

Remarks by the Secretary of Homeland Security Michael Chertoff at the American Bar Association Second Annual Homeland Security Institute Meeting

Release Date: January 18, 2007

Washington, D.C.
American Bar Association
Homeland Security Institute Meeting

Secretary Chertoff: I want to thank Joe, who is a former colleague as United States Attorney, also was the first General Counsel of the department for his very kind introduction. I also want to thank Lynn for running this conference and bringing it back.

I am all that stands between you and the bar -- and I don't mean the Judicial Bar -- so that's always a perilous place to be. I also have to say that it's interesting to think about homeland security law as a discipline. When I left the practice of law in 2001, there was no such thing. And now, as evidenced by the population of this room, it's burgeoning. And I guess that's no surprise, because, in fact homeland security is increasingly intertwined with a lot of activities in the private sector, and that means lawyers get involved. And I thought what I would do is talk a little bit about the ways in which we do that, and what I see going forward, in terms of where we have a lot more work to do.

The biggest challenge for us as a government department is not the traditional job of running operational agencies like the Coast Guard or Secret Service or Customs and Border Protection -- government always does that. We run operational agencies, we own assets, we employ people. The biggest challenge is working in partnership; getting things done when we don't employ the people and we don't own the assets, and where, in fact, most of the assets and employees are operating in the private sector. What is expected of us in homeland security is something that can only be delivered in a partnership with your clients, and therefore it becomes very important for us to figure out how do we work that relationship with your clients.

In particular -- I'll get into this in a little bit of time -- is there something we can do besides just regulation? The traditional way government interacts with the private sector is we make them do things. Are there things we can do to engage, particularly those of you who are distributed in fields that are not particularly heavily regulated? And I think that's one of the challenges and the topics for homeland security as we go forward.

Now we have faced some significant challenges in the two years I've been Secretary. We had just an unprecedented hurricane season in 2005, never before experienced in the United States. In 2006, of course, we had a plot which was disrupted, but which had the potential to be equal to or perhaps even greater than 9/11, in terms of its scope and impact on this country.

At the same time, we've dealt with the challenge of border security and immigration reform, a problem that has festered for 20 or 30 years. We've begun to confront it in a way that we've never done before, and that's been an amazing challenge, but it's also been something that has a real opportunity and a real promise.

All of these episodes have contributed to the maturation of the Department of Homeland Security, which is approaching its fourth anniversary, which is quite young for a department. We've learned, we've adjusted, we've broadened partnerships across government, with the private sector and internationally. In some areas we've made tremendous strides, in others we have considerable distance to travel. And one of those areas where I think we do have some distance to travel is maturing our relationship with the private sector.

Let me stand back for a moment and review our progress to date. We have begun to build a solid foundation for our future security as a nation, one that recognizes the dynamic nature of the enemy; one that is focused on risk management, which is not risk elimination, but it's management of risk; one that thinks about costs and benefits and doesn't blindly go for security at all costs, or unwilling to pay any price for security; and one that considers how to balance security with liberty with prosperity and with the convenience and freedom that we expect as part of our way of life.

As part of this maturation effort over the last couple years, we've dramatically improved the way we screen people at the border. We're collecting biometrics fingerprints, two fingerprints from foreign visitors who come to

the United States, and we are now moving to collecting 10 prints. What that is going to do is give us, for the first time, the capability to identify the unknown terrorist, based on latent fingerprints that we pick up in battlefields and in safe houses all over the world. That is a major step forward, and something that was not foreseeable five years ago. And it's something that we've achieved without a major increase in the waiting times or any major interference with travel.

We've dramatically improved the way we screen cargo. We now assess all incoming containers for risk and we inspect all the high-risk containers. By the end of this year, we will scan every container or virtually every container that comes into the United States from across our land border or from overseas through radiation detection equipment. And we are beginning now to move that capability of scanning overseas through a pilot program we're running in six ports, including a port in the United Kingdom and a port in Pakistan.

