

**NOMINATION OF
SETH HARRIS AND M. PATRICIA SMITH**

HEARING
OF THE
**COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS**
UNITED STATES SENATE
ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

NOMINATION OF SETH HARRIS TO BE DEPUTY SECRETARY OF THE DE-
PARTMENT OF LABOR AND M. PATRICIA SMITH FOR SOLICITOR OF
THE DEPARTMENT OF LABOR

MAY 7, 2009

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NOMINATION OF SETH HARRIS AND M. PATRICIA SMITH

THURSDAY, MAY 7, 2009

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met at 10:03 a.m., in room SD-430, Dirksen Senate Office Building, Hon. Patty Murray presiding.

Present: Senators Murray, Casey, Merkley, and Burr.

OPENING STATEMENT OF SENATOR MURRAY

Senator MURRAY. Good morning. This hearing of the Senate Health, Education, Labor, and Pensions Committee will come to order.

First of all, I would like to extend my warmest wishes to our chairman, Senator Kennedy who, as we all know, continues to be a very great champion for America's workers. We all wish him the best.

The Department of Labor is charged with a critical mission in our Nation's government that includes fostering and promoting the welfare of America's workers by improving their working conditions, advancing their opportunities for profitable employment, protecting their retirement and health care benefits, helping employers find workers, and strengthening free collective bargaining.

Few things are more important during these challenging economic times than making sure that the agency charged with serving and protecting workers has the leadership it needs to make that mission a reality.

So I am pleased today to have two nominees with us who have answered the call to service and are committed to the task at hand and are highly qualified for the job.

Seth Harris has been a professor of law at the New York Law School since 2000 and is currently serving as a consultant at the Department of Labor. Seth helped lead the Obama administration's Agency Review Working Group on Education, Labor, and Transportation, and he has experience at the Department.

From 1993 to 2000, he served in several roles at Labor, including Acting Assistant Secretary for Policy, Deputy Assistant Secretary for Policy, and senior advisor to both Secretary Alexis Herman and Robert Reich.

M. Patricia Smith has been the Commissioner of New York State Department of Labor since 2007. She is co-chair of New York

State's Economic Security Sub-cabinet, and oversees 3,700 employees in 80 offices with an annual budget of \$4 billion.

For the previous 20 years, Tricia worked in the Labor Bureau of the New York Attorney General's Office, and she served on the Obama administration's transition review team for the Department of Labor.

As chair of the Subcommittee on Employment and Workplace Safety, I know the challenges that America's workers are facing. So I am pleased that the Obama administration has made it clear that working families will once again be a top priority in this country. And that commitment is demonstrated by the quality of nominees before us today.

If confirmed as Deputy Secretary, Seth will face the tremendous challenge of allocating and managing the Department's resources effectively in order to enforce the laws under the agency's charge. He will also be charged with connecting the efforts across Labor into a larger strategic plan to accomplish the Department's mission.

If confirmed as the Department's top legal counsel, Tricia will have the profound responsibility of enforcing more than 180 Federal laws and managing more than 450 attorneys nationwide. She will be responsible for defending the Department in litigation, as well as providing legal advice and guidance on nearly every policy, legislative, regulatory, and enforcement initiative of the Department. Most importantly, she will be responsible for defending the rights of workers when they are not able to speak for themselves.

Both of you have a big job ahead of you, if you are confirmed, and working families need the Department to be the advocate Congress intended it to be, a charge that I know neither of you takes lightly.

So I want to thank both of you for taking the time to be here at this hearing today and to take on these responsibilities. I have met both of you. I am confident that you are highly qualified for the positions you have been nominated for, and I hope that this committee can move the process quickly so that both of you can get to work. America's working families need a fully functioning Department of Labor now more than ever. So I, again, thank you both for taking on this responsibility and being here.

I will turn it over for an opening remark from our colleague, Senator Burr.

PREPARED STATEMENT OF SENATOR MURRAY

This hearing of the Senate Health, Education, Labor, and Pensions Committee will come to order.

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As Chair of the Subcommittee on Employment and Workplace Safety, I know the challenges that America's workers are facing right now. And, I know the previous Administration's track record on putting workers first is less than stellar. So, I'm pleased that the Obama administration has made it clear that working families will once again be a top priority in this country. And that commitment is demonstrated by the quality of nominees before us today.

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Both of you have a big job ahead of you if confirmed. And working families need the Department to be the advocate Congress intended it to be—a charge that I know neither of you takes lightly.

I want to thank both of you for taking the time to speak with me. After our conversations, I am confident that both of you are highly qualified for the positions you have been nominated for. And I encourage my colleagues to move through this process quickly, so you can get to work.

America's working families need a fully functioning Department of Labor more than ever. So, thank you for being here.

Before we hear from our witnesses, I'll turn to Senator Burr for his opening statement.

STATEMENT OF SENATOR BURR

Senator BURR. I thank you, Madam Chairman. I welcome our witnesses today and look forward to their confirmation in the Senate. I will try not to hold my colleagues up who are here for an important reason, and that is to introduce them. But I do have an extended opening statement.

I want to thank Senator Murray and thank Seth Harris and Patricia Smith, our witnesses today. They have been nominated to important positions in the Department of Labor. At a time of economic upheaval, we need a Labor Department that helps inspire the confidence that will allow America's economy to recover.

Unfortunately, there are some early signs from the Administration that are troubling in terms of following the normal rulemaking procedures, and they concern me.

Specifically, I am concerned by the economically damaging decision of the Department to reverse the recent improvements made to the H-2A temporary worker program. This decision is causing great distress to farmers across the country, including my State of North Carolina. I have written to Secretary Solis about the issue. However, her response was not reassuring. In fact, the letter was, in all candor, a nonanswer.

Let me lay out the background here for my colleagues. On March 17, the Labor Department suspended the implementation of new regulations that were designed to improve the H-2A temporary worker program. The new rules were implemented on January 17, 2009 and were a collaborative effort that progressed through the traditional rulemaking process.

The newly promulgated rules have been under development with input of Members of Congress on both sides of the aisle for over a year and are critical to the economic well-being of the agribusiness community in North Carolina and the entire United States. Farmers in my State have already made decisions about the 2009 growing season, taken out loans, made crop protection decisions, bought fertilizer and seed, rented land, made equipment decisions, and entered into marketing agreements. Many of these budgetary decisions were made on the Department of Labor's estimates regarding their expected labor costs to hire a legal workforce to man their fields.

Changing the rules at this point without going through the traditional rulemaking process severely impacts farming operations and the financial stability of the agribusiness community. For example, according to North Carolina's Agribusiness Council, under this proposal a North Carolina farmer who employs 45 H-2A workers will have an added and unexpected expense to his budget this year of approximately \$250,000. Given that farmers are in the business of growing commodities and have no way to increase the price of their product, they will have to make it up through tough decisions in extremely tough economic times. It is very important that many farmers in my State and other States throughout the Nation will be forced to suspend their operations for the entire year or longer as a result of an arbitrary agency decision.

I am troubled by the lack of information that was provided to Congress and to my constituents about why this swift decision was made. I asked the Secretary of Labor for a detailed explanation of why she planned to suspend the newly implemented regulations that went through the extensive traditional rulemaking process, with contributions from various stakeholders as well as bipartisan Members of Congress.

Mr. Harris is a nominee to a chief policy position at DOL. I want to explore this issue with you during the questions.

The Secretary's letter stating that the Department cannot comment on the H-2A regulations because of pending legal challenges is difficult to accept. The Department and other agencies frequently comment on regulations that are the subject of litigation.

The Administration lays out in its letter, and I quote, "evidence emerged that the Department of Labor and State workforce agencies lack sufficient resources to adequately implement the new rule." In fact, the final rule dramatically streamlined the H-2A application process for the Department and State workforce agencies, and some State workforce agencies actually opposed the suspension. It is difficult to understand how it can be said that agencies that were able to operate under the previous rule and which were presumably able to operate if the final rule were suspended would not be able to implement a rule that involved less work for agencies and was more streamlined.

As you know, the Department of Labor received more than \$80 million in the stimulus package for various programs and functions, including oversight of existing worker laws. The language also gave the Department of Labor the discretion to transfer any or all of these moneys to the Employment and Training Administration which governs the H-2A program. In addition, the omnibus spending bill provided \$82.6 million for migrant and seasonal worker programs. Both funding bills passed before the rule was suspended. To claim that there was not sufficient money is disingenuous.

While we appreciate the expressed concerns about the economic recession and its impact on employers and employees, suspending a rule that farmers have justifiably relied on to make their hiring, planning, pricing, and other crucial decisions for the 2009 season has not been helpful. Creating regulatory chaos among farmers does not help farm workers. If the agricultural industry suffers because of this arbitrary decision, then American and guest workers will suffer lost job opportunities.

In addition, increases in food costs that will result from these higher legal and labor costs that the Department is now imposing on farmers will adversely affect all Americans, especially those of limited means.

The weakness of the Department's arguments concern us greatly as it leads us to believe that the Department has made an arbitrary decision to disregard the public rulemaking process purely to change with the views of the new Administration. In fact, our staffs have been told that because the improvements were implemented 3 days before the new Administration took office, that it was the prerogative of the new Administration to change them.

The assertion has also been made that the 10-day comment period was acceptable because it was considered to be a simple decision to suspend implementation of a regulation.

In addition, the Secretary's letter uses the pretense that the Department is reviewing the comments received by stakeholders. However, the day before the letter was sent, the Department submitted to the Office of Management and Budget a final rule on the suspension. This indicates to us that the Department has made up its mind contrary to the Secretary's letter to me. She is no longer considering these comments, which we were told largely opposed the suspension.

Mr. Harris, the collective efforts of the American people to produce food should not be undermined by a mere change in Administrations. The improvements made to the H-2A program were the product of 18 months of work and collaboration in a bipartisan fashion through a public comment period and enjoyed the support of members on both sides of the aisle.

That is because agricultural policy is not simply a matter of politics. It is a complex mixture of regional views, urban versus rural dynamics, environmental concerns, and many other factors. Due to this complexity, regulatory decisions made on agricultural matters are best made through a public rulemaking process that includes, not excludes, the view of stakeholders.

Mr. Harris, I look forward to hearing your views on this matter and your read on why the Department is unable to carry out its responsibilities under the new regulations and why it decided to act outside the normal rulemaking process with little to no consultation with interested or impacted parties on this.

Madam Chairman, I thank you for the available time to make my opening comments, and I yield the floor.

Senator MURRAY. Thank you very much, Senator Burr.

We have two of our colleagues who have joined our committee today to introduce their home State friends. Senator Lautenberg, if you would like to do your opening remarks and then Senator Schumer.

STATEMENT OF SENATOR LAUTENBERG

Senator LAUTENBERG. Thank you very much, Madam Chairman, and thank you, Senator Burr, for being here.

This is a wonderful opportunity when we have someone with the qualifications of Seth Harris, a New Jersey resident, a dedicated public servant. He served on a high post in the Clinton administration, academically well-qualified, also practiced law. So he has seen it from all aspects. He is President Obama's nominee to become our country's next Deputy Secretary at the Department of Labor.

There is no more important concern that we have than what happens with the working public. Just yesterday, the statistics were released that indicated that there was a slowing down of the number of cases that would be applying for unemployment insurance.

And by the way, forgive me for the moment, but that statistical base comes from a company called ADP. It is a company I was the founder of, and it has surpassed the Bureau of Labor Statistics for accuracy and timeliness.

[Laughter.]

Senator SCHUMER. Not after these two nominees.

Senator LAUTENBERG. I have no pecuniary interest.

[Laughter.]

The members of this committee are acutely aware that we are struggling with the most severe economic crisis since the Great Depression. Back home in our State of New Jersey, Mr. Harris and I have seen the effects of this crisis firsthand. The unemployment rate in New Jersey is the highest it has been in 15 years, and those men and women who still have jobs are often working longer, getting less for their labor. That means less money to pay for necessities, while the bills are piling up and collection agencies are calling.

It also has a terrible effect on the attitude and on the feeling of safety that families have. It is a depressing moment, and we need all the work that we can get to help allay this problem for them and get them back into jobs. In these tough times, the work of the Department of Labor is critical and consequential. It helps workers find jobs. It helps employers find workers. And while they seek a job, unemployment insurance is a lifesaver. It monitors working conditions for people on the job. It makes sure that people get the benefits, labor rights, and retirement that they have earned.

And if confirmed, Mr. Harris would be directly responsible for helping to meet those goals. He would be the second highest ranking official in the Department and would oversee its day-to-day operation.

Now, based on his years of expertise, his previous service at the Department of Labor, I believe that he is exactly the right person at the right time. And during the Clinton administration, Mr. Harris served as counselor to the Secretary of Labor and as Acting Assistant Secretary of Labor for Policy. He joined New York Law School's faculty in 2000, and today he is not only a professor, but Director of Labor and Employment Law Programs. Mr. Harris also has a distinguished educational background, receiving his bachelor's degree from Cornell University's School of Industrial and Labor Relations, his law degree from the NYU School of Law.

David Harris knows what we need to protect our Nation's greatest asset, our workforce, and I believe that he uniquely possesses the skills and leadership ability to get that job done. I am proud to support his nomination, which I hope will be favorably considered very shortly.

Thank you.

Senator MURRAY. Thank you very much, Senator Lautenberg.

Now we will turn to Senator Schumer. I note that Congresswoman Louise Slaughter was here a moment ago in support of Ms. Smith as well. Senator Schumer, we will turn to you for an opening statement.

STATEMENT OF SENATOR SCHUMER

Senator SCHUMER. Thank you. I want to thank you for inviting me, Madam Chairwoman, and thank everybody for being here.

It is my honor to introduce Patricia Smith, not only a fellow New Yorker, but I have just learned she lives three blocks away from me in Brooklyn. So she is a fellow Brooklynite.

