

**Questions for the Record for Mr. Michael Walsh
U.S. Senate Committee on Commerce, Science, and Transportation
“Nominations Hearing”**

June 16, 2020

Questions Submitted by the Hon. Maria Cantwell to Mr. Michael Walsh, Nominated to be General Counsel of the Department of Commerce.

Scientific Integrity. As a leader at the Department of Commerce who has served as Deputy General Counsel, Chief of Staff, and now Acting General Counsel, you play a key role in ensuring that Department respects its scientific and professional staff and the role they play in the decision-making process. From natural disasters and emergency response to fisheries management and weather, the Department must follow the best available science.

Unfortunately, there have been several recent deviations from that course at the Department of Commerce. On September 1, 2019, President Trump sent a Tweet that “South Carolina, North Carolina, Georgia, and Alabama will most likely be hit (much) harder than anticipated” by Hurricane Dorian. As you know, this was disputed by National Oceanographic and Atmospheric Administration (NOAA) weather forecasters stationed in Birmingham, Alabama. To address confusion and the potential risk to public health and safety from that Tweet, the National Weather Service (NWS) office in Birmingham issued a clarifying Tweet that Alabama “will NOT see any impacts from Dorian.”

Rather than support its scientists, NOAA released an unsigned and confusing statement on September 6, 2019, stating that the National Hurricane Center models “demonstrated that tropical storm-force winds from Hurricane Dorian could impact Alabama.” Several media reports have indicated that you were involved in the drafting or facilitation of the unsigned NOAA statement. Specifically, these reports indicate that the statement may have been drafted on the computer of the Department’s Deputy General Counsel and later reviewed or revised by you.

Question 1. How would you describe your level of involvement in and responsibility for NOAA’s unattributed September 6, 2019 statement about Hurricane Dorian?

Answer.

As noted in the Inspector General’s report and my response thereto (which is included as Appendix Q), I sought to ascertain all relevant facts free from commentary, bias, or spin. I convened and empowered a team of Department and NOAA leadership to address the issue while I was traveling on official business overseas, and that team was free to raise any issues about process with me. I and other Department leaders were concerned about ensuring that NOAA leadership – political and career – and NOAA scientists were comfortable with any statement before it was issued.

Question 2. In retrospect, would you have changed anything about the process that led to the drafting or issuance of NOAA's unattributed September 6, 2019 statement about Hurricane Dorian? Would you change anything about this statement? If so, what?

Answer.

No.

Question 3. Did NOAA's unattributed September 6, 2019 statement about Hurricane Dorian benefit NOAA or further NOAA's mission? If so, how and what aspect of its mission?

Answer.

I direct you to Appendix Q of the Inspector General's report, which contains my response and the Department of Commerce's response.

Question 4. Did you engage with NOAA political leadership, career leadership, or employees in general to address the publicly reported NOAA employees' complaints and concerns about NOAA's unattributed September 6, 2019 statement about Hurricane Dorian?

Answer.

I work frequently and well with political and career leadership and employees of NOAA.

Question 5. The committee is aware that the Department of Commerce Office of the Inspector General (OIG) has an open inquiry into the events surrounding NOAA's unattributed September 6, 2019 statement about Hurricane Dorian. Should the committee be concerned about the outcome of the OIG report and how it reflects on your character or fitness to hold the position of General Counsel of the Department of Commerce?

Answer.

No. The Office of the Inspector General has published its report, and I direct you to Appendix Q, which contains my response. The conclusions in the Inspector General's report about me are completely unsupported by any of the evidence or factual findings that the report itself lays out. The only evidence that the report cites to support its conclusion that the process was somehow flawed because of my leadership is information that was never communicated to me and only available after the fact. The record shows that the process I designed was open and collaborative and intended to achieve a consensus-based outcome.

Question 6. Do you have any lessons learned from the process that was undertaken to ultimately lead to the release of the NOAA's unattributed September 6, 2019 statement about Hurricane Dorian?

Answer.

I direct you to Appendix Q of the Inspector General's report, which contains my response.

Question 7. In hindsight, assuming you had the authority to do so, would you stop the release of NOAA's unattributed September 6, 2019 statement about Hurricane Dorian? Why or why not?

Answer.

