Ms. JACKSON LEE. Well, you understand my problem then. I'm usually hitting a hundred degrees, and I'm very happy at that level.

Mr. EVERSON. Yes, of course. I understand. Let me take a couple of these points, and I'm not sure I'll satisfy you on all of them, but let me try to respond. I think there were four of them.

We don't think the issue of the Coast Guard and this military role that you speak to is any different than it was really in the Department of Transportation where you had a mix of functions within that department. That's the first point I would make.

We were very careful in crafting the proposal to make sure that the Coast Guard goes over as is. The two elements that come into the department that are not subject to any change or any of the latitude in our proposal for reorganization are the Secret Service and the Coast Guard because we see those as quite clearly distinct. So I don't think that your concerns there really need be that great.

Ms. JACKSON LEE. The only thing I would say to you is that when they come under the Homeland Security, they'll be thinking differently.

Mr. EVERSON. That gets—clearly, we think that they're a vital resource to be integrated in that border security. That is true. You're right. You're right in that regard for sure. But there's no change, again, as to how it would interact in times of war or its role in the Navy, within the Navy.

Wiretapping, this doesn't treat wiretapping at all. I understand the concerns that you raise. I think they're broader and they go to the existing legislation, the changes made in the PATRIOT Act and others, but nothing that we're doing here has any impact on that area. I understand you're trying to spot the issue for future discussion, but it is not addressed here.

The same thing with the national ID card. I indicated a few minutes ago that I think that this is something that obviously needs to be discussed at some point, as do all potential tools to increase our security. But, again, consistent with the theme that you and your colleagues on the Committee are speaking to today, the very real balancing and weighting of privacy concerns must be a part of any debate on that issue.

Finally, I'm not sure how the name got established, but I think it follows on to—basically, it follows on to the creation of the Office of Homeland Security that was established under the Executive order last October. And it certainly is not intended in any way to address or to cause confusion or send a bad message about South Africa in any way and the very real issues, the sensitivities that you talk to.

Ms. JACKSON LEE. Thank you. The Administration is not pushing a national ID card, to your knowledge?

Mr. EVERSON. No. But I do want to say that I—I haven't been sitting in the Homeland Security internal meetings. There are lots of Committees, and it may very well have looked at this issue. I just don't know. I don't want you to get the impression that no—it's never been discussed. I just don't know.

Mr. SWIRE. Do you want me to take a crack at it? On national ID in terms of things you could do in the bill, two things come to mind. A more modest language change would say that nothing in this statute creates any new authority to issue or use national ID cards. So it's clear that this statute itself is not creating anything new in that area. A stronger version mentioned in my testimony is saying no funds shall be expended, and then you describe what that would be for a required national identification card or whatever.

On wiretaps, my understanding is—I'm not aware of there being any wiretap authority here. One thing that may be different is the bigger number of people who receive the fruits of wiretaps because with the many functions and the discussions about getting raw data and various intercept data, there may be a new department that has substantial fruits of wiretaps. I'm not sure quite what to do with that.

Ms. JACKSON LEE. Thank you very much. Thank you.

Mr. BARR. We thank the gentlelady.

I just have one final question. Then I believe the Ranking Member might have one or two final questions. Then we'll submit some additional materials in writing.

Mr. Everson, one of the other Members of the Subcommittee was asking some questions about a privacy officer, and I don't think that—I know you also said the devil's in the details. I don't mean to pin you down. Whatever language we might come up with regarding the privacy officer would be acceptable, but is it correct to state that the Administration is not opposed to having a privacy officer set forward statutorily in the legislation?

Mr. EVERSON. Absolutely not. I think that the privacy is a very important function, and if you bring us a proposal, I would imagine that we would look at it very seriously.

What we've done, as you probably noticed, is we've constructed the Department a little bit differently as to officials. One of my col-

leagues on the panel made a reference to this. We have, for instance, not all Senate-confirmed officials. Within the 29, there are 29 delineated senior officials of the Department. We've left 14 of those to be nonconfirmed. That includes the general counsel, the official that was mentioned, and we did that because we want to be able to get people right on the job very quickly, and we want to have the flexibility to get them there. That doesn't mean there will be any less accountability, and certainly all the senior policy and operating officials would go through that channel of the Senate confirmation. The only counsel I would say is if you delineate or you put in a privacy officer, I would hope you not end up with some constraint as to how it would be structured within the Department.

I've found, since coming back into Government, that sometimes arbitrary solutions can be taken that don't work as well over time. I'll give you an example: the CFO Act. The CFO Act did a lot of very good things in terms of standards that have to be met, and establishing accountability. But it says, arbitrarily, that the CFO needs to report to the Secretary. That is really not honored in fact. And any time you make a very specific reporting relationship as opposed to establishing the authority and the responsibility for the function, I fear that you can—you can create a situation that just doesn't work over time.

Mr. BARR. If we were, for example, hypothetically, to propose an amendment regarding a privacy officer patterned on an Executive memorandum and an implementing OMB directive, that probably would not cause you a great deal of heartburn?

Mr. EVERSON. I'd be hard pressed to argue against that.

Mr. BARR. Thank you. The gentleman from North Carolina, the distinguished Ranking Member is recognized for any final couple of questions.

Mr. WATT. Thank you, Mr. Chairman. I'll try to be quick. I wanted to not leave the impression that I was just beating up on the Administration. I wanted to give equal time to beat up on Mr.—Professor Swire.

Mr. SWIRE. Thank you, sir.