In fact, we're increasing our footprint overseas in terms of container screening, by having about 80 percent of the containers actually get their initial screening in a foreign port before they even get on a ship.

As it relates to domestic infrastructure, we have issued a proposed new regulation to protect chemical sites; to decrease the standstill time for hazardous rail cargo; to mandate transportation worker identification; and to work with the aviation and maritime sectors to increase security across the board. And I think we've done it in a way that is not oppressive, and doesn't unduly burden, but looks to set performance standards and it invites the private sector, for the most part, to figure out how to meet those performance standards using its own ingenuity and the tools that every individual business brings to the table.

In the area of emergency management, we have put the re-engineering of FEMA on turbo chargers. We're in the process of completing the reorganization that will be effective on March 31. We have solidified our partnership with the Department of Defense. We have built real-time information gathering capability in an emergency that never existed before. We've done a level of planning that is much more detailed than ever envisioned by anybody in a civilian department dealing with emergencies. And all of these have taken place in a very, very short period of time. All of these things have materially contributed to the security of this country.

What do we want to do moving ahead? Well, again, I like to look at this in terms of categories that we have to address. First, we've got to continue to put emphasis on keeping dangerous people out of the country and out of our critical infrastructure. We've got to continue to put emphasis on keeping dangerous things, particularly radiological and nuclear devices, biological or chemical weapons, from entering the country or from posing a threat inside the country. We've got to continue to enhance the security of our critical infrastructure, recognizing that the model is going to change depending on the sector in the economy you deal with. It can't be a cookie cutter, one size fits all.

We've got to continue to boost emergency preparedness and response, including individual preparedness and business preparedness, which is the foundation of what all preparedness is, because, again, it can't be a dictated, top-down model, it's got to be a networked, bottom-up model.

Finally, on a more parochial note, we have to complete the job of creating DHS' core management as an organization as the largest government merger since the Defense Department was formed in 1947, and we've got to find a way to make the organization a model 21st century organization, which is a different organizational style than perhaps the familiar 20th century hierarchical government behemoth with which we're so familiar.

What I hope to do a little bit today is talk in particular about how the private sector must play a critical role when it comes to dealing with two of these elements of what our upcoming goals are: protecting critical infrastructure and emergency preparedness. In both of these areas, our success depends a great deal upon getting the private sector properly engaged and incentivized to play a partnership role with respect to homeland security.

After 9/11, the initial response, not surprisingly, I think was that the job of homeland security is a government job, and there's no question that a lot of it is a government job. The government has the responsibility to attack the enemy overseas. The government, for the most part, has the responsibility for manning the borders and checking what comes in through our airports and our seaports.

But five years later, as we look back, I think we have a little bit more complex and robust understanding of what is really required to achieve homeland security in depth, as opposed to merely the first cut of homeland security. And that means we have to have an integrated partnership with the private sector, spanning all 17 areas or sectors of the economy that cover what we call critical infrastructure or key resources. That means

we have to have shared responsibility with a government agency, with principle responsibility for a sector playing a tightly-knit role with the private sector that actually owns and operates the assets within that sector.

These shared responsibilities include protective measures that companies need to put in place to protect the infrastructure that every single American depends upon every day, the steps that companies need to take to prepare employees for emergencies, because I will tell you in a real emergency employees will be looking to companies for the initial assistance in terms of dealing with the particular threat.

We have to think about the role of companies in major threats to public health and safety, like a pandemic flu, and the interdependencies in the economy that mean that when there's a failure on the part of one institution in the private sector, it can have cascading effects with respect to other institutions.

And finally, we have to consider the construction of an intelligent, but nevertheless reasonably tough system of rules and regulations to enhance security in the infrastructure field, and to make sure that everybody plays on the same level, so we don't have freeloaders or people who take advantage of the fact that others do what they should do in order to hide themselves with a diminished level of security protection.