No. I was informed that the statement was scientifically accurate, and neither the NAPA report nor the Inspector General's report have concluded otherwise. As set forth in the Inspector General's report and my response thereto, NOAA employees were involved in drafting the statement and it was my understanding at the time that senior NOAA employees and forecasters at the National Weather Service had reviewed and did not object to the issuance of the statement.

Question 8. Will you commit to the release of the OIG's report on NOAA's unattributed September 6, 2019 statement about Hurricane Dorian without any requested redactions for privilege by the Department? If not, why are taxpayers not entitled to the full report to show how government business was conducted regarding the September 6, 2019, NOAA unattributed statement about Hurricane Dorian?

Answer.

The Inspector General's report was released on July 9, 2020 and is available at <https://www.oig.doc.gov/Pages/Evaluation-of-NOAAs-September-6-2019-Statement-About-Hurricane-Dorian-Forecasts.aspx>.

Question 9. Did you cooperate fully with the OIG in their inquiry related to NOAA's unattributed September 6, 2019 statement about Hurricane Dorian?

Answer.

Yes.

Question 10. Please respond to the allegation made by Julie Kay Roberts in an interview by the NOAA General Counsel that on September 6, 2019, at around 2:30 a.m. Eastern Standard Time with regard to the Hurricane Dorian Birmingham Weather Forecast Office tweet, you said "There are jobs on the line. It could be the forecast office, or it could be someone higher than that and that's less palatable to me." Do you recall a phone call with Ms. Roberts on or around that date and time? What was the nature of that call? Why would Ms. Roberts come away with the impression that "jobs [were] on the line"?

Answer.

I recall speaking to Ms. Roberts on September 6, 2019 at 9:30 am local time when I was traveling overseas on official business, but my recollection of the substance of the conversation differs from hers. I do not know why and it would be unfair for me to speculate. I note that the Inspector General found that there was no credible evidence that I threatened jobs.

Question 11. An internal NOAA Fisheries memorandum dated June 22, 2020, directed NOAA Fisheries employees to refrain from using the term COVID-19 and COVID-19 related terms whenever possible in both agency rulemakings as well as other formal announcements, including fishery management announcements. Since March, NOAA has routinely made announcements for fisheries management, including modifications to fishery observer coverage, specifically in response to transmission risk of COVID-19 between observers and crew. COVID-19 has resulted in significant direct and indirect impacts to the fishing industry including safety onboard vessels, impacted market access, and seafood processing safety requirements. Did you participate in the drafting of this NOAA National Marine Fisheries Service memorandum? If, so, what was your role in establishing this guidance? If not, did you provide any guidance to NOAA leadership regarding response, communications or messaging for COVID-19?

Answer.

I did not have any role in establishing or drafting this guidance.

Interference with the Census Bureau. Media reports also indicate that you were involved in the attempt to add a question regarding citizenship status to the 2020 Census. Specifically, these media reports note that you were involved in efforts to claim that the citizenship question originated with the Department of Justice, rather than the fact that the genesis originated with Secretary Ross.

Question 1. Are these reports of your involvement in the attempt to add a “citizenship” question to the 2020 Census correct? If not, please explain why they are not correct.

Answer.

I joined the Commerce Department in January 2018, as Deputy General Counsel, one month after the Department of Justice requested the reinstatement of a citizenship question to the 2020 decennial census. I was involved in the Commerce Department’s careful consideration of the Department of Justice’s request. I do not know which media reports are referenced in the question, so I cannot comment on their accuracy.

Question 2. The Census Bureau recently created 2 top level positions that were filled by political appointees. Specifically, the Census Bureau hired Nathaniel T. Cogley as Deputy Director for Policy and Adam Korzeniewski, a former political consultant, as Mr. Cogley’s senior advisor. What role will they play in the organizational structure of the Bureau; how do their appointments impact the roles of existing senior staff; and, what role, if any, will these individuals have in directing the execution of 2020 Decennial Census field operations, tabulations, and policy?

Answer.

Dr. Cogley and Mr. Korzeniewski will support Census Bureau Director Steven Dillingham. Dr. Cogley will report to Director Dillingham and Mr. Korzeniewski will report to Dr. Cogley as his Senior Advisor. Both joined the Census Bureau from the Department of Commerce where they had been working on Census issues since April. Additional information about their respective

positions can be found in following statement released by the Census Bureau, available at <https://www.census.gov/newsroom/press-releases/2020/statement-new-staff.html>).