[Laughter.]

But there are probably about 10,000 between her house and my house. So we do not know each other all that well.

Tricia is a dynamic and accomplished public servant, and I am delighted to support her nomination to be Solicitor of the U.S. Department of Labor. She is a great fit for this position. She has devoted her life's work to advocating for the little guy. And as the Department's top lawyer, she will continue to vigorously protect and defend our Nation's workers.

She earned her stripe in the New York State Attorney General's Office where she was head of the Labor Bureau, and over the course of over 20 years there, she developed a system of active labor law enforcement that has become the model for Attorneys General across the country. She even came to Washington, climbed those daunting steps, and argued two cases before the U.S. Supreme Court, and she won them both, like a true Brooklynite.

[Laughter.]

Not the Dodgers, but others.

[Laughter.]

Or rather, I should say, she did not win. The workers won since both cases involved protecting employee pensions.

In 2007, because of her impressive work in the AG's Office, she was tapped to become Commissioner of the Department of Labor, and over the course of her tenure as Commissioner, she has proven to be a real policy innovator. Just last month, Tricia established a much-praised program to assist the unemployed with gas and public transportation costs associated with looking for work. She has established a Bureau of Immigrant Workers Rights to protect this particularly vulnerable group from exploitation. And time and time again, she has helped ensure that employers compete on a level playing field by going after businesses that violate minimum wage and overtime laws.

From the moment she graduated from New York University Law School 32 years ago, she has been a crusader for workers rights. It is clear to me she has the experience, the moxie, and the heart necessary to excel as Labor Solicitor. I encourage the committee to approve this nomination with the certitude that Commissioner Smith's credentials merit. And I thank you, Madam Chair, for the honor of introducing her.

Senator MURRAY. Thank you very much, Senator Schumer.

With that, we are going to move to both of our nominees today. We are going to start with Mr. Harris. Mr. Harris, I understand you have some family members who are here to support you as well. If you want to take a minute before you do your statement to introduce them to us.

Mr. HARRIS. Thanks. I actually have so many, I am just going to do my immediate family because it would take the rest of the hearing time. Thank you very much, Madam Chair.

Let me start with the matriarch of our family, my mom, Martha Harris; the rock of our family and the love of my life, my wife Karen. Right behind me is my oldest son Jonathan, and here is my youngest son Daniel. They were the happiest to find out there was going to be a hearing because they really wanted to meet a real-live Senator.

[Laughter.]

Senator MURRAY. Well, there you go.

Mr. HARRIS. Thank you very much, Madam Chair.

Senator MURRAY. Well, thank you and thank you to all of your family for the sacrifice they are making as well.

Mr. Harris, we will start with you.

STATEMENT OF SETH HARRIS OF MONTCLAIR, NJ, PROFESSOR AND DIRECTOR OF LABOR & EMPLOYMENT LAW PROGRAMS, NEW YORK LAW SCHOOL

Mr. HARRIS. Thank you, Madam Chair, Senator Burr, and distinguished members of the committee, for inviting me to discuss my nomination to be the Deputy Secretary of Labor.

Before we begin, I would like to join the Chair in paying a special tribute to Chairman Kennedy. His presence is felt today even though he is not participating in the hearing. I look forward, if confirmed, to renewing a close working relationship with him and working closely with all the members of the committee.

Madam Chair, I am humbled to be sitting before you today. My grandparents fled the Czar's tyranny and deadly anti-semitism to seek opportunity in this country, the opportunity to live the American dream. Through hard work, the support of their communities, the power of their unions, and well-timed assistance from their government, my grandparents built a life in the new world that gave my parents a chance at a secure place in the American middle class. They could not have imagined that their sacrifices and struggles would 1 day allow their grandson to stand at the threshold of high government office.

I am a grandchild of immigrants and a child of the middle class. My parents were public school teachers. My dad taught and wrote about history. When he died, the headline of his obituary read, "Jonathan Harris, Fought Racism." I hope that 1 day my service can be summed up as simply and elegantly.

My mom was a school librarian, and today at the age of 85, she still works in a public library near her home on Long Island. She is still giving back to her community, and I am very proud of her.

Every American child should have the same chances my parents provided to my brother and me: a great education, a secure home, reliable health care, strong values, a welcoming community, and a family's loving support. And every American parent should be able to provide for their families and leave their children something more than they were given. My parents did that for me. My wife Karen and I are doing our best for Jonathan and Daniel.

But today, parents across America are wondering what they will be able to leave to their children. Their homes are being foreclosed. Their jobs are disappearing, along with their health insurance. Decades of stagnant wages have left them with debts they cannot repay. Retirement for themselves and college for their children have moved out of reach. For too many of these parents, for too many working Americans, the American dream is slipping away.

If I am confirmed, Madam Chair, I will work hard every day for these families. My simple goal will be to help the President and the Secretary to serve those workers who are struggling to secure their place and their children's place in the middle class. I will dedicate myself to making that American dream into a reality.

The President and Secretary Solis will define the Labor Department's agenda. If confirmed, my role will be to implement that agenda. I view the Deputy Secretary as the chief operating officer of the Labor Department. And if I am confirmed, my job will be to manage the Department to meet the Administration's goals consistent with the President's and the Secretary's commitment to open government, responsible stewardship of the taxpayers' money, and broadly inclusive citizen engagement.

One important part of my job will be to assure a collegial and cooperative relationship with the Department and the members of this committee, and if I am confirmed, I will do my best to lead by example.

I would like to briefly mention five priorities that I would pursue as Deputy Secretary, and perhaps we will have a chance to explore them more fully in my answers to your questions.

First, if I am confirmed, I intend to continue the Labor Department's longstanding commitment to strategic planning.

Second, if confirmed, I will bring a strong commitment to accountability to the Department, accountability by clearly defining performance goals and measures, but also by inviting public examination. Open Government is not just a slogan or a policy position. It is a powerful management tool.

Third, I believe the Labor Department must welcome working people and other stakeholders into its decisionmaking processes, as well as its programs. Americans should not need a lobbyist to have their voices heard in the Labor Department. This includes building constructive, problem-solving relationships with the unions that represent the Labor Department's employees.

Fourth, if confirmed, I will work with the Secretary, the Office of Management and Budget, the members of this committee, and the members of the Appropriations Committees to produce departmental budgets that serve the Department's mission as effectively and economically as possible.

And finally, if I am confirmed, I hope to help the Secretary build a management structure and a working environment that foster innovation, collaboration, creativity, and problem-solving.

Madam Chair, thank you again for inviting me to testify before the committee today and I look forward to the committee's questions.

[The prepared statement of Mr. Harris follows:]

PREPARED STATEMENT OF SETH HARRIS

Thank you, Madam Chair, Senator Enzi, and members of the committee for inviting me to share my views about the Labor Department and the role of the Deputy Secretary of Labor.

Before we begin, I would like to pay special tribute to Chairman Kennedy. His presence is felt today even though he is not participating in this hearing. I look forward, if confirmed, to renewing a close working relationship with him and all of this committee's members.

Madam Chair, I am humbled to be sitting before you today. My grandparents fled the Czar's tyranny and deadly anti-semitism to seek opportunity in this country—the opportunity to live the American Dream. Through hard work, the support of their communities, the power of their unions, and well-timed assistance from their government, my grandparents built a life in the New World that gave my parents a chance at a secure place in the American middle class. These working class Eastern European immigrants could not have imagined that their sacrifices and strug-

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One important part of my job will be to assure a collegial and cooperative relationship between the department and the members of this committee. If I am confirmed, I will do my best to lead by example.

I would like to briefly highlight five priorities that I would pursue as the Deputy Secretary.

First, if I am confirmed, I intend to continue the Labor Department's longstanding commitment to strategic planning. I began work in the Labor Department's Office of the Assistant Secretary for Policy not long after the Government Performance and Results Act (GPRA) was enacted in 1993. I also worked directly for Secretary Herman in 1997 when the department undertook an extensive strategic planning effort pursuant to GPRA. I look forward, if confirmed, to re-engaging in the Labor Department's GPRA strategic planning process, consulting with this committee, other Members of Congress, and stakeholders, and working under the Secretary's direction with the Secretary's management team on the department's mission, performance goals, and performance measures.

Second, if confirmed, I will bring a strong commitment to accountability to the Deputy Secretary's office. Employers, pension and welfare plans, and other entities regulated by the Labor Department must be held accountable when they fail to comply with the law. The department's grantees and contractors must meet their contractual and other obligations. The Labor Department's staff and agencies, including their highest ranking leaders, also must be held responsible for their performance. This commitment to accountability is inextricably bound up with clear defining performance goals and measures in the strategic planning process and beyond. But I am convinced that another important tool for holding the department accountable is to expose our department's performance, as well as the behavior of the communities regulated by the department, to public examination. Open government is not just a slogan or a policy position. It is a powerful management tool. If I am confirmed, I look forward to making it a regular part of how the Labor Department does business.

Third, and building on the theme of open government, I believe the Labor Department must welcome working people into its decisionmaking processes as well as its programs. Americans shouldn't need a lobbyist to have their voices heard in the Labor Department. And they should not have to be part of a traditional stakeholder group before their concerns are taken seriously. All of the department's stakeholders should be welcomed, but I believe the Labor Department must do more to reach out. Using new information technologies and an increasingly diverse workforce with con-

nections to American workers of every type, the Labor Department should be the people's department.

Let me hasten to add that inclusive decisionmaking necessarily involves building constructive, problem-solving relationships with the unions that represent the Labor Department's employees. If I am confirmed, I expect to play an important role in that process. I do not mean that the answer to every union demand will be "yes." But answering "no" will not mean that collective bargaining has failed. Like any human relationship, collective bargaining can be difficult on occasion. Nonetheless, I consider collective bargaining to be a necessary part of American democracy and I agree with the President that unions are an essential bulwark of the middle class. If I am confirmed to be the Labor Department's senior manager, I expect to live that value, even when it is difficult.

Fourth, if confirmed, I will work with the Secretary, the Office of Management and Budget, and the members of this committee and the appropriations committees to produce departmental budgets that serve the department's mission effectively and economically as possible. Budgeting involves hard choices. The Labor Department must creatively leverage its limited human and capital assets to achieve the best possible outcomes for America's workers. But the department's resources must match the department's mission. If we expect safer and healthier workplaces, we must invest in OSHA compliance officers and build OSHA's standards capacity. If we expect out-of-school youth, workers with disabilities, and other disadvantaged workers to succeed in the labor market over the long term, we must fund the basic skills training, job training, and supportive services they need to succeed. If we expect military servicemembers to transition into middle-class civilian jobs, then we must assure they get credentials, transition assistance, and placement services.

Finally, if I am confirmed, I hope to help the Secretary build a management structure and working environment that foster innovation, collaboration, creativity, and problem solving. We have not heard every good idea. We have not yet generated solutions to every conundrum. And we have not completed the list of every person who can contribute to the department's success. Ultimately, there can be only one final decisionmaker in the Labor Department and that is the Secretary of Labor. But Labor Department staff at every level and from every region can help the Secretary arrive at the best possible decision by providing her with the fullest possible information and the broadest range of ideas from which she can choose. It is management's task to build processes that make that happen. It is a task that I view as essential to moving the Labor Department into the future.

Madam Chair, thank you again for inviting me to testify before the committee today. I look forward to your questions and the beginning of a long lasting dialogue with this committee.

Senator MURRAY. Thank you very much, Mr. Harris.

We will turn to Ms. Smith. I understand you have some family members as well in the audience, and if you would like to begin by introducing them to us, we would appreciate it.

Ms. SMITH. Thank you, Senator Murray. First I would like to introduce my parents, Mary and Perry Smith. And then I have a large extended family and only the lawyer contingent came. I would like to introduce my sister, Kathleen Delatch, and my niece Liz, both of whom are attorneys, and finally, unsurprising to me, my cousin, Charles Smith, who says he is my greatest fan and comes every time I come to Washington, is also here.

Senator MURRAY. Well, we welcome all of you, and thank you for being here.

STATEMENT OF M. PATRICIA SMITH OF ALBANY, NY, COMMISSIONER OF LABOR, NEW YORK STATE LABOR DEPARTMENT

Ms. SMITH. Thank you, Madam Chair, Senator Burr, and distinguished members of this committee. I am honored to appear before you today as you consider my nomination as the Solicitor of Labor. I want to thank President Obama for nominating me and Secretary Solis for recommending me. If confirmed, I look forward to serving

the American people and assisting the Labor Department in improving the opportunities for America's working families.

I have spent my entire career in public service. I spent 10 years at federally funded legal services programs. I then spent 20 years in the Labor Bureau of the New York Attorney General's Office. I served at the pleasure of both Democratic and Republican Attorneys General, and I represented commissioners of Labor who were appointed by both Democratic and Republican Governors.

At the Attorney General's Office, I represented the New York State Labor Department in litigation, primarily involving New York's little Davis-Bacon Act, Fair Labor Standards Act, Public Employee Health and Safety Act, unemployment insurance law, and Apprentice Training Program. I represented Governor Pataki and the Health Department in matters involving ERISA preemption before the U.S. Supreme Court.

During the 8 years I served as Chief of the Labor Bureau, I opened many investigations and cases involving low-wage workers. The Labor Bureau also prosecuted contractors who were stealing taxpayer dollars on public construction projects by falsely claiming to be paying the prevailing wage. I took those cases because I believe that government must assist those who are least able to assist themselves. I also wanted to assist law-abiding employers who were at an economic disadvantage when their competitors are not complying with minimum labor standards.

Recognizing that employers are not always aware of all their legal obligations, major enforcement initiatives were paired with Office of Compliance training. And believing that enforcement of the labor law should result in better jobs, not fewer jobs, I worked with employers who did owe back wages to enter into fair and reasonable payment plans.

