

STATEMENT OF CLARK KENT ERVIN BEFORE THE “UNITED STATES SENATE TRADE AND SECURITY FORUM” SPONSORED BY SEN. MAX BAUCUS – April 3, 2006

I was a strong opponent of the proposed acquisition by the UAE-controlled company, Dubai Ports World, of terminal operations at six key American seaports, and so I was delighted when the deal was recently scuttled. However, it is a good thing for the nation that the controversy arose because it has highlighted the urgent need both to reform the process by which such deals are considered and to enhance port and maritime security.

First, with regard to process, I would wager that until this controversy arose most Americans did not know that port terminals in this country have been operated by foreign companies for quite some time. Likewise, most Americans did not know that a secretive federal interagency group, the Committee on Foreign Investment in the United States (CFIUS), currently has the unilateral power to approve the acquisition by foreign companies of key U.S. strategic commercial assets after a mere 30-day review without being obliged so much as to notify the President or the Congress beforehand. Where the acquiring entity is a foreign government and the asset to be acquired has “national security” implications, an additional 45 day “investigation” is to be conducted. At the conclusion of the investigation, CFIUS is to make a recommendation to the President, who then has an additional 15 days to study the matter on his own and make a decision. The President must then inform Congress of what he has decided.

As we all know now, in this instance, the already unduly lax CFIUS procedures were not followed. Though the acquirer was to be a foreign government - and one with a mixed record on terrorism - and the asset to be acquired was a strategic one like port terminals, no investigation was conducted, and the committee approved the deal on its own without involving the President or notifying the Congress.

As I argued in a New York Times op-ed a few weeks ago in my judgment, certain minimum reforms must be made to the CFIUS process now that we live in an age of terror. Whenever the acquiring entity is a foreign government and the asset to be acquired is a strategic one like any element of the nation’s critical infrastructure, a full investigation must be conducted by the committee; the President should conduct his own separate review of the matter; and then Congress should have the opportunity to either ratify or overturn the President’s decision. If treaties and trade agreements are important enough to require congressional concurrence, surely the same should be true for deals that would result in the acquisition of a strategic asset by a potentially hostile foreign power.

The bill sponsored by Senator Shelby that was marked up last week is a step in the right direction, in my judgment, by *requiring* investigations when the acquiring entity is a foreign government, and by permitting agencies on the committee to extend the review period if they deem it necessary to make a sound decision as to whether to approve the transaction at issue. While Congress is not given ultimate veto power, at least

congressional leaders must be notified that a review is under way, and this will provide an opportunity for lawmakers to improve the terms of questionable deals or to scuttle them altogether before they are approved.

I myself would still give Congress the power to approve or reject such deals on the theory, again, that such deals are at least as important to the national security and welfare as are treaties and trade deals. And, I share the concern of Senators Collins and Lieberman (and their co-sponsors), who have introduced a competing bill, that keeping Treasury, rather than placing Homeland Security, in charge of the CFIUS process may continue to favor our economic interests over our security interests. Another area of dispute between the Shelby bill and the Collins-Lieberman, bill, I note, is whether “national security” is broad enough to trigger the CFIUS process when the asset to be acquired is a “critical infrastructure asset” like port terminals. In my judgment, there is no question but that port terminals nowadays have “national security” implications, so I myself do not believe that an additional explicit reference to critical infrastructure is necessary. In any event, I believe that either of these bills would be a significant contribution to strengthening the CFIUS process, which as I say, is desperately needed.

Let me add one more word about process, if I may. A little noticed story in the Associated Press a couple of weeks ago called attention to the fact that other government agencies besides CFIUS have a role to play in approving transactions that can result in foreign government’s compromising homeland security. The U.S. National Nuclear Security Administration, a component of the Energy Department, is negotiating the terms of a no-bid contract with Hutchison Whampoa, a Hong Kong conglomerate with close ties to China, under which the company’s employees would be in charge of scanning cargo for radiation in a Bahamian port before that cargo sets sail for the United States. This is the first proposed deal I am aware of whereby a foreign company with close ties to a potentially hostile foreign government would be in charge of the ultimate sensitive security related activity. Needless to say, this deal, too, should be scuttled, and a comprehensive review should be undertaken by Congress of which other government agencies may approve such questionable transactions. The fact that this deal has surfaced, to my mind, buttresses the case for centralizing the review and approval process for transactions affecting “national security” in the Department of Homeland Security, which is at least *supposed* to make security its principal concern.