Question 3. The Census Bureau's response to the COVID-19 pandemic was to delay 2020 Decennial Census field operations for the health and safety of its workforce and the American public. Respondent data quality degrades as the gap between the reference period (April 1, 2020) and the date of collection (now late summer) increases. How can we be assured the counts are valid for reapportionment, redistricting, and general purpose uses (i.e., will you remove misreported children born after April 1; will you remove individuals duplicated because they were enumerated by the Census multiple times and how will you select their correct location; will appropriate field resources be directed to close the current significant gap in response rates by race)?

Answer.

The Census Bureau has taken substantial action to adjust for COVID-19. The years of planning and Secretary Ross's commitment to ensuring the 2020 Census was adequately funded when the Department of Commerce and the Census Bureau updated the Lifecycle Cost Estimate in 2017 have ensured the 2020 Census has the necessary resources to adapt to COVID-19. Most important was the inclusion of substantial contingency funding in that estimate. The Census Bureau had more than \$2 billion in contingency funding available at the start of the pandemic, which is projected to cover the costs of the shift in operations and still leave \$500 million available for other contingency needs.

The timeline shift in operations is necessary to ensure a complete and accurate census. The self-response rate has already surpassed the target of 60.5 percent before the census takers begin visiting non-responding households. Census takers will begin visiting non-responding households in most of the country in August, with work in some places starting earlier in July. The paid media budget for the 2020 Census was increased from \$240 million to \$323.5 million. The communications campaign has been adapted in light of COVID-19, and it targets low-responding areas. The campaign is supported by more than 1,500 partnership staff who work at the local level to promote the 2020 Census in low-responding areas.

The Census Bureau has special procedures and processes to help prevent people from being counted more than once and to ensure they are counted in the right places. These sophisticated procedures and processes have been developed from decades of census and survey-taking experience. In order to maintain the strong protections against fraud, the Census Bureau keeps the specifics of this sensitive process confidential and cannot reveal them in a public way. Within the bureau, only employees with an operational need to know have this specific information. These methods have been thoroughly tested and are well-established and effective to support a complete and accurate count.

Question 4. To protect the identity of 2020 Decennial Census respondents, the Bureau will be applying differential privacy methods to infuse noise into its substate tabulations. While this approach does not impact apportionment tallies, it could have a significant impact on the quality of data used in redistricting, assuring voters rights, and a variety of applications used for small

geographic areas. When will the Census Bureau determine the categories of data to be perturbed and the level of noise to be infused? What are the Bureau's plans to ensure the public's trust in the validity of these products, will you provide measures of uncertainty by characteristic at the Census block level, and will you train data users on how best to use these new products?

Answer.

The Department of Commerce and the Census Bureau are committed to the legal requirement to protect the confidentiality of personal information. With the rise of advanced technology that can reconstruct individual-level records from tabulated data, and the proliferation of third-party data sources that can then be linked to those records, the privacy risks associated with publishing highly granular statistics contained in our data products have increased enormously.

The Census Bureau is publishing a series of data releases throughout this summer for data users to evaluate this new system, and it is committed to working with data users and other stakeholders. The Bureau has also engaged the National Academy of Sciences Committee on National Statistics to assist in this work.

Question 5. The 2020 Census enumerations will be the basis for the Bureau's Intercensal Estimates that are subsequently employed as demographic survey controls (e.g., the American Community Survey). These statistical measures are used to distribute trillions of dollars in federal domestic assistance over the course of a decade. Given the uncertainty of the 2020 census enumeration quality, what avenues do state and local governments have to challenge their 2020 enumerations? Does the Bureau plan to be more flexible in accepting challenges from impacted governments in either its Decennial Census or Intercensal Estimates Challenge process. If enumeration anomalies are discovered in this decennial census, would the Bureau be willing to modify the file used as the basis for its population estimates, in a manner similar to its development and application of the 1990 Modified Age Race Sex file?

Answer.