For the last 2 years, I have had the privilege of serving as New York's Commissioner of Labor. I brought my philosophy of proactive enforcement, balanced with compliance assistance, to that position. For example, we took proactive enforcement actions in the car wash industry in New York where we found a 45 percent non-compliance rate statewide and 78 percent in New York City. In the racetrack industry, we found a noncompliance rate of 70 percent. In each of those cases, we followed up with an invitation to every car wash and every horse trainer in New York State to come to training sessions geared to their industry.

As the head of the Mis-classified Worker Task Force, which was the first of its kind in the country, I worked with other State agencies to address the issue of employee misclassification. In 18 months, we identified over \$157 million in unreported payroll to over 12,000 New Yorkers.

I also worked creatively to find ways to train, retrain, and attract a skilled workforce to meet the needs of New York businesses. Our menu of business services was enhanced, including providing technical assistance in new areas such as layoff aversion and expanding existing areas.

I directed my business service staff to aggressively promote labor market and talent pool information. This critical information, along with information on grants and tax credits and no-cost department

services such as human resources and on-site OSHA consultation programs, became vital to new and small businesses in New York.

Our ongoing communication with the business community helped us respond to the workforce needs of existing and emerging firms in New York. We refocused our WIA-funded programs on strategic industry clusters, and since the outset of this economic crisis, I have aggressively promoted the shared work program which averts layoffs by reducing the hours of workers and allows them to collect some unemployment insurance.

If confirmed, I will bring my experience working with both the worker and the employer communities to the Solicitor's Office. The work of that office is critical to the Department's mission. The various agencies and departments within the Labor Department cannot by themselves secure full compliance with the law. They must have the full backing and the cooperation of the attorneys in the Solicitor's Office to prosecute violations.

I believe that my combined experience as Commissioner of Labor and as an Assistant Attorney General prepare me well to serve as the Solicitor. If confirmed, I will do my best to promote and support the President's and Secretary Solis' agenda. As always, resources allocated to the mission of the Department are an issue. Therefore, I believe we must work harder and smarter with the resources that are already given to us. And if confirmed as Solicitor, I intend to work much more closely with the client agencies to make sure that the resources given to the Department are leveraged to their most efficient and their most strategic use.

My experience has taught me that when executive agencies work together on common goals, that we can accomplish those goals with fewer resources, and I hope to work with other executive agencies.

And finally, during my tenure as Commissioner of Labor, I had very good working relations with all the stakeholders and the New York Legislature, including both sides of the aisle. And if confirmed as Solicitor, I will endeavor to have the same productive and cooperative relationship with all the stakeholders who are impacted by the Solicitor's Office and with the members of this committee.

Thank you.

[The prepared statement of Ms. Smith follows:]

PREPARED STATEMENT OF M. PATRICIA SMITH

Thank You Madam Chair, Senator Enzi and distinguished members of the committee. It is an honor to appear before you today as you consider my nomination to be Solicitor of Labor. I want to thank President Barack H. Obama for nominating me and Secretary Hilda L. Solis for the confidence she has shown in me by recommending me for the position. I also want to thank my family members, especially my parents, and friends who are here supporting me today. If confirmed, I look forward to serving the American people and assisting the Department of Labor in improving opportunities for America's working families.

I have spent my entire career in public service. Upon graduation from law school I spent 10 years at federally funded legal services programs, in Connecticut and Indiana, representing low-wage individuals primarily in employment and job training related areas. I then spent 20 years in the Labor Bureau of the New York Attorney General's Office, serving at the pleasure of both Democratic and Republican Attorneys General and representing Commissioners of Labor appointed by both Democratic and Republican Governors. I served first as a supervisor, then as the Deputy Bureau Chief and finally as Bureau Chief managing a staff of approximately 30 attorneys.

At the Attorney General's Office I represented the New York State Department of Labor in litigation primarily involving New York's little Davis-Bacon Act, Fair

Labor Standards Act, Public Health and Safety Act, its Unemployment Insurance Law, and Apprentice Training Program. I defended the Worker's Compensation Board in appeals from its decisions. I represented Governor Pataki and the Health Department in matters involving ERISA preemption before the U.S. Supreme Court.

During the 8 years that I served as Chief of the Labor Bureau I represented the People of the State of New York, opening investigations and bringing cases involving low-wage workers. These cases involved delivery workers, wait staff, kitchen staff, retail clerks, street vendors and bathroom attendants. Some of these employees worked long hours with no overtime, others worked at wages far below the minimum wage, others worked only for tips, and still others were not even allowed to keep all their tips. The New York Labor Bureau also prosecuted contractors who were stealing taxpayer dollars on public construction projects by falsely claiming to have paid workers the prevailing wage. We also worked with returning veterans, making sure they received all the benefits they were entitled to under New York Law.

I took these cases, involving some of New York's most vulnerable workers, because I believe that government must assist those who are least able to assist themselves. I also took these cases to assist law abiding employers who are at an economic disadvantage when their competitors do not comply with minimum labor standards. Over the years, I have had employers ask me to investigate their industry for exactly that reason. Recognizing that not all employers are aware of their obligations under the law, all major enforcement initiatives were paired with offers of compliance training. And, believing that enforcement of the labor laws should result in better jobs, not fewer jobs, I worked with employers who did owe money to their employees to enter into fair and reasonable payment plans so that both they and their employees could thrive going forward.

I believe that getting employers into compliance is the main goal of labor law enforcement. I worked with employer groups and worker groups to create an innovative "Code of Conduct" in New York's Greengrocer industry where we had seen a zero compliance rate with the minimum wage law. Employers who signed onto the Code agreed to come into immediate compliance with the law and have their compliance monitored by third parties. In turn, the Attorney General's office agreed that so long as the employer was in compliance, it would not investigate claims of prior wage underpayments. Over 200 Green Grocers signed onto the code, and after 2 years the compliance rate was over 98 percent.

For the last 2½ years I have had the privilege of serving as New York's Commissioner of Labor. In that capacity, I have managed a staff of nearly 4,000 employees and a budget of \$11 billion. I brought my philosophy of proactive enforcement balanced with compliance assistance to this position. For example, we took proactive enforcement actions in the car wash industry where we found a noncompliance rate of 45 percent statewide and 78 percent in New York City. In the race track industry, we found a noncompliance rate of 52 percent. In each case we followed up with an invitation to each car wash and each horse trainer in the State to come to training sessions around the State, tailored to their industry. I am pleased to say that over 50 percent of those employers took us up on that offer. I directed staff to change their practice and focus their routine compliance assistance efforts on small businesses, because I understand that they often don't have the use of a Human Resources manager to assist them in navigating their legal obligations. As the head of the Mis-classification Workers task force, the first one of its kind in the country, I worked with other State agencies to address the problems of employee workers misclassification as independent contractors or working off the books and identified over \$157 million in unreported payroll to over 12,000 workers.

Along with my philosophy of proactive enforcement, as Labor Commissioner I also worked creatively to help find ways to train, retain and attract a skilled workforce that meets the needs of New York's employers. I initiated this effort by establishing a new Division in the Department, the Division of Employment and Workforce Solutions, that brought together the formerly separate Wagner-Peyser funded and Workforce Investment Act-funded staff. This merged and streamlined Division enabled us to better align our workforce development efforts with our business outreach activities. As a result, our menu of business services was enhanced, including providing technical assistance in new areas such as layoff aversion, and expanding existing areas such as targeted recruitment for individual businesses.

This first involved reshaping how traditional job fairs work and replacing them with career exploration job fairs that offer training and real job opportunities. I also directed my business services staff throughout the State to aggressively promote vital services and resources such as labor market and talent pool information to emerging businesses. This critical information, along with information on grants and tax credits and no-cost department services such as human resources and on-

site Occupational Safety and Health Administration (OSHA) consultation programs, became vital to new and small business.

Our ongoing communication with the business community helped us to better respond to the workforce needs of existing and emerging firms across the State. We accomplished this by refocusing our WIA-funded programs on strategic industry clusters in each region of the State and by requiring the local Workforce Investment Boards (WIBs) to enter into regional partnerships in order to access certain grant funds. We also applied this strategic concept to our WIA-funded incumbent worker training program, by giving priority to training that meets each region's growth strategy. Lastly, since the onset of the economic crisis and the need to help New York's employers, I aggressively promoted the Shared Work program which averts layoffs by reducing the hours of workers while also allowing them to collect unemployment benefits. The promotion of this program resulted in over 890 companies signing up since January of this year and thus saving over 15,000 jobs. It also prompted Scott Hollander, Vice President of Latham International, to say "the Shared Work Program has helped us to save millions of dollars by avoiding the costs that often arise with turnover, hiring and lost productivity and it keeps people on the payroll and working." All of these programs became especially important as businesses struggle to remain competitive and weather the economic storm.

With this wide range of improvement to the services the Department provides employers, I also worked on increasing our efforts to detect and prosecute Unemployment Insurance claimant fraud, in an effort to make sure employers are not paying unnecessarily higher tax taxes. Since early 2008, this enforcement effort resulted in over \$17 million returned to the unemployment insurance trust fund.

I am proud of my record thus far as Commissioner of Labor for New York and if confirmed, I will bring this experience working with both the employer and worker communities to the Solicitor's Office at the Department of Labor. The work of the Solicitor's Office is critical to the Department's mission. The various divisions and agencies within the Department cannot, by themselves, secure full compliance with the many important laws the Department is charged with enforcing. They must have the full backing and cooperation of the attorneys in the Solicitor's office to prosecute violators. The work of the Solicitor's office touches every area of the Department of Labor. While I am not knowledgeable in all the areas of law that the Department enforces, I believe that my combined experience as Commissioner of Labor and as an Assistant Attorney General has prepared me well to serve as Solicitor of Labor. I look forward to returning to being a full-time attorney.

If confirmed, I will do my best to support the President's and Secretary Solis's agenda. As always, resources allocated to the mission of the Department are an issue. Therefore we must work harder and smarter with the resources we do have. If confirmed as Solicitor, I intend to work much more closely with the client agencies, Occupational Safety and Health Administration (OSHA), Mine Safety and Health Administration (MSHA), the Wage and Hour Division, Office of Federal Contract Compliance Programs (OFCCP), and the Employment and Training Administration (ETA), just to name a few, to assure that the resources given to the Department are leveraged to their most efficient and strategic use.

My experience in the last 2½ years as head of the Mis-classified Workers Task Force and as Co-Chair of the Governors Economic Security Sub Cabinet has taught me that when executive agencies work together on common goals, results are accomplished with fewer resources. I hope to work with other executive agencies, including the Treasury Department on mis-classified worker issues and all the agencies that have a role in enforcing the Davis-Bacon Act and the Services Contract Act.

Finally, during my tenure as Commissioner of Labor, I maintained very good working relations with members of the New York legislature on both sides of the aisle. The Workers' Compensation Reform bill of 2007, which I helped negotiate, was praised by both business and labor and passed with broad bipartisan support. Last year the legislature passed a State WARN Act, again with broad bipartisan support. If confirmed, I will endeavor to have a similar cooperative and productive relationship with all stakeholders impacted by the Solicitor's Office and with the members of this committee.

Senator MURRAY. Thank you very much.

We will proceed to a round of questions of 5 minutes per Senator.

I am going to start with you, Mr. Harris. Can you tell us how you would describe the bulk of your responsibilities at the Department if you are confirmed? Manager or policy advisor? I am sort of asking if you are going to keep the trains on track or if you are going to decide their destination.

Mr. HARRIS. My view is that the Deputy Secretary is the chief operating officer, and the chief operating officer's job is to make sure that the trains meet the schedule. The Secretary and the President will define the schedule and the direction of the trains, if I can beat that metaphor into the ground.

In the process of serving in the role of chief operating officer, I think it is unavoidable that there will be a process of winnowing options for the Secretary and trying to provide for her the best possible information. So I do not see myself as entirely disengaged from that policy process, but the Secretary will be the decision-maker. My job will be to provide her with the staff work that she needs and then to implement her decisions after they are made.

Senator MURRAY. I have heard some concerns from the Employment Security Department in my home State of Washington about the H-2A rule change. They have told me that they have concerns about having sufficient resources to implement the proposed rule, and they have expressed some concern about which rule to follow. Agriculture is very important in my home State of Washington, and I would think this complex issue needs some really serious thought.

Is the Department of Labor taking every necessary step to review this rule to make sure that it balances the needs of all of the stakeholders that are involved?

Mr. HARRIS. Well, Senator, I have not, as yet, played a substantive role in the H-2A regulation, but my understanding is that the process that the Secretary is going through, first, to try to get to a quick decision on the question of whether or not the rule is going to be suspended—and by the way, my understanding is that that decision has not yet been finalized, if it is going to be finalized at all. But to try to quickly get to your question, to create some time so that she can examine the rule and to assure that it strikes the balance that you are describing, balancing the legitimate interests of farmers that Senator Burr was talking about just a short while ago and having enough workers to till and pick their crops, the interest of American workers in having a shot at those jobs, and the interest of H-2A nonimmigrant workers in having fair pay and safe working conditions and good quality housing.

So my understanding is that those substantive decisions have not been made and the Secretary's goal is to create the time in which to make them involving the members of this committee, involving all of the involved stakeholders, listening to the growers and the farm workers in Senator Burr's home State of North Carolina and your State of Washington.

So I expect that if I am confirmed, although I will not be the one to write the rule and I will not be the one to decide what goes into the rule, it will be my job to make sure that all of those voices are heard in that process.

Senator MURRAY. I appreciate that answer very much.

Ms. Smith, if you are confirmed, what is going to be your approach as Solicitor of Labor? How are you going to prioritize your caseload?

Ms. SMITH. Well, Senator, that is a decision that I want to make in close consultation with the agencies who are the individuals who actually bring the cases.

But I think that in the wage and hour area, one of the things that we do have to do is look at repeat violators and make sure that if you do have individuals who are repeat violators, that the full force of the law is brought against them. Those are individuals who we know are not violating the law out of ignorance since they have been in violation of the law before.