As to the larger issue of port and maritime security, only about 6% of the 27,000 or so containers that enter our seaports each day are physically inspected to determine whether they contain weapons of mass destruction, other deadly weapons, or terrorists themselves. The Department of Homeland Security has consistently claimed that we should not be troubled by this low percentage because the Customs and Border Protection unit’s “targeting” efforts are so precise that we can be certain that the 94% of cargo that is not inspected is low-risk. However, studies by the DHS Office of Inspector General, the Government Accountability Office, and, just last week, the Senate Homeland Security and Governmental Affairs’ Permanent Subcommittee on Investigations, have all found the “ATS” (for “Automated Targeting System”) used by Customs to distinguish between high and low-risk shipments to be flawed.

The other program that Customs cites to comfort those who rightly believe that a 6% inspection rate is far too low is the “Container Security Initiative,” or “CSI.” The theory behind CSI is unassailable – if a container with a weapon of mass destruction inside is not inspected until it arrives at an American seaport, it might be too late. So, through CSI, Customs “pushes the border out,” by obtaining the agreement of foreign ports to inspect containers bound for the U.S. before the ships that carry them set sail.

The problem, though, is that foreign inspectors often refuse to inspect containers that we Americans deem to be high-risk. Less than a fifth of the containers that we believe should be inspected abroad – 17.5% to be precise – are in fact inspected by foreign ports. Ports in France, for example, refuse to inspect about 60% of cargo that we deem to be high-risk. Furthermore, because, as noted above, the ATS targeting system is flawed, chances are we should be requesting more inspections than the 13% worldwide that we are currently requesting.

Another program that Customs disingenuously touts as a cargo security measure is the “CTPAT” or Customs Trade Partnership Against Terrorism program. Companies in the global maritime supply chain can reduce the chances of their cargo’s being inspected by simply submitting paperwork to Customs claiming that they have rigorous security measures in place, provided they have no history of shipping deadly cargo. The problem is that the benefit of a decreased chance of inspection is extended *before* Customs investigators get around to verifying that the security measures the companies claim to have in place are in fact in place. According to the same Senate subcommittee investigation referenced above, less than a third (27%) of the companies in the program are validated beforehand.

Moreover, when cargo containers are inspected, there is no assurance that any weapons of mass destruction within them will be found because there is too little radiation detection equipment deployed here at home at our ports and abroad at CSI ports. To take one example, only 670 radiation portal monitors – that can detect radiation and pinpoint the source – of the 3,034 that are scheduled to be deployed here in the United States have been installed. At last year’s average rate of 22 per month, it will take more than three more years (until September 2009) to reach the goal. Furthermore, there are limits to the effectiveness of the equipment deployed. The thousands of pager-like personal radiation devices deployed can only alert inspectors to the presence of radiation; they cannot pinpoint the source. Radiation portal monitors can detect and pinpoint radiation, but they cannot distinguish between the deadly kind and the harmless kind that naturally occurs in, say, kitty litter, bananas, and ceramics. Radiation isotope identifier devices can detect, pinpoint, and distinguish between kinds of radiation, but even they failed some of the tests of the American National Standards Institute that is responsible for setting standards and determining whether radiation detection equipment meets it. The department’s Domestic Nuclear Detection Office should move with dispatch to develop and deploy at home and abroad equipment that meets ANSI standards.

In short, then, our ports and maritime sector are dangerously insecure. All experts agree that the likeliest way for a weapon of mass destruction to be sneaked into the country is in a cargo container through a seaport. Urgent steps, then, must be taken to enhance port and maritime security, as there is not a moment to waste.