The Census Bureau has not yet published guidelines for the 2020 Census challenge program. The Census Bureau will also conduct two important coverage evaluations for the 2020 Census – the Demographic Analysis and the Post-Enumeration Survey – to assess the quality and coverage of the census. In the meantime, the Department of Commerce and Census Bureau are committed to doing everything possible to ensure a complete and accurate count.

Executive Branch Concerns with FCC's Ligado Decision. The Departments of Commerce and Transportation (along with the entirety of the executive branch) believe that the Federal Communications Commission's ("FCC's") recent approval of Ligado's terrestrial wireless plans threatens the nation's global positioning system ("GPS") on which the safety and security of everything from civil aviation to military operations to weather forecasting rely. The FCC rejected the executive branch's concerns and related technical studies both from the government and the private sector showing that the precision and effectiveness of GPS could be impaired. Instead, the FCC relied on competing technical studies (some of which were funded by Ligado),

and its own conclusion that the government studies measured the wrong things, to allow Ligado to move forward with its plans.

Yet in its decision to allow Ligado to move forward, the FCC acknowledged that its “analysis [in the order] should not be construed to say there is no potential for harmful interference to any GPS device currently in operation in the marketplace.”

Question 1. Did the FCC quantify the number of receivers that would be negatively impacted by its decision, or analyze the impact of its decision on the risk this interference could cause to safety of life or property?

Answer.

It is my understanding that the FCC’s Ligado Order did not include such an analysis. The Department of Commerce’s National Telecommunications and Information Administration (NTIA) recently filed a petition on behalf of the Executive Branch seeking the FCC’s reconsideration of the Ligado Order focusing primarily on the potential harm to the critical missions of federal users, including the Department of Defense and Department of Transportation. The NTIA petition did note that the FCC’s Ligado Order did not consider the major economic impacts its decision will have on civilian GPS users if Ligado’s operations increase the risk of substantial disruptions to a wide range of civil GPS receivers, including those used by emergency first responders.

Question 2. Did the Department of Transportation or Commerce provide data in its study on the percentage of GPS receivers that would suffer interference from Ligado’s terrestrial operations at the power levels recently authorized by the FCC? Did the FCC ask for such information?

Answer.

Neither the Department of Transportation nor Commerce attempted to quantify the percentage of GPS receivers that may suffer interference from Ligado’s terrestrial operations. NTIA did submit to the FCC materials and information on the harms Ligado’s operations would cause to GPS, including direct pleas from the Departments of Defense and Transportation. For example, NTIA’s Office of Spectrum Management solicited technical inputs from federal agencies, and in collaboration with the FCC and agency subject matter experts, evaluated all of the GPS measurement data collected over the years in assessing Ligado’s December 2015 applications, as amended in May of 2018. The data show that a vast number of GPS systems would still be impacted even under reduced power and guard bands adopted by the FCC. The testing data revealed that even very low power levels from a terrestrial system in an adjacent band will degrade the functionality and performance of very sensitive equipment required to receive and process GPS signals, resulting in a range of adverse effects such as loss of lock, reduced accuracy, position error, and increases in satellite acquisition/reacquisition time.

Question 3. Do you agree that in high-profile spectrum decisions, particularly ones which create potential risk to safety of life, that it is in the greater public interest to reach consensus among

and between the FCC and the expert federal agencies on aviation, transportation safety, and national defense?

Answer.

I agree that it is imperative that consensus be reached in resolving all technical disputes that involve the potential for harmful interference to critical services such as GPS whenever possible.

Questions Submitted by the Hon. Amy Klobuchar to Mr. Michael Walsh, Nominated to be General Counsel of the Department of Commerce.

Question 1. In March 2018, Secretary Ross announced his intent to add a citizenship question to the 2020 Census, which would have led to an undercount of about 6 million people according to one study. Last July, the Supreme Court ruled against this effort. Reports indicate that you were involved in efforts to claim that the citizenship question originated with the Department of Justice rather than the Commerce Department.

If confirmed, how will you ensure that any changes to the Census do not unfairly target immigrants and politicize citizenship data?

Answer.

The law is clear that information obtained in the census is used only to produce statistics and cannot be used to target any individual. It is a criminal offense to reveal information obtained by the Census for any purpose other than the statistical purposes for which it was supplied, and violations are punishable by up to 5 years in prison and/or a \$250,000 fine.