I think that one of the other things that we really need to do is make sure that—I mean, as you know, the Solicitor's Office has 400 lawyers across the country in regional offices, and I think we really need to make sure that we have consistency of priorities around the country so that you get the same service from the Solicitor's Office in San Francisco as you do in Maine.

Senator MURRAY. I understand that you undertook some pretty interesting enforcement efforts in New York with regard to an industry that had very low compliance with the law, Green Grocers, and through a combination of compliance assistance and enforcement and outreach, you really turned that industry around and it now has a very high compliance rate, it is my understanding. Can you share with us exactly what you did there?

Ms. SMITH. Well, after a number of years of bringing enforcement actions in the Green Grocer industry in New York City, which we had found had almost a zero compliance rate, we sat down with representatives of the industry, representatives of workers, and we drew up what we called the Green Grocer Code of Conduct. If Green Grocers signed onto that code of conduct and they agreed to come into immediate compliance with the law and they agreed to independent monitoring, that we at the Attorney General's Office would agree that we would not pursue claims against them for back wages that may have been owed. In New York City, we had over 200 Green Grocers sign onto that code of conduct. It was on for 2 years. Every single one of them was monitored, and by the end of that 2-year period, there was a 98 percent compliance rate in that industry.

Senator MURRAY. Does that sort of exemplify your approach to how you are going to do your job?

Ms. SMITH. The Green Grocer Code of Conduct is one of the ways that I would look at doing my job. It really does require very specific circumstances to work. That is my experience. I have not quite been able to replicate that in New York, although we have had discussions. If I could replicate those circumstances, I am always open and willing to look into those type of agreements, yes.

Senator MURRAY. Thank you.

Senator Burr.

Senator BURR. Let me thank both of you for being here, more importantly, for your families. Mr. Harris, I hope there is a strong genetic transfer trait in your family. Looking at your mother, you have got something to look forward to.

Just to clarify I think something that Senator Murray raised, OMB put on their Web site last night that they had concluded review of the DOL rule. Now, that does not mean that the conclusion of that rule will be printed in the Federal Register today, but it clearly states that they had concluded their review of the DOL rule—final rule on H-2A—yesterday. So I am not exactly sure how much consideration of stakeholders has gone into the development

of the rule or to the review of the rule, but clearly, those empowered with moving the process forward determined that should happen.

Let me ask you, Mr. Harris, if I can, because you are not new to the Department of Labor. What is the standard time for public comment of rulemaking?

Mr. HARRIS. Well, Senator, let me just say I am afraid it is an indication of how little I have been involved in the H-2A rule that I did not know that OMB had put that announcement on its Web site last night, and I apologize. I simply did not know that.

My understanding is that the Administrative Procedure Act expects a comment period of somewhere between 60 and 90 days. I usually turn to my lawyer for advice on that kind of a question. But that is, I think in part, designed for complicated, substantive rules that go into great detail in implementing a program. The rule that was proposed in this case was a rule that simply dealt with the question of whether or not to suspend the existing H-2A regulation. As I understand it, the regulation that, as you just said, was approved by OMB or was decided about by OMB last night does not address any of the detailed substantive questions that one would have to address in the H-2A program. So a shorter time-frame might have been appropriate in that case, but the typical time period, as I understand it, is somewhere between 60 and 90 days.

Senator BURR. And one would assume that when an affected population like farmers who are currently in the fields preparing and getting ready for the growing season, 10 days would not be sufficient for that community to respond. But yet, there were over 1,000 requests to the Department's proposed rule.

Now, you are the one in your testimony that said you are basically the chief operating officer. If you are confirmed, and you are faced with a decision as to whether to carry out this ruling and you perceive that it has not been according to what the statute says for rulemaking, what are you going to do?

Mr. HARRIS. Well, I would not be the one to decide. The Secretary would be the one to decide. My expectation is that, as in this case, she would turn to the staff in the Employment and Training Administration, to her Solicitor of Labor, to the career staff in the Solicitor's Office for advice about what is appropriate and what is not appropriate. My job would be to marshal those opinions to provide her with a reasonable set of options, a set of options that we collectively agreed were a set of reasonable options, and then she would make a decision based on those recommendations.

I would expect there to be some back-and-forth, but I would not be the only one engaged in that back-and-forth. The incoming Assistant Secretary for Employment and Training would be in that discussion. Commissioner Smith, if she is confirmed, would be in that discussion. It would be a collaborative effort in trying to advise the Secretary in the best way to move forward.

Senator BURR. Do you find it difficult to understand why DOL would change a rule right in the middle of the season?

Mr. HARRIS. Well, my hope would be that we would try in our rulemaking process not to disrupt any industry in any rulemaking process. However, it is a necessary consequence if you are going to

reconsider a regulation that was promulgated just before the President's inauguration that there may be some upset in that industry.

But let me say I view one of my roles as the chief operating officer of the Department, if I am confirmed, to be to assure that the members of this committee, all the Members of Congress, and perhaps more importantly, their constituents have a full voice in this process and have the full opportunity, when the substantive regulation is considered, if one is in fact considered in this case, that their voices are heard.

Senator BURR. Do you feel that 10 days was sufficient in this case?

Mr. HARRIS. Well, again, in that case it was not the substantive rule. It was just the question of suspension.

But as I understand it—I do not want to take up too much of your time, Senator—but as I understand it——

Senator BURR. I have got all day.

[Laughter.]

Mr. HARRIS. And I am happy to stay.

As I understand it, the suspension contemplates that if there is a reconsideration of the rule, there will be, I think, a 9-month period to get to final regulation on that substantive rule. And in that process, you have my commitment, Senator—and I know that this is a concern of yours and it is one that I am going to be sensitive to. You have my commitment that you and your constituents, the farmers that are so important to the economy of your State, are going to be heard in this process, the process of arriving at a substantive rule.

Senator BURR. And I appreciate that. I realize my time has run out, and I will wait for the second round.

But let me just say that the one thing that I think government has a responsibility to provide is predictability, and today we have farmers across this country, regardless of what State they are in, who do not know what rules they are following. They have a workforce that they have contracted to bring in that is now in question, due to the suspension of this rule. Arguments that the Secretary made about funding, hopefully, I have dismissed with the statement of amount of funding we have delivered in the stimulus package. But you said budgetary planning was a mission of yours.

The Secretary extended to 90 days the requirement for farmers to actually advertise the availability of a job to American workers. That is the same 90 days that were required in the old rule. So it is not like we have enhanced the requirement up front to farmers to do that. It is just if this were suspended, that 90 days would go into the growing season which then puts in jeopardy one's ability to bring in that workforce in a timely fashion.

But I will get to some other questions as we move to the next round.

Senator MURRAY. And we will allow you to do that.

Senator Merkley.

Senator MERKLEY. Thank you very much, Madam Chair.

Mr. Harris, in your testimony you describe, and I quote, "the American dream is slipping away." As you kind of step back and watch the last couple decades, why is the American dream slipping away?

Mr. HARRIS. Well, I am afraid that is a complicated question, and I will do my best. But there are better policy minds, I think, than mine to get to that question.

We have seen for decades now stagnant wages for middle class workers, particularly for men. We have seen a reconfiguration of our economy that has taken a lot of traditional middle class jobs and either shipped them overseas or, through technological change, they have just disappeared. We have seen rising consumer debt loads. We have seen families throwing additional members into the workplace. We have more two-working-parent families than we did, say, 30 or 35 years ago. Families are struggling. Families are struggling.

And I know that this is a grave concern of both the President and the Secretary, and it is going to take a multifaceted approach to address those questions, particularly given the historic recession that we are now experiencing in our country where simply getting back to where we were, which was a circumstance where working families were not doing so well, is going to be a significant struggle and require substantial investment in recovery efforts. We are beginning to see some glimmers of hope, although not in the labor market right now.

So I know the Secretary is very tightly focused on this question. It is something that she thinks about every day. I know the President, as you know, is very tightly focused on it, and I am looking forward to working with them.

Senator MERKLEY. Thank you, Mr. Harris.

One of the things that has been brought to our attention time and time again is that in the past, as productivity increased, the wages of working Americans increased. There has been a huge split in that with productivity continuing to increase at a significant rate, but many of the gains are really going to greater disparity with, as you point out, stagnant wages.

What are the ways that the Department of Labor can help undertake restoring prosperity for the middle class?

Mr. HARRIS. Well, I agree with you, Senator, that there has been rising wage inequality in our country. The workers' bargaining position in the labor market has gotten weaker. The Secretary has talked about this. The President has talked about, for example, that if we talk about having a strong middle class, one necessary component of that is having a strong labor movement.

The Labor Department's role is to—there are many roles that the Labor Department can play. One is to help to assure that workers have the skills and the opportunities to get middle class jobs. Senator Murray has certainly played a critically important leadership role, along with Senator Enzi, on workforce development issues. And I know we are looking forward to the discussion about Workforce Investment Act reauthorization in that regard.

The Labor Department assures that workers have secure retirements and get the pensions that they are promised. They make sure that workers' wages are not cut because of overtime, that workers are not discriminated against on the basis of race or sex. I think the Labor Department has a critical role to assuring that workers get the place that they are entitled to in the American middle class. And my job will be not so much to set the agenda to

make sure that that happens, but to implement it to make sure that it happens.

Senator MERKLEY. Mr. Harris, I want to thank you for your testimony and for your commitment to, as you put it, working hard every day for working families. We certainly have a lot of work ahead of us.

I want to turn, Ms. Smith, and applaud you on your work in the Green Grocer area. I never could envision really an industry that had a zero compliance rate with minimum wage laws described in your testimony. The fact that you were able to go from 0 compliance to 98 compliance is a phenomenal accomplishment.

How did you fare in these other areas that you had mentioned, in the car wash industry and did you say horse racing industry?

Ms. SMITH. The horse racing industry. That is right, Senator.

We just conducted those investigations last summer. So we have not done our re-investigations yet. But I am pleased that when we did invite all the car washes in the State of New York and all the horse trainers to come into our training sessions afterwards, we had about 33 to 40 percent of the employers in those industries come in to our compliance assistance training sessions. So I am hoping that when we go back next summer and do a revisit to these individuals, we will see a much higher compliance rate.

Senator MERKLEY. Great. For those who do not come in and work with your compliance program, then do you pursue investigations of failure to pay overtime, failure—

Ms. SMITH. Well, Senator, I would not make any assumptions about individuals who did not come into the compliance training sessions because there may well be individuals out there who do not need to come into it. They are very well aware of their obligations under the law. We did find that there was a 45 percent non-compliance rate. That means that 55 percent of the car washes were in compliance. So we will continue to pursue investigations and re-investigations, but I would never presume that because someone did not come into a compliance training session, that meant they were in violation of the law.

Senator MERKLEY. Let me put the question a little differently, and I will just wrap up with this, Madam Chair.

On the one hand, you are saying work with us. Come into compliance. And you are really reaching out in a very positive fashion. But for folks within the industry who say, you know what, I am not paying the minimum wage or I am not paying overtime and I am not changing, do you then investigate and pursue—

Ms. SMITH. Oh, absolutely. We would investigate and pursue, and at least in New York, we would be imposing additional penalties on those individuals because since they did not come in and take advantage of our compliance offers and because they continue to be in violation of the law, we would impose willful penalties on those employers. And if they continued not to come into compliance with the law, I, which I have in the past, would recommend criminal prosecution of those employers.

Senator MERKLEY. Well, thank you very much to both of you for your presentations and for your work on behalf of working Americans.

Senator MURRAY. Thank you very much, Senator Merkley.

Ms. Smith, let me go back to you again. This committee has had a number of hearings about workplace accidents in the aftermath of tragedies. One of the things that has really become apparent is that families of victims have very little say in OSHA's and MSHA's compliance decisions. And I wanted to ask you if you believe that OSHA and regional solicitors should consult more closely with the victims' families or injured workers when they are assessing penalties.

Ms. SMITH. Thank you, Senator. Yes, I do believe that they should consult more closely with the victims' families. I also believe in the wage and hour that victims, those underpaid workers, should be consulted when there are enforcement actions taken. I believe in a much more open and inclusive process of investigation, not that the victims' families or the victims themselves can dictate the decisions, but I definitely believe that their wishes and their perspectives have to be taken into consideration to make it meaningful enforcement.

Senator MURRAY. I appreciate that. One of the things we have learned is often the victims' families know information that they are never asked about, and I would think that information is very important to reaching conclusions. So I appreciate that response.

Mr. Harris, I wanted to ask you, as the Department's top manager, what will you do to help build a culture of innovation and creativity? I think I have heard from a lot of people within the Department that there is an employee morale problem. I wondered what you are going to do to address that.

Mr. HARRIS. I think that the essence of creating that kind of environment is allowing the employees of the Department at every level in every region to understand that their voices are going to be heard, their views are important. Frequently they have information that is critical to the Secretary's decisionmaking and the decisionmaking of the Assistant Secretaries in their agencies.

The idea that I have perfect information, as I walk through the door, if I am confirmed, is just fallacious on its face. I do not expect that I am going to know everything at any stage, regardless of how long I were to stay as the Deputy Secretary. I am going to rely very heavily on the Assistant Secretaries, the career managers, and working with the Department's unions, and the front line employees of the Department to learn what we can.

There are going to be a lot of terrific ideas, and our challenge, using information technology, using the collective bargaining process, and just an open process with the unions is going to be to gather that information in a usable format. I mean, the Department does have more than 16,000 employees. So that could be a cacophony. We have to find a way to get it into a usable format so that it is employable in our decisionmaking processes at the relevant time.

It is going to be a challenge, and I look forward to working with the Secretary who I know is deeply concerned about this question and with the other stakeholders inside the Department to make that a reality.