So let me unpack this in two categories: infrastructure protection, which is how do you harden yourself against an attack; and emergency preparedness, which is what do you do to respond and build resiliency when you have an attack.

Well, when it comes to protecting critical infrastructure, we have two basic approaches. Our first and preferred approach is to work in a voluntary capacity with the private sector to share information about threats; to discuss, identify and propose remedies for vulnerabilities; and to be candid about what the consequences are that drive the highest risks.

What we want to do is to work with the private sector to recommend protective actions to owners and operators, and that means in particular to let them use the expertise that they have with their own businesses to achieve the measures of performance which are necessary to achieve security.

In a lot of cases, industry has already stepped up to the plate, and has made these investments. I'll tell you, for example, the financial sector is an area of the economy that has done an enormous amount on its own to protect its infrastructure, its resiliency, the interests of its various stakeholders, and to harden itself against various kinds of attacks. Smart industry recognizes that if you have invested in assets, if you've invested in business goodwill, if you've invested in your employees and your customers and your stakeholders, it behooves you to protect that investment in much the same way that it behooves you to have auditors to make sure people aren't stealing your money.

This issue of homeland security and risk management has got to be as much a part of corporate activity as your financial controls and your protection against financial misbehavior or financial losses, or your legal controls, and your protection against legal misbehavior could result in corporate liability.

Now there's a second approach we can take to this issue of infrastructure protection, and that's to regulate. There is a misconception the government wants to regulate everything in the private sector. It reminds me of a joke told about Winston Churchill and Clement Atlee. Clement Atlee, for those who are too young to know this, was the Labour Prime Minister who succeeded the Conservative Prime Minister Winston Churchill after the second World War. And the story is that they were both in the wash room, and actually Atlee was there, and Churchill came in and immediately Atlee moved to the other end of the wash room. And Churchill said to Atlee, "Clement, I know we have our political differences, but has it really come to this?" And Atlee said, Well, Winston, any time -- I'm sorry, I've got it reversed, I've stepped on my joke. Churchill moved to the other end of the wash room. Atlee said, "Winston, I know we have our political differences between Conservative and Labour, but has it really come to this, you won't even stand in close proximity to me?" And Churchill said, "No, it's nothing personal, Clement; it's whenever you Labour people see anything big that works you want to nationalize it."

So that joke will be told about government when it comes to regulation. I know I twisted the joke. It was probably worth the wait, though. We don't want to regulate everything. Our goal is to achieve protection with a minimal amount of intrusion and big footing, and we want to try to do that through a voluntary process.

But there are instances where regulation is necessary and appropriate. And, frankly, there are times when regulation benefits industry, because it assures you that when you make an investment you're not going to be at a competitive disadvantage. That's why I think intelligent regulation, for example, of financial standards and

accounting standards is a benefit, because ultimately it raises the playing field for everybody who wants to have fair competition.

So, for example, after asking Congress for some time to give us the authority to regulate chemical sites, we did, in fact, issue late last year proposed regulations on chemical site security. But here's what's important -- we didn't only look at chemical site security in a vacuum. We looked at the entire system. And we recognized that if you're concerned, as we should be, about dangerous chemicals, particularly toxic inhalants, as a threat to surrounding populations, we need to think not only about the plant where the chemical comes to rest, but how the chemical moves from location to location, which is another vulnerability.

So as a companion to chemical site security, we issued proposed regulations for rail shipments carrying toxic materials. And we're also proposing regulations for TWIC at the ports, which elevates security for other areas where dangerous chemicals often come to rest. The idea here being that we're trying to be holistic and systemic in our approach to regulation, and to make sure that we are being intelligent in the way we roll it out.

At our approach, again, in these efforts, was not to become very prescriptive or to micro-manage the business of individual companies, it was to recognize, first, that different chemical sites have different levels of risk -- some are more dangerous than others -- and we ought to tailor our approach based on this; and second, to recognize there is more than one way to skin a cat, and what we want to do is to make sure the cat is skinned, but let the individual business owner come up with a plan to get that job done.