Mr. WATT. Page 10 of your written testimony, at the bottom you talk about the Freedom of Information Act, and it's interesting, the next to the last sentence on the page, or actually the last full sentence on the page said the text of section 204 reads like the fantasy of one fringe of the debate, the fringe most dedicated to limiting disclosure of information to the public. Let me suggest that your proposal might be—that we ax this whole provision from the statute might be the other fringe of the debate, in this political context we're probably not going to get there.

So I guess my question is, you obviously looked at some ways, this being one fringe, your proposal to take this language out completely being the other end of the spectrum. Are there some ways somewhere between those two extremes that you could suggest that might enable us to reconcile again? I mean that's what I've been trying to do here, reconcile the positions that you all have been taking.

Mr. SWIRE. Yes, Congressman. One of the joys of no longer being in Government is I can use words like "fringe of the debate" more freely, but there have been extensive discussions. There was first

a Davis-Moran Bill in the House that had some serious flaws to it. This year the discussion of that issue has focused, based on the people that I've been talking to on a proposal of Senator Bennett, where there's quite a detailed proposal, and there's been many series of meetings about how to find middle ways on this topic. And myself and other people have worked on that issue—

Mr. WATT. Let me interrupt you just for a second.

Mr. SWIRE. Yes.

Mr. WATT. I'm assuming that the proposal to ax this out is a nonstarter with the Administration. Maybe I should have asked that question first. I just assumed that I needed to find some middle ground here. Am I correct in that assumption?

Mr. EVERSON. I think you're doing fine. [Laughter.]

Mr. WATT. I kind of had the sense that the Administration probably wasn't—wasn't going to be happy if we started talking about what he was proposing.

Mr. EVERSON. Absolutely.

Mr. WATT. Okay. Then I'm headed the right direction then.

Mr. SWIRE. Well, there is—I ran into the hall before this hearing today. John Tritak, who is the head of the Critical Information Assurance Office for the Department of Commerce, and he was testifying on this at another hearing right now, and he said in the hall—and I'm sure that that reflects what he's saying in the public hearing—that this language does need to be reworked substantially and that the Administration's in the process of reworking it, he said.

And so I guess the one thing I'd say there is that people who have worked on this from the Freedom of Information side I hope can be included in that—in that working through.

Mr. WATT. Mr. Lubbers, you had a recommendation and then I'll kind of bring closure to this, I think.

Mr. LUBBERS. Yes, sir, since I'm in between the two fringes here. I made a modest proposal on page 11 of my testimony to just add a phrase to the language so that it would read: "Information provided voluntarily by non-Federal entities or individuals, that"—I'm sorry—"to the extent that it relates to infrastructure vulnerabilities, shall not be subjected to section 552." That at least would allow for segregating material that related to it from the material that did not relate to it in the same document. So if you had a 100-page document the agency could not just withhold the entire document.

Mr. WATT. How does that strike you, Mr. Everson, and Professor Swire, as a compromise that might be acceptable in the House bill without getting into all of the extensive drafting that Senator Bennett is doing, that I presume might get incorporated into the Senate bill, and at least get us into a posture in conference that—I mean obviously I could offer an amendment in the markup that strikes this whole provision. I think I lose. I acknowledge that in my opening comments here.

Mr. EVERSON. Yes.

Mr. WATT. I'm trying to find some middle ground here.

Mr. EVERSON. I think that would move us closer to the middle ground, but as Professor Swire indicated, we are looking at this. This has been highlighted for us as an area where the language

can be improved upon, so we're very open to looking at the right language there. I do want to emphasize, however, that it has to be treated because, as you know, over three-quarters of the infrastructure is in private hands. We need to assure ourselves that that information which is not now in the hands of those who would try to direct our infrastructure protection gets into their hands, and we need to have some protections where appropriate without interfering with any ongoing regulatory or any other issues that would color the protection of this information where it shouldn't be protected.

Mr. WATT. Professor Swire, what do you think of the middle ground as—

Mr. SWIRE. I think that it addresses one clause of this language. There's quite a number of distinct issues and I've been in touch with, and perhaps can refer you and your staff to, people who have been working pretty much full time on this exact issue for really several months. And I think that I would encourage them to be very—the people I've been working with to be very realistic about language that meets the goals of everybody and is politically survivable, but that avoids some of these problems, and I think it takes a bunch of work, not just one or two words.

Mr. WATT. I guess my concern is we got a markup on this bill starting tomorrow, and—

Mr. SWIRE. I can call them right now when we leave, and there's people who have lived this issue.

Mr. WATT. We have got people that have been working on this for 2 years. It's not likely that I'm going to resolve it between now and tomorrow, even if Bob and I agree on it, which we probably do.

But anyway, you all have raised some wonderful issues, and I—I really appreciate you being here and I think just having this hearing and getting us focused on some aspects of this bill that need to be addressed is just vitally important, particularly given the time schedule that the bill seems to be moving on.

And I want to thank all of you for being here and sharing your wisdom with us, and hope we can continue to work in the same spirit that this conversation has been conducted today.

Thank you, Mr. Chairman.

Mr. BARR. I thank the distinguished Ranking Member.

This has been an extremely interesting and very, very productive hearing. I very much appreciate—speaking not just for myself, but for the entire membership of the Subcommittee—the three very distinguished witnesses being with us today, and in light of what the Ranking Member just said, that this is on a very, very fast track, if you all have any specific further recommendations, please try and get them to us just as quickly as possible, and we'll do the same in terms of getting any additional questions or proposals to you all to take a look at.

Thank you all again. This hearing is concluded.

[Whereupon, at 1:25 p.m., the Subcommittee was adjourned.]