Senator MURRAY. Well, communication within the Department is really important, fostering that. It is also important here in Congress. During the last Administration, it was challenging, to say

the least, for us to get access to evaluations or reports on the Workforce Investment Act programs.

Given your commitment to enforce open government and accountability at DOL, will you make access to evaluations and studies a priority across the Department?

Mr. HARRIS. Absolutely, yes.

Senator MURRAY. And we will take you up on that.

Senator Burr, do you have any additional questions?

Senator BURR. Yes, ma'am.

Mr. Harris, you are currently in a consulting role with the Department of Labor. Correct?

Mr. HARRIS. I am.

Senator BURR. Were you consulted on this decision on H-2A?

Mr. HARRIS. I did not play a substantive role, Senator. I think I exchanged a couple of e-mails and participated in one or two early staff meetings on this subject. I think the e-mails I exchanged were simply about assuring that we had done the requisite congressional outreach and contact with the press on the subject. So I did not play a substantive role, no.

Senator BURR. Did you get an affirmative answer on did they do appropriate outreach?

Mr. HARRIS. I do not recall that I got any answer, Senator.

Senator BURR. Let me propose or suggest that this possibly could be litigated. It has not been to this point. But I asked my staff to go through and find possible places of violation of law. They include the Administrative Procedure Act, specifically the 10-day comment period. Retroactive rulemaking because contracts are currently in place that would be affected by the change in the rule. The Fair Labor Standards Act because the original rule designates Christmas tree farmers were agricultural rather than forestry; therefore, they are exempt from overtime requirements. The regulatory Flexibility Act. As part of the rulemaking, DOL failed to include the required analysis to provide the public with an opportunity to comment on the analysis and failed to include a final analysis when publishing the Solis suspension final rule. Unfunded Mandates Reform Act. The Executive Order 12866, the regulatory planning and review. Executive Order 13132, federalism. The Executive Order 13175, consultation and coordination with Indian tribal governments. DOL failed to include the required tribal summary impact statements in the Solis suspension final rule. Section 654 of the Treasury and General Accounting Appropriations Act of 1999. Executive Order 12630, 12988, and 13211. In all cases, DOL failed to include the evaluations sufficient to issue a final rule.

Now, I would only ask both of you, have I identified things that you think are serious if they were in violation?

Ms. SMITH. Senator, I will answer that. I want to preface it by saying that I, obviously, am not knowledgeable about the H-2A rule suspension. My staff, as the Commissioner of Labor, did not even mention it to me.

Senator BURR. And trust me. I am not trying to play "gotcha." I am just asking—

Ms. SMITH. No. I understand.

Senator BURR [continuing]. Are these serious if they were violations?

Ms. SMITH. I am sure that there are violations there. You have mentioned at least a number of things that would be serious, yes.

Senator BURR. Mr. Harris, would you agree?

Mr. HARRIS. I would rely on my lawyer for answer to that question.

[Laughter.]

Or the Secretary's lawyer, I should say.

The only thing I would add is that the Solicitor's Office was involved in this decisionmaking process, and I cannot say the extent to which they analyzed the specific questions that you raised. But they were involved in the process, and it would be their responsibility to offer legal advice to the Secretary on whether or not the Department, in proposing a suspension of the rule, was in compliance with all those requirements you listed.

Senator BURR. So if a court reversed this decision, would you see that as a failure of the Department of Labor to fully vet the law and how they proposed rulemakings?

Mr. HARRIS. Well, I would want to know why it was the court disagreed with the decision, and I would want to take a close look at that. And if Commissioner Smith is confirmed, I would want to have a long talk with her about what it was that happened.

As you noted early on in your opening statement, the existing H-2A regulation is the subject of litigation as well. This is an area of sensitivity among stakeholders of all types. And so I do not think I would be surprised if any further action in this area were the subject of litigation, but as the chief operating officer, I would want to have a discussion with the Solicitor and the Employment and Training Administration staff about the processes they used to arrive at the conclusions they reached.

Senator BURR. There is one thing that I think we all three will agree on. Court involvement does not grow the food we need in this country, and any confusion will, in fact, impact the prices.

If the Chair would allow me to ask three more questions, I would be done at this hearing.

Ms. Smith, Wage Watch was something that either you created or created while you were there. Can you share with me how that idea was hatched and how it was developed?

Ms. SMITH. Yes, Senator. My experience in New York is that we really do have a crisis about workers not getting what they are entitled to under the law in minimum wage or overtime. Wage Watch was basically modeled on Neighborhood Watch, which we examined and appears to be a very successful crime-fighting program, especially in New York. Just like the purpose of Neighborhood Watch is to get the public involved, that is the purpose of Wage Watch. I was concerned on two levels.

The first was that I do not think that the concept of workers not getting the minimum wage and overtime is really as prevalent in the public's consciousness as it should be. I know when I go into a restaurant and I leave a tip, it goes through my mind, I hope this worker is actually getting this tip that I am leaving. But I do not know that that is true for the general public. So I wanted to raise the consciousness of the general public to this possible problem.

The second thing is that we have limited resources in New York as we do everywhere in government. And I am very committed to

the concept of education, both employer education and worker education. So the substance of Wage Watch's purpose is to engage groups to help us with education. So we have a pilot program which we have just begun. We have six groups which were picked on the basis of our prior experience with them, so I knew they were reliable and sensible groups. We developed training. We developed an agreement, and they have agreed to do educational events both for workers and employers.

Senator BURR. But you reached out to individuals and groups to help craft the specifics of—

Ms. SMITH. Actually, no, Senator, we did not. This was an internally crafted group. It was only after we sat down and crafted it ourselves that we reached out to groups to see if they would be interested.

Senator BURR. Have you had any discussions relative to your being at the Department of Labor that would extend Wage Watch in any fashion on a Federal level?

Ms. SMITH. No, we have not had any discussions of that. I have not had any discussions with the Department of Labor in New York about whether we would extend it across New York State.

Again, it is a pilot program which we just did in January. We specifically limited it to a small number of groups, and we limited it to a small geographic area. We limited it to basically New York City, Long Island, the lower Hudson Valley so that we could assess what the successes would be, what the problems would be. I am happy to report that after what—since January, we have had no complaints about that program.

Senator BURR. Well, if Senator Schumer were still here and heard you describe that portion of New York as a small area—he thinks that is 90 percent of the world.

[Laughter.]

So I am sure he might disagree with your statement.

Ms. SMITH. I cannot speak for Senator Schumer.

Senator BURR. Nobody can.

[Laughter.]

I want to thank both of you for your indulgence of my questions and the fact that there were areas that we need to get into that deal with issues that you have not been involved in. But, hopefully, I have stressed with both of you that these are complicated issues that affect real people across the country. They are not Republicans or Democrats. These are individuals that are trying to maintain their livelihood. It requires planning. They have to make commitments, and sometimes government is blind to the expenses that we inadvertently put on the system.

At the end of the day, it is the consumers of this country and around the world of agricultural products that will feel the unintended consequences of quick decisions, decisions that potentially went outside the framework of what we have built into the system to assure us of the transparency that you talked about earlier, Mr. Harris, the accountability that you talked about, the ability for strategic planning that you talked about, the accuracy of the budget, and more importantly, the third point that you said. We welcome stakeholders.

You know, everything else may have worked technically to the letter of the law, but nobody will convince me that in this process, we welcomed the stakeholders to the table. I can question pretty thoroughly whether it was even attempted to review the thousand stakeholder comments that were made because had they been reviewed, I do not think we would quite be on the accelerated path that we are, having OMB already completed their review. And we will watch anxiously to see if they find fault with the process up to this point.

Madam Chairman, I hope you will pass on to Chairman Kennedy that I hope we expedite these confirmations as quickly as we can. Again, I thank you.

Senator MURRAY. Well, thank you very much, Senator Burr, and I will pass that on. I do hope we can move these expeditiously as well.

And I want to thank both of our witnesses for being here today and participating in this important hearing.

I want all members to know that they can submit additional questions to you, and we will probably do so for a written response. But I would encourage all of our members to do so before the end of the day tomorrow so we can move this process quickly and move these nominations forward.

For members who want to submit their statements for the record, the hearing record will be open for 7 days.

So, again, thank you to both of you for coming today, for your willingness to take on these incredibly important jobs.

And, Mr. Harris, your two sons did a marvelous job sitting still behind you today.

[Laughter.]

I hope they are going to get to do something fun when we adjourn this hearing. Thank you very much.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR ENZI

I'd like to begin by thanking Senator Murray for holding this hearing today. Confirmation hearings for Presidential nominees are one of this authorizing committee's most important functions. Earlier this year, the Senate has confirmed two nominees who came before the HELP committee: Education Secretary Arne Duncan and Labor Secretary Hilda Solis. Last week, the committee took up and the Senate confirmed an additional eight labor and education nominees. We have made significant progress on nominations.

Today, the committee conducts its Constitutional duty of "Advice and Consent" on two senior positions at the Labor Department: the Deputy Secretary and Solicitor, the two most senior deputies to the Secretary. These positions carry significant responsibility within the Department, as well as to workers, businesses and retirees, to name just a few stakeholder groups. It is important that during this hearing we obtain an understanding of their management experience in preparation for these roles and their approach to the cross section of issues that fall under the Department's jurisdiction.

Both Seth Harris and Patricia Smith have impressive academic credentials and are accomplished professionally in their own right. I commend them for their previous public service and willingness to go through the process of Senate confirmation.

Today, I want to learn more about how they would approach the respective positions to which they have been nominated. I have reviewed each of these nominees' previous records of public service, and have already had a chance to ask Mr. Harris questions for the record. Based upon what I have learned about these two nominees so far, I am a bit concerned about the direction the Obama Department of Labor will take. While I fully recognize that I may take the philosophical opposite perspective from our nominees, I truly hope that they do not bring to the table an approach that creates an adversarial role against small businesses and all businesses in general. In this current economic environment, all employers, particularly small business, are struggling. In the last 5 months 3.3 million jobs have been lost, and 663,000 jobs were lost in the month of March alone. The unemployment rate currently stands at 8.5 percent, and in many States it exceeds 10 percent. The Bureau of Labor Statistics has reported that job losses are large and wide spread across major industry sectors. As my colleagues probably know, tomorrow we will receive an update from Bureau of Labor Statistics on the employment situation for the month of April.

I am particularly interested in your thoughts on whether it is part of the Department's mission to assist businesses in understanding and complying with Federal regulations—as well as your views on penalties and enforcement. President Clinton signed into the law the Small Business Regulatory Enforcement Fairness Act to help small businesses comply with Federal laws. I would hope that both nominees would voice their strong support for maintaining and strengthening this law to help small businesses comply rather than use the overly heavy hand of enforcement procedures. Because I have reviewed your records, I will have some specific

questions for each of you related to your background, as well as additional questions for the record.

I have particular questions and concerns with the so-called "Wage Watch" program in the State of New York and the use of community and labor groups to enforce State labor laws. Since both of the nominees are from New York, I want to know your views as to whether this program is a suitable model for the Federal Government.

I would also like to hear more from the nominees about their approach to regulating and their view on the role stakeholders play in that process. Would stakeholders describe your management style as inclusive and one that seeks input before judgment, or one that instead limits the discussion process? Especially given our current economic situation, stakeholder input from people who actually meet a payroll is essential for everyone at all levels of government. After all, the first rule of public service should be to "do no harm." These are just a few of the areas I intend to touch on today.

In closing, I would like to again thank Senator Murray for holding this hearing today.

RESPONSE TO QUESTIONS OF SENATOR ENZI BY M. PATRICIA SMITH

Question 1. It is my understanding that as Labor Commissioner in New York in 2007 you determined that any construction projects undertaken by charter schools in New York were subject to New York's prevailing wage law. It is also my understanding that prior to your decision, charter school construction projects had been treated as exempt from the State's prevailing wage law. What facts or legal opinions led you to reverse the treatment of these construction projects? Did you discuss this matter with any labor unions or their representatives, and, if so, what were the circumstances surrounding those discussions?

Answer 1. In New York, administrative agencies are free to overrule or modify prior determinations so long as they sufficiently explain the different result. In August 2007, the Department of Labor concluded that charter school projects were subject to New York's prevailing wage law. The change brought the Department's position in line with a formal opinion issued on the matter by Attorney General Spitzer, 2000 Ops. Att. Gen. No. 2000-F3. The 2007 opinion letter concluded that charter schools meet both conditions of the test for application of the prevailing wage law first expounded by the New York Court of Appeals in *Matter of Erie County Industrial Development Agency, Roberts*, 94 A.D. 2d 532 (4th Dept 1983) *aff'd* 63 N.Y. 2d 810 (1984). It further relied upon a recent amendment to the prevailing wage law, known as the third party bill. The change from the prior position resulted from my conclusion that the prior position was a misapplication of the law. I also wanted to avoid confusion and clarify the matter for the public and the courts by reestablishing consistency between the positions of the Department, the agency charged with enforcement of the prevailing wage law, and the Attorney General's Office, which represents the Department in litigation. On September 10, 2007, I wrote the Charter Schools Institute, the New York State Education Department, and other interested members of the public to advise them of the Department's new position and its prospective application. I have attached both the opinion and the notification letter.

The opinion was written after receiving a formal request for an opinion from the Painters Union. I never discussed the matter with any labor union or union representative prior to issuing the opinion.

Question 2. Do you believe that charter schools that receive Federal funding for any purpose are subject to the Federal Davis-Bacon law with regard to any construction projects they undertake? If confirmed as Solicitor, would you seek to extend Davis-Bacon requirements to charter school construction projects?

Answer 2. My opinion on the applicability of the New York Prevailing Wage Law was based solely on my analysis of New York's law. My understanding is that the Davis-Bacon Act and the approximately 60 Davis-Bacon related acts have very different applicability provisions. The applicability of the prevailing wage requirements in any of the Davis-Bacon or related acts would depend upon the language in those

statutes. If confirmed as Solicitor, and if the issue of the applicability of Davis-Bacon to charter schools arose, I would have to examine the language of relevant statutes in order to make such a determination.

Question 3. It is my understanding that as Commissioner of Labor you created and approved a pilot program called "Wage Watch" that was designed to "extend the reach of labor law awareness and enforcement into the community" and "find cases that might not otherwise come to the Department's attention." To implement this program your office engaged "community" and other groups to participate in increased education and reporting efforts. Among other things, participating groups were to "conduct outreach to the public about labor laws" by "handing out [official NY Department of Labor] brochures" in places where the public gathers, such as "supermarkets"; obtain information regarding potential labor law violations; and, fill out complaint forms regarding potential labor law violations.

What groups did your Department enter into these agreements with?

Answer 3. Make the Road New York; Centro del Inmigrante; UFCW Local 1500; the Workplace Project; Retail Wholesale Department Store Union; and the Chinese Staff and Workers Association.

Question 4. With respect to each group listed in your response to Question 3, please set forth the date or dates on which you had any written or oral communications, discussions or meetings with each group and/or any group representatives regarding the creation, development or implementation of the Wage Watch program, the names of all persons involved in such communications, meetings or discussions, and the substantive content of all such communications, meetings or discussions. Please forward to the committee any notes, memoranda, correspondence of any kind and any written materials related in any way to any such communications, meetings or discussions and a copy of any written communications.

Answer 4. There was one meeting, on November 4, 2008, with many members of my staff including Terri Gerstein, Deputy Commissioner for Wage, Protection; Colleen Gardner, Special Assistant to the Commissioner; Lorelei Boylan, Director of Strategic Enforcement and Geovanny Trivino. Members from the groups listed above included Jeff Eickler from the RWDSU and Amy Carroll and Deborah Axt from Make the Road New York. There may have been other people from the RWDSU in attendance as well. I attended for about 15 minutes. My staff had done considerable work researching Neighborhood Watch and developing the concept of this initiative and felt it was time to present the Department's ideas for what is now known as Wage and Hour Watch, to gauge the possible interest of these two groups with whom we had worked and to get feedback. I have no written notes from the meeting. I was cc'd on a few e-mails which I am not able to include as I do not have the individual authority to release them. The e-mails are not mine but are the property of the State of New York. Committee members may request access to the e-mails by contacting the Governor's Counsel's Office in Albany. I have reviewed the e-mails and they discuss the need for objective criteria for choosing pilot participants, the need for and content of training for participants, the need for a written agreement, and the possible name for the pilot. I may have spoken to members of the other groups listed in response to Question 3 at the press event announcing Wage and Hour Watch on January 26, 2009 but there were no substantive discussions.

Question 5. In addition to the groups referred to in your response to Question 3, and their representatives, please set forth the names of any other groups and/or persons, including but not limited to other local, State and Federal Government officials, that you had any written or oral communications, discussions or meetings with regarding the creation, development or implementation of the Wage Watch program; the date or dates of such communications, discussions and/or meetings, and a summary of the substantive content of all such communications, meetings or discussions. Please forward to the committee any notes, memoranda, correspondence of any kind and any written materials related in any way to any such communications, meetings or discussions and a copy of any written communications.

Answer 5. At the November 4 meeting Raj Nayak from the National Employment Law Project attended and he was also on some of the e-mails discussed above. Starting in the summer of 2008 until the present I have discussed the Wage and Hour Watch pilot on dozens of occasions with members of my staff including, but not limited to, Mario Musolino, Executive Deputy Commissioner, Terri Gerstein, Deputy Commissioner for Wage Protection, Carmine Ruberto, Director of the Division of Labor Standards, Lorelei Boylan, Director of Strategic Enforcement, Colleen Gardner, Special Assistant to the Commissioner and Maria Colavito, Counsel.

I have no written notes from the conversations nor can I pinpoint the exact dates. The conversations occurred in the course of daily business and my calendar does not show any staff meeting specifically devoted to Wage and Hour Watch. The purpose of the conversations was to discuss the concept and the scope of the initiative, to determine the geographic area the pilot would be conducted in, and to select groups for possible participation. Also discussed was the content of the required training.

I was copied on a few e-mails that discussed the need for a written agreement and the content of a written agreement. I am not able to include them as I do not have the individual authority to release them. The e-mails are not mine but are the property of the State of New York. Committee members may request access to e-mails by contacting the Governor's Counsel's Office in Albany, NY. I have no further written communications or materials regarding those staff conversations.

Beginning in the late fall of 2008, I also discussed the pilot on numerous occasions with Jeff Mans, the Deputy Secretary to the Governor for Labor and Financial Regulation. I have no written notes from the conversations and can not tell you on what days the discussions took place as I speak with Mr. Mans at least three times a week and there was never a conversation specifically devoted to the pilot. The purpose of the conversations was to apprise him of the Labor Department's ideas for the pilot and to get the approval of the Governor's office.

On January 15, 2009 I sent an e-mail to my Labor Standards staff, explaining the pilot to them. I am not able to include it as I do not have the individual authority to release it. The e-mail is not mine but is the property of the State of New York. Committee members may request access to this e-mail by contacting the Governor's Counsel's Office.

On January 30 I received an e-mail concerning the pilot from Ellen Chapnick, Dean for Social Justice Programs at Columbia Law School, offering law student assistance. I am not able to include it as I do not have the individual authority to release it. The e-mail is not mine but is the property of the State of New York. Committee members can request access to this e-mail by contacting the Governor's Counsel's Office in Albany, NY.

I had a telephone conversation with the Assistant Counsel David Weinstein of the Governor's Counsel's Office, and Deputy Secretary Mans, on February 4. I answered questions about how the program operated. There are no written notes or other materials associated with the conversation.

On March 17, I had a meeting with representatives from the Retail Council of New York State, the New York State Restaurant Association, the New York Association of Convenience Stores, the Food Industry Alliance of New York State and the Empire State Restaurant and Tavern Association. In attendance were James Sherrin, Ted Potrikus, Rich Sampson, James Calvin, Michael Rosen, Scott Wexler and Melissa Fleischot. I had received correspondence from the trade associations which can be found on the internet at www.nyacs.org/documents/09wagewatch.pdf. The purpose of the meeting was to explain the pilot. I answered their questions about the program, gave them a copy of the agreement and the literature that is handed out and invited their associations to participate in the Wage and Hour Watch initiative if the pilot is successful. They asked for one change in the agreement, that Wage and Hour Watch groups be prohibited from giving out information about their group when they are doing Wage and Hour Watch activities. I agreed to make that change going forward and we have orally instructed the groups to refrain from that activity. I also asked them to report to me any issues or complaints their members were experiencing with the pilot and I have received no complaints from then to date. I have no notes from that meeting. I have attached the written information I provided to the meeting attendees. I also described this initiative for Jennifer Ludden of National Public Radio on April 29, 2009.

After the pilot was announced, my counsel, Maria Colavito, received correspondence from a wage survey company complaining of possible trademark infringement from the Department's use of the name "Wage Watch." After consultation with the Attorney General's office the name of the pilot was changed to "Wage and Hour Watch." There was a meeting on March 11, 2009 with myself, and as I recall, my counsel and Deputy Commissioner Gerstein to discuss the name change. There are several e-mails concerning the possible lawsuit, our possible response, and possible alternative names that could be used to avoid litigation. I am not able to include them as I do not have the authority to release them. The e-mails are not mine but are the property of the State of New York. Committee members may request access to these e-mails by contacting the Governor's Counsel's Office in Albany, NY.

Question 6. Does the New York State Open Meeting Law apply to any of the discussions and/or meetings with non-governmental stakeholders regarding the creation, development or implementation of policy initiatives such as the Wage Watch

program? If not, why not? If so, were all requirements of that law met with respect to any and all meetings and discussions that you had regarding the Wage Watch program?

Answer 6. Meetings between the Department and entities who are interested in or participating in the Wage and Hour Watch initiative are not conducted as public meetings. This is because the Public Meeting Law (Public Officers Law, Article 7) applies only to meetings of "public bodies" for the purpose of conducting public business. A public body is defined in the statute as ". . . any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the State or for an agency or department thereof . . ." The Department of Labor is not an entity for which a quorum is required to conduct public business. Therefore, the Department staff or department heads do not constitute a public body for purposes of the Open Meetings Law. See Committee on Open Government, Opinion 2883. To interpret the law otherwise would require the Department to treat *all* of its interactions with constituent groups, regulated parties, advocates, or the public as gatherings subject to the Open Meetings Law.

Nor are the Wage and Hour Watch groups "public bodies" within the meaning of the law. The groups that volunteer for the Wage and Hour Watch are not acting on behalf of the Department of Labor and are not performing a government function, as the agreement with them makes explicit. In fact, we rejected a suggestion that Wage Watch participants should become "the Commissioner's "authorized representative," as one group requested.

Question 7. Did you seek to engage any employer groups as "Wage Watch" participants? If not, why not?

Answer 7. We did not seek to engage any employer group in the Wage and Hour Watch pilot because none of them met the criteria we had established for pilot participants: the referral of at least 10 cases to the Department or the Attorney General of New York in the last 2 years. As I noted before, I did ask a number of employer associations to participate in the program if it is continued after the pilot and they agreed to consider the invitation.

Question 8. Since most of the organizations involved were labor unions, did the Department ever consider that such groups might seek to use their status as Wage Watch participants to further their efforts to unionize unorganized employers?

Answer 8. Most of the groups in the pilot are not labor unions but community groups, usually known as worker centers. These organizations do not organize individuals into unions. There are two unions participating. In order to avoid the possibility you raise, we instructed them not to use their status as Wage and Hour Watch groups as a union organizing tool. In order to implement this instruction, in the required training sessions, participants are taught to introduce themselves using their name and their group, not by Wage and Hour Watch or the Department of Labor. They are required to participate in role plays where we can see how they introduce themselves and what they say to employers and employees. They are taught that they may not hold themselves out as employees or a subdivision of the State or the Department and any violation of this requirement is grounds for immediate termination from participation in the program.

Question 9. What safeguards were in place to prevent such misuse of the program? Please attach the oversight and enforcement guidelines for groups participating in Wage Watch.

Answer 9. Please see my answer to No. 8, above. Participants were told that they would be terminated if they misused the program. To date we have received no complaints from any employers who have been visited by Wage and Hour Watch groups. A copy of the current agreement is attached to the response to question 5.

Question 10. Did the Department ever consider that since these efforts were targeted at legally unsophisticated workers, many of whom were likely to have language issues, and that the participants were passing out official NY Department of Labor materials, that there might be considerable risk that workers would view Wage Watch participants as government "officials?"

Answer 10. Yes. In the required training sessions participants are taught that they may not hold themselves out as employees or a subdivision of the State or the Department and any violation of this requirement is grounds for immediate termination from participation in the program. We instruct them to introduce themselves using their name and their group, not by Wage and Hour Watch or the Department of Labor. They are required to participate in role plays where we can see how they introduce themselves and what they say to employers and employees.

Question 11. Wage Watch members were to be given a "certificate of membership." Was that certificate signed by any NY State official? Did it contain the NY State seal, or any other markings that would make it appear "official?" Could you forward a blank copy of the membership certificate to the committee?

Answer 11. Participants are given a "Certificate of Completion" which is modeled on the certificate that was given to all greengrocer employers who completed training sessions after signing on to the Attorney General's Greengrocer Code of Conduct. It is attached. They are also given a card to carry with them, which is also attached.

Question 12. Labor law "education," complaint preparation and associated "enforcement" activities are the statutory responsibility of the NY State Department of Labor, and its duly authorized employees. Why did you believe it was necessary or prudent to deputize, or grant a quasi-official role to outside organizations to also perform these functions, particularly where the groups you selected might plainly have had ulterior motives for their participation?

Answer 12. This program was modeled on the successful Neighborhood Watch Program. While the police have the statutory duty to investigate crimes they use Neighborhood Watch programs to involve ordinary citizens in efforts to keep their communities safe and increase the reach of law enforcement in their neighborhoods. Similarly, in Wage and Hour Watch, these groups are not authorized to perform any enforcement activities and all investigation of complaints is done solely by the Department and not the groups. Their role is limited to doing outreach and community education and to report any violations they encounter to the Department. I thought it was prudent to engage outside groups because the Department has very limited resources relative to the number of employers in the State and with the current fiscal crises is facing reductions in staff in this area. This involvement allows the Department to have a broader reach and use more of its limited resources on investigating cases. Labor law violations are rampant in many industries and areas of the State and the activities these groups are engaging in will promote employer compliance.

Question 13. Have you discussed with anyone, including, but not limited to, any Federal official, nominee, appointee, employee, stakeholder, union or community organization representative, Administration representative or official representative of President Obama's Transition Team, the idea of making the NY Wage Watch program a national program for any Federal labor laws?

Answer 13. No.

Question 14. Please provide that name(s) of any individual(s) or group(s) with whom or which you have had any written or oral communication, or met with and/or discussed, the possibility of creating, developing or implementing any program like Wage Watch with respect to any Federal labor laws, and in each instance please provide the dates of any and all such communications, meetings or discussions, and a summary of the substantive content of all such communications, meetings and discussions. Please forward to the committee any notes, memoranda, correspondence of any kind and any written materials related in any way to any such communications, meetings or discussions and a copy of any written communications.

Answer 14. None.

Question 15. In light of your support for the Wage Watch program in New York, would you advocate utilizing the same approach for other laws that impact the workplace? For example, would you support the State of New York or the Federal Government entering into a Wage Watch-type agreement with groups such as the Minutemen Project to "extend the reach of awareness regarding illegal immigration and enforcement into the community?"

Answer 15. This initiative was designed as a local model in a limited geographic area in a State, for a particular issue under a particular statute. It was not designed for other laws or to be used on the Federal level. Until the pilot is completed and evaluated, I would not advocate expanding it to other areas in New York, to other areas of the country, to the Federal level or to other Federal or State laws.

RESPONSE TO QUESTIONS OF SENATOR ISAKSON BY M. PATRICIA SMITH

Question 1a. Recently, 19 opinion letters were withdrawn without substantive reason even though substantial effort had been expended by the previous Administration in developing an answer. The only explanation provided was,

"It does not appear that this response was placed in the mail for delivery to you after it was signed. In any event, we have decided to withdraw it for further consideration by the Wage and Hour Division."

Does this response endanger the opinion letter process by allowing any administrator to withdraw a letter simply because it was signed under a previous Administration?

Answer 1a. I am not familiar with the process used by the Wage and Hour Division (WHD) for drafting and issuing opinion letters or evaluating whether or not to withdraw them. In addition, I have no knowledge of the facts and circumstances surrounding the 19 opinion letters referred to in your question. However, I understand that the issuance of opinion letters play a significant role in helping both employers and workers understand their rights under the Fair Labor Standards Act. If confirmed as Solicitor, I look forward to making sure that the Office of the Solicitor provides adequate legal support to the WHD with respect to the opinion letter process as well as other issues confronting that agency.

Question 1b. The Wage and Hour Division noted that the withdrawal of the official signed and dated opinion letters was done in accordance with the Department of Labor's interpretive guidelines under 29 CFR § 790.17(d). That section states, "Opinion letters of an agency expressing opinions as to the application of the law to particular facts presented by specific inquires fall within this description." Similarly, it has always been the practice of previous Administrations to only withdraw issued opinion letters based on specific inquires asking for rescission or a change of opinion. Do you agree that this is the preferred method and will you follow this precedent?

Would the Administration's claim of transparency be furthered by allowing the department to withdraw letters without any record of a request?

Answer 1b. As discussed in my response to question (1a), above, I am not familiar with the legal issues involved in the Wage and Hour Division's withdrawal of opinion letters or the practice of previous Administrations with respect to such withdrawals. If confirmed, I hope to work with WHD to assure that the process for issuing and withdrawing opinion letters results in guidance to the regulated community that is both clear and transparent.

Question 2. Last year, you told the *New York Times* that you had "made the determination that it would be better for workers to lose their jobs than to continue working there." How do you make a determination that you know better than workers what is in their best interest?

Answer 2. I was making the same determination, that workers who have acquired knowledge of this employers' illegal and abusive business practices routinely made, to get out. This employer had been under investigation by both the Labor Department and the Workers Compensation Board for over a year when I made this statement. He had been in business for a long time, changing names and filing for bankruptcy to avoid paying debts. He refused to come into compliance and despite several visits and notices of violation he continued his illegal and abusive practices. When this employer hired a new worker they were told their first 2 weeks pay would be put in the "kitty" and they would get it when they left. During this investigation many workers quit because they were not getting paid and I am aware of no one who ever received their first 2 weeks pay. After the first 2 weeks this employer routinely did not pay or paid by bad checks. When he did pay he paid \$50 per day for 12- to 14-hour shifts. He used threats to keep employees under his control. He deducted taxes from the workers wages and never remitted them to the tax authorities.

In my experience, when this employer's workers finally learn what I learned in the investigation, they routinely quit. But at that point they are owed anywhere from 4 weeks to 6 months pay. When a worker quits, this employer simply hires another one and the pattern of abuse began again. This employer currently owes over \$600,000 to 22 workers and had hidden his assets (he lives in what the police described as one of the largest homes in the Bronx that is owned by his 26-year-old son) such that I am unsure that these or any other workers would be able to get the money for which they have worked so hard. He is now being prosecuted by the New York State Attorney General office for multiple felonies arising out of these illegal business practices.

Question 3. Do workers have a right to a secret ballot when making a decision on unionization? Should they?

Answer 3. The Solicitor of Labor does not enforce organizing law, rather, that enforcement responsibility lies with the National Labor Relations Board. Having said that, I personally believe that workers have a right to genuine workplace democracy in which they can choose whether or not to join a union free from coercion, and there are a number of factors leading up to the actual practical process of the elec-

tion that must be taken into consideration in making a determination as to whether the election meets basic labor standards.

Question 4. With regard to your “Wage Watch” efforts in the State of New York, do you see the possibility of instituting similar efforts on the national level?

Is there an application of this concept to education efforts and/or enforcement of the Labor-Management Reporting and Disclosure Act? How about immigration laws? Which groups would be appropriate partners for the government in these efforts?

Answer 4. This program is still just a pilot program in one region of New York, and hasn’t been implemented statewide. Until the pilot is completed and evaluated, I would not consider or advocate expanding it across New York, to other parts of the country, to the Federal level or to other laws.

RESPONSE TO QUESTIONS OF SENATOR COBURN, M.D. BY M. PATRICIA SMITH

Question 1. President Obama has been a champion of government transparency during his time in the U.S. Senate and campaigned on a promise to make the Federal Government more transparent. What is your philosophy on transparency?

Answer 1. Throughout my career, I have supported and welcomed transparency, because it is the best way to make sure that members of the public can participate in an effective and accountable government.

Question 2. Currently all recipients of Federal grants, contracts, and loans are required to be posted online for public review. Do you support making all Federal assistance including subcontracts and sub-grants transparent in the same manner?

Answer 2. In general, as I said before, I support transparency and accountability in government. I would support publicly posting this information to the extent practicable, except in cases where there are genuine privacy concerns.

Question 3. Will you commit to ensure the Department fully implements all aspects of the Federal Funding Accountability and Transparency Act (P.L. 109-282) at the Department of Labor?

Answer 3. The Secretary has stated public support for this legislation, as has President Obama who co-authored this legislation and worked with you to secure its passage. It is my commitment to enforce all Federal laws under the Department’s jurisdiction, including this important law.

Question 4. President Obama’s transition Web site said this about how Cabinet agencies will operate: **Conduct Regulatory Agency Business in Public:** Obama will require his appointees who lead the executive branch departments and rule-making agencies to conduct the significant business of the agency in public, so that any citizen can see these debates in person or watch them on the internet.

Have you considered how you will implement this transparency mandate in your position should you be confirmed?

Answer 4. I have not had an opportunity to learn or evaluate how the Office of the Solicitor participates in rulemaking activities at the Department of Labor. However, I intend to work closely with the leadership team at the Department to maximize public transparency with regard to the decisionmaking processes at the agency.

Question 5. Will you commit to fully cooperate and assist me and my staff in our efforts to conduct oversight of Department of Labor programs especially those under your authority?

Answer 5. If confirmed, I will do my best to respond promptly and fully to all reasonable requests for information or assistance from members of the committee, including those relating to oversight of Department of Labor programs. I hope to maintain a productive working relationship not just with this committee, but with all Members of Congress.

Question 6. Have you considered any replication of the “Wage Watch” program or similar program(s) at the Federal level?

Answer 6. This initiative was designed as a local model for a limited geographic area in a State, rather than at the Federal level. Until the pilot is completed and evaluated, I would not consider or advocate expanding it to other areas in New York, to other areas of the country, to the Federal level or to other laws.

Question 7. The D.C. Circuit Court of Appeals held recently state that teacher unions are under the same Labor Management Reporting and Disclosure Act of 1959 reporting requirements as national teacher unions. The decision to apply

LMRDA transparency reporting requirements to State teacher unions was advanced by the Department of Labor to foster increased information for State teachers across the country. Will you commit to uphold and advance this important Department position to seek transparency from State affiliates of national organizations that must comply with LMRDA?

Answer 7. I have not yet become familiar with this case and the legal issues it addresses. However, as I have said in confirmation meetings, I believe in strong and balanced enforcement of the LMRDA. If confirmed as Solicitor of Labor, one of my principal functions will be to provide the Secretary with legal advice as to the Department's responsibilities under the laws it administers and enforces so that she has the benefit of this information as she implements her priorities and those of the Administration.

RESPONSE TO QUESTIONS OF THE HELP COMMITTEE BY M. PATRICIA SMITH¹

Question 1. To what degree, if any, have you been consulting with U.S. Department of Labor officials pending your nomination? Have any of your staff consulted on your behalf? What were the nature and substance of any conversations? Have you been provided with any documents by U.S. Department of Labor staff? If so, please provide them in full to the committee.

Answer 1. I have consulted and received advice from the Department's ethics attorneys in connection with my financial disclosure report and the ethics requirements applicable if I am confirmed as Solicitor of Labor. I also attended a portion of a meeting of the senior managers of the Office of the Solicitor, when I was in Washington on other business in April 2009, to introduce myself.

I have consulted with the Office of Congressional and Intergovernmental Affairs (OCIA) during the committee's consideration of my nomination, including in preparation for meetings and in responding to the committee's written questions. In preparation for my confirmation hearing, OCIA provided me the questions for the record asked by this committee of the Secretary in her confirmation hearing, along with her answers, and met with me to review questions that would likely be asked of me in my hearing. A few political appointees in the Office of the Secretary participated in a mock hearing in preparation for my confirmation hearing. In addition, the Director of Intergovernmental Affairs at the New York State Department of Labor, Patricia Fahy, had one conversation with OCIA concerning the status of my nomination.

I have also discussed possible candidates for positions in the Solicitor's Office with the Labor Department's White House Liaison. I have received approximately 10 resumes from the Labor Department's White House Liaison, but I have not made any hiring decisions. Because those resumes contain personal information and the individuals do not necessarily know their resumes were sent to the Labor Department I have not included them. I also received from the Labor Department a forwarded request to attend a Bar Association function in my role of Solicitor nominee, which I declined. I have attached it as Attachment A.

Question 2. In your role as Commissioner of Labor in New York, have you recused yourself from any matters that involve interactions with the U.S. Department of Labor since your nomination?² If confirmed, to what degree would you recuse yourself from matters pertaining to the New York Department of Labor and for what periods of time?

Answer 2. In my role as Commissioner, I have not recused myself from any matters that involve interactions with the U.S. Department of Labor. To my knowledge all interactions with the U.S. Department of Labor, since my nomination, involved routine business matters and have not involved the Solicitor's office. Pending my confirmation, the only matter involving the U.S. Department of Labor that required my personal involvement is subject to the confidentiality protections provided by New York law to non-final interagency discussions and is discussed as part of my confidential response. As to future recusals, I plan to follow the commitments described in my Ethics Agreement which was provided to the committee. It states:

¹The committee took care to only include non-confidential documents and information based on those documents in these questions that will be given to the clerk for inclusion in the official public record. We believe we segregated the question based specifically on confidential documents and information into a separately labeled confidential request. Should you have concerns with the documents or information referenced herein being included in the public record, please contact the committee to discuss those concerns.

²To the extent this request raises specific confidentiality concerns, please state as such and provide any answer as part of the confidential response.

"For a period of 1 year after my resignation (as Commissioner of Labor of New York), I will not participate personally and substantially in any particular matter involving specific parties in which New York State is a party or represents a party, unless I am first authorized to participate pursuant to 5 CFR § 2635.502(d). In addition, for the duration of my tenure as Solicitor of Labor, if confirmed, I will not participate personally or substantially in any particular matter in which I previously appeared before, or directly communicated with the U.S. Department of Labor on behalf of the New York State Department of Labor, unless I am first authorized to participate pursuant to 5 CFR § 2635.502(d)."

Question 3. Do you believe that it is appropriate for the enforcement staff of the Federal or State Government to work and coordinate with entities that have vested and/or financial interests that happen to align with enforcement efforts of the Department of Labor? For example, did you or your staff consider whether there was any actual or apparent conflict of interest in having unions that are seeking to organize workers in a particular industry also perform outreach and report violations for those same industries? How is that situation different from for-profit businesses participating in the Wage and Hour Watch program?

Answer 3. I believe that it may be appropriate for the government to work with entities that have interests that align with the government's own enforcement efforts if those entities are reliable and understand what the collaboration entails. My staff and I did consider whether there was an actual or apparent conflict of interest in having unions that may be seeking to organize in particular industries perform outreach and report violations in those industries. We concluded that our prior experience over a number of years in working with the two unions that are participating in Wage and Hour Watch demonstrated no such conflict.

I believe unions, community groups, and for-profit businesses are all entities that may have legitimate, albeit different, interests in labor law enforcement that align with the Department of Labor's enforcement efforts. Additionally, each of these three types of entities often has knowledge of significant labor law violations that could support the government's own enforcement efforts. Therefore I believe it may be appropriate for government to work with these, and other entities, that have interests that align with the government's own enforcement efforts.

Question 4. What is the vetting process for the New York Department of Labor to partner with an entity both with regard to the Wage and Hour Watch program and other programs? Did the Department comply with that policy in the case of Wage and Hour Watch groups? Were any groups rejected for the Wage and Hour Watch program? Were any background checks (administrative enforcement actions, criminal records, etc.) undertaken by the State of New York with regard to any sponsoring groups and/or officials and individuals of the groups, and/or any individuals who participated in the Wage and Hour Watch program? If so, please provide a complete record of these background checks to the fullest extent possible.

Answer 4. There is no formal vetting process for the New York State Department of Labor to partner with an entity. Instead, the Department relies primarily on prior experience working with the group. For the Wage and Hour Watch pilot, the Department selected the groups that were asked to join based on prior experience working with them on a more informal basis. Groups were rejected in the sense that some groups the Department had worked with were not asked to join the pilot based on past experience with them. Currently, for the potential expansion of Wage and Hour Watch, the New York State Department of Labor has a written application, which the committee has been provided. I have attached an additional copy as Attachment B. The Department did consider the possibility of background checks on the groups but ultimately rejected that idea after inquiring as to whether Neighborhood Watch groups are subject to background checks. The Department was informed that the groups participating in this more sensitive crime prevention partnership were not subject to a check.

Question 5. One of the groups participating in the program, Make the Road New York, sent an e-mail on February 2, 2009 to the New York Department of Labor discussing its relationship with ACORN that was "not for quoting, but for background." [Attached as Exhibit A]. Did the Department specifically inquire into this relationship? If so, what was the reason for the inquiry and please describe the nature and substance and any response given besides this e-mail. Has ACORN applied to join Wage and Hour Watch? Does the Department have any other relationship with ACORN? If so, please describe the nature of the relationship.

Answer 5. I have no personal knowledge of this e-mail or the circumstances surrounding it. I inquired of the Deputy Commissioner to whom it was sent. To the

best of her recollection, she had called the sender of the e-mail after an editorial in the *New York Post* described Make the Road New York as being “closely aligned” with ACORN, a statement that surprised her based on her experience with Make the Road New York. Apparently, the inquiry was more personal than an official Department of Labor inquiry. There was no other response besides the e-mail, which the Deputy Commissioner kept in case there were press inquiries triggered by the editorial. ACORN has not asked to participate in the Wage and Hour Watch program and, to the best of my knowledge, the Department has no other relationship with ACORN.

Question 6. The Wage and Hour Watch agreement (the “agreement”) contains language that requires groups to “maintain the confidentiality of all personal information obtained through Wage Watch activities, “but, “[t]his pledge of confidentiality shall not preclude outreach to individuals working with Wage Watch groups to notify them or engage them in meetings, community organizing, or other activities typically engaged in by the Wage Watch group.” [Attached as Exhibit B]. Please clarify whether and how Wage and Hour Watch participant organizations are permitted to use any information gathered as part of Wage and Hour Watch under the agreement.

Answer 6. The only use that Wage and Hour Watch groups can make of information gathered as part of Wage and Hour Watch activities, other than giving it to the Labor Department as part of a referral, is to use contact information such as names and addresses to notify individuals of the group’s activities, such as meetings or community organizing events.

Question 7. In your response to prior Question for the Record 5, you stated that the State had orally instructed Wage and Hour Watch groups to refrain from giving out information about their member groups “when they are doing Wage and Hour Watch activities: in response to a request made on March 17 by several trade associations. When was that direction given and who directed the groups to refrain from that activity?

Answer 7. Within a week of the March 17 meeting, I directed Lorelei Boylan to call all of the Wage and Hour Watch groups, inform them that this issue came up at a meeting with various trade associations, that the issue was not directly covered in the agreement, and to instruct them that, to the extent they had materials about their organization, they should refrain from giving out these materials when they were doing Wage and Hour Watch activities. Within a week after that she reported back to me that she had spoken to each of the groups, they understood the instruction, and would comply.

Question 8. On May 26, 2009 e-mail sent by Brian O’Shaughnessy of a labor-religion group to several persons interested in Wage and Hour Watch program, which is carbon-copied to Deputy Commissioner Gerstein through the Wage and Hour Watch e-mail account, purportedly attaches a New York Department of Labor document that is “NOT” in final form and for internal use ONLY of those on this e-mail from DOL that I believe may answer many of your questions.” [Attached as Exhibit C]. Please provide a copy of the referenced document. Were other groups or individuals outside the New York Department of Labor given this same information?

Answer 8. The document was a blank copy of the Wage and Hour Watch Agreement which the committee already has been provided. I have attached another copy as Attachment C. The document was described as “not in final form” because we are anticipating that some changes may be made in the agreement if the pilot is expanded. This is the document that would have been sent to any group that requested more information, but my staff believes that no other group requested more information.

Question 9. Was additional funding sought or obtained by the New York Department of Labor for either the pilot program or any anticipated expansion of the Wage and Hour Watch Program? Please provide the total cost to date of the Wage and Hour Watch program to fullest extent possible.

Answer 9. No additional funding was sought or obtained by the New York State Department of Labor for either the pilot program or any possible expansion of the Wage and Hour Watch program. The total out-of-pocket cost of the program (for in house printing of materials and costs associated with the February 7, 2009 training) to date is approximately \$665. My staff estimates that salaries for staff time spent developing and implementing the Wage and Hour Watch Program to date is under \$5,000. The total cost for the Wage and Hour Watch pilot, to date, is approximately \$5,665.

Question 10. A November 7, 2008 e-mail with attached notes regarding Wage and Hour Watch states that the New York Department of Labor should include the "Workers' Rights Law Center since their current staffing will leave them in need of support from government agencies." [Attached as Exhibit D]. The same attachment suggests that the groups and the New York Department of Labor may want to approach private foundations for grants as part of a public/private partnership to support the program. How would Wage and Hour Watch membership have assisted the Workers' Rights Law Center with staffing difficulties? Are you aware if any payments and/or grants were made to Wage and Hour Watch participants for joining or participating in the program? Please specify which groups and the amounts. Will the State of New York be overseeing or auditing any funds given to the participating organizations to fund Wage and Hour Watch activities?

Answer 10. Since I am not the author of the e-mail cited in your question, I have no direct knowledge of what the author was thinking when she wrote the notes. However, I do know that unlike the other groups who are participating in the Wage and Hour Watch Program, the Workers Rights Law Center is a law office that brings legal cases and around the time this e-mail was written it had lost two of its three attorneys. I asked the author and she informed me that when she wrote the e-mail she thought that participation in the Wage and Hour Watch pilot would encourage the Center to refer more cases to the Department, lessening its own case-load and the burden on its remaining staff. To my knowledge no group has applied for or received any funding from any source for participation in the Wage and Hour Watch program. The New York State Department of Labor has not approached any private foundations for grants, nor has it been contacted by any private foundation, or other entity, to discuss the Wage and Hour Watch program and the possibility of funding anyone for participation in that program.

Question 11. When formulating the New York Wage and Hour Watch program, what analysis did you undertake to consider whether legislative authorization was required to establish the program? Please provide the committee with any written analysis on this point to the extent it has not already been produced or, if the analysis was not written, please provide a written summary of the analysis.

Answer 11. I myself did not perform any legal analysis. That was the job of the New York State Department of Labor's Counsel who reviewed the documents for the then-proposed program and did not find any legal implement to launching the pilot under existing legal authority. No written legal analysis was produced.

Question 12. Do you think that establishment of a similar Wage and Hour Watch program on the Federal level could be done under existing authority, or would legislative authorization be required? Have you obtained any legal analysis on this point? If so, please provide the committee with any such written analysis or, if the analysis was not written, please provide a written summary of the analysis.

Answer 12. I have not considered whether a similar Wage and Hour Watch program could be established on the Federal level within existing legal authority or whether it would require legislation and have no opinion on this subject at this time. I have neither sought nor obtained a legal analysis on this issue.

Question 13. Several e-mails produced to the committee, including a February 27, 2009 e-mail from Deputy Commissioner Gerstein to the outside pilot groups [Attached as Exhibit E], suggest that a Web page and "Google group" or list serve be developed for Wage and Hour Watch. The committee is only able to locate press materials announcing the program on the New York Department of Labor's Web site. Was such a Web page and/or group created and is it functioning? To the extent commercial internet resources were used for a list serve or group, what safeguards are being used to prevent potential confidential complainant information shared through such portals from being improperly accessed?

Answer 13. Neither the Web site nor the list serve group was ever created and neither is functioning.

Question 14. A Wage and Hour Watch participant organization, Make the Road, requested in a May 11, 2009 e-mail that Ms. Boylan "squeeze in" referrals of bigger cases before she leaves the New York Department of Labor. [Attached as Exhibit F]. What kind of criteria does the New York Department of Labor have for accepting referrals for this Taskforce? Did the New York Department of Labor accept the referrals in question on behalf of Make the Road? What criteria was used to determine which cases were bigger than other cases?

Answer 14. The Fair Wages Taskforce uses the following criteria for accepting referrals from individuals or community groups:

1. Whether employees in the particular business are at high risk of exploitation (child labor, certain low-wage industries that have high rates of noncompliance, immigrant workers).

2. Businesses that employ 30 or more employees in low-wage industries.

3. Large cases in the sense that the employer has multiple locations requiring a coordinated team effort for the investigation.

The focus of the Fair Wages Taskforce is low-wage industries so the criteria for bigger cases is either the number of employees or number of locations (as opposed to amounts of underpayments which tend to be much more in higher paid industries where most cases involve overtime violations). As far as I know the Task Force accepted one case mentioned in the e-mail, the bagger case, because baggers have been a priority occupation for the Task Force since early 2008.

Question 15. You stated previously in response to Questions for the Record that as of May 2009 you had not received any complaints about Wage and Hour Watch. Are you aware of whether any other government agencies may have received complaints about Wage and Hour Watch?

Answer 15. I am not aware of any entity, governmental agency, trade organization, or participating group that has received any complaints about Wage and Hour Watch.

Question 16. You stated in your testimony that one of your goals as Solicitor would be to "make sure there is a consistency of priorities around the country so that you get the same service from the Solicitor's Office in San Francisco as you do in Maine." Are there any specific priorities that you do not believe are being consistently applied nationally? Why do you believe those priorities are not consistent nationally? If confirmed, what specific steps do you anticipate taking to ensure greater consistency?

Answer 16. When I worked on the Labor Department Agency Review team for the Obama transition I was assigned to the Wage Hour Division. One of the main issues brought to my attention by the Wage Hour personnel in the field is that their ability to bring cases was highly dependent on the regional Solicitor's Office. Because the Wage Hour regions are different than the Solicitor's Office regions, some Wage Hour regional offices are served by more than one Solicitor's Office. I was told there was often a marked difference between the two Solicitor's Offices in their responses to requests to file lawsuits. If confirmed, before I take any specific steps to ensure greater consistency, I would want to determine how widespread this problem is, including the extent to which it is experienced by the other enforcement agencies and what the apparent cause or causes of the problem are.

Question 17. Do you think it is appropriate for State and/or Federal Government enforcement agents to use their position to promote union organizing efforts at particular companies? If you discovered that government enforcement personnel were targeting investigations and/or otherwise using their positions for such purposes, would you support taking disciplinary action, including terminating them? Will you commit to investigating and removing any enforcement personnel found to have done this or otherwise abuse their position in a law enforcement agency at the U.S. Department of Labor?

Answer 17. I do not think it is appropriate for a State or Federal Government enforcement agent to use his or her position to interfere with union organizing efforts whether the goal is to promote or deter the efforts. I also would not automatically dismiss legitimate complaints about possible violations of labor laws because of their source. I would support taking disciplinary action against any agent that abuses their position in that way. However, I am not sure at this time that I can commit to investigating and removing such personnel because I do not know if this type of investigation falls under the jurisdiction of the Solicitor's Office or some other office, such as the Office of the Inspector General.

Question 18. In your testimony in May and in your written statement submitted with the committee, you discussed the fact that your Green Grocer Code of Conduct required employers to submit to "independent monitoring." Who conducted that monitoring and is it continuing? How were/are they compensated for that monitoring and what is the annual cost of that monitoring?

Answer 18. The monitoring was done by A&L Group, Inc, an independent monitoring firm hired and paid by the Attorney General's office. The monitoring was done for 200 establishments for a period of 2 years, the length of time required by the Code of Conduct. I can't tell you the exact cost of the contract because I no longer have access to the files at the Attorney General's Office. I remember that the cost was approximately \$30,000 the first year and \$20,000 the second year.

Question 19. In your testimony in May, you suggested that New York employers who do not participate in “compliance offers” from your agency violate wage laws and should be prosecuted as willful violators. Do you believe that failure to participate in compliance opportunities renders all labor law violations (e.g., health and safety, wage and hour, etc.) as willful violations? If confirmed as Solicitor of Labor, would you seek to impose willful liability on violators who do not participate in “compliance offers” with the U.S. Department of Labor?

Answer 19. I believe that an entity is in willful violation of New York’s Labor Law when it violates the Labor Law after (1) there has been a major publicized investigation into their industry, (2) that investigation has resulted in findings of a high non-compliance rate in the industry, and (3) the entity was invited to a compliance seminar and declined to attend. In New York the legal standard for a willful violation is “known or should have known” of the violation and I believe that standard is met in these circumstances. While I believe that failure to attend a compliance seminar is a factor in finding willfulness under New York law, it is not the only factor. Other factors, including the ones I describe above should also be considered. If confirmed as Solicitor I will apply the appropriate Federal legal standard to findings of willfulness. I am not currently familiar enough with the Federal standard to make any final conclusions but if failure to attend a compliance seminar is an appropriate factor in applying the Federal standard, I will apply it.

Question 20. The Department of Labor issues opinion letters under a number of its programs, particularly in the wage and hour and employee benefits areas, to explain the law and regulatory requirements in specific circumstances. At any given time, there may be several hundred pending requests for opinion letters from stakeholders. In your prior response to Questions for the Record, you stated that you understood the importance of opinion letters and would provide adequate support to Wage and Hour to issue opinion letters. Would you commit to updating the committee on the total number of opinion letters pending on a monthly basis in the wage and hour and employee benefits areas and other areas under the Department’s jurisdiction?

Answer 20. I have seen the value of opinion letters at the New York State Department of Labor where the letters are issued by Counsel’s office. My understanding at this time is that at the U.S. Department of Labor, opinion letters are not issued by the Solicitor’s Office but by the various agencies. However, these opinion letters are on the Department’s Web site; for example, the Wage and Hour Opinion letters can be found at: www.dol.gov/esa/whd/opinion.opinion.htm. I continue to believe the Solicitor’s Office must provide adequate support to the agencies, and, if confirmed, intend to address any problems caused by lack of Solicitor’s support. However, my understanding at this time is that the Solicitor’s Office is not involved in every opinion letter, or even in most opinion letters and therefore believe that office does not have the ability to update the committee on the numbers of opinion letters issued by the various agencies.

[Whereupon, at 11:10 a.m., the hearing was adjourned.]

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