Now we need to talk about auditing that plan and reviewing it and making sure it, in fact, meets standard, but I think this is the kind of flexibility which business worked with us to make sure we had, with the ultimate, bottom-line requirement that it not compromise the fundamental requirement of security, which drives this entire process.

Now there are some areas where we don't have regulatory authority, or it doesn't make sense to regulate, or the private sector has taken action. For example, in the commercial sector, shopping centers, apartment buildings, hotels, there are such a wide variety of assets, and so many different kinds of businesses, it's hard to imagine the government significantly regulating that area. But it doesn't mean that there's not a role for private business to take its own responsibility.

Under the National Infrastructure Protection Plan, which we completed last year, all 17 critical sectors of the economy -- whether it be nuclear and chemical, which are comparatively well regulated; or commercial, which is comparatively unregulated -- have to develop and have developed sector-specific plans that outline the private sector's responsibility and role in protecting critical infrastructure.

We've been working with the private sector, in partnership, to develop these plans. It's a back and forth, it's not a mandate. And this is going to serve as the first draft of our playbook going forward.

This is very helpful, I think, to your clients and to you, because it's guidance developed with the private sector that everybody can look to, in terms of knowing what they need to do to take reasonable steps to protect their assets from attack. It recognizes interdependencies, that we have an economy which is very much intertwined, and where failures in one respect have cascading effects in other areas of the economy. It recognizes there are consequences if one partner in this chain of supply or chain of economic activity fails to live up to his or her responsibilities. And I want to make it clear, just because these are not regulations enforced in law doesn't mean they can be ignored. In fact, I think, as I'm going to say in a few minutes, that these will become powerful tools to drive behavior, if you look at them in the context of the overall liability system, in which all companies and of course all lawyers operate.

But before I get to that punchline, let me talk about the one other area that deserves a little bit of attention, and that is emergency preparedness and response. If there is an emergency, an unexpected emergency, it is likely that a lot of people will experience that emergency when they're at work, and that means they're going to be looking to their employers for what the first response ought to be. It also means, in the case of some kinds of emergencies, employers are going to have immediate decisions to make about who is an essential employee; who stays home; who comes to work; how do we get up and running again; what can we do via telecommuting and the Internet; and what do we have to bring people in for?

This will be particularly relevant when we come to things like a public health emergency. Now we've been spending a lot of time talking to business about how we can help business get prepared. Through the National Infrastructure Advisory Council, which is appointed by the President, we've been working with key

representatives of the private sector, for example, to provide guidance for something like a pandemic flu.

A pandemic flu may not be imminent, it may not ever occur, but if it did occur it would have a huge impact on this country and a huge impact on the business community and the critical infrastructure. You would have to make decisions in each business about how do you keep going if you have a significant number of people who are absentee, either because of sickness or because they're caring for the ill? How do you counsel your employees to minimize contagion? What is your responsibility or what responsibility do you want to assume to provide antivirals or even vaccines, if they're available?

And each of these decisions are going to have a host of legal issues that are related to them, as well as practical and business issues. Nor can you simply avoid the problem by saying, we'll just shut down, because you'll have obligations and responsibilities to other stakeholders, and there will be liability if you don't perform those responsibilities.

In many ways, looking at the possibility of a pandemic flu engages the very same kinds of thinking that many of you may have been involved in the run-up to Y2K, which is thinking ahead about how do you prepare yourselves for what could be a very significant business problem, and therefore a significant legal problem, as well.

We in the government have already taken some very clear steps to prepare the private sector for a severe pandemic outbreak. We've released the Pandemic Influenza Preparedness Response and Recovery Guide for critical infrastructure and key resources, which you ought to get, which lays out a basic template. We are working on our own government plan. You need to be working with a sector-specific -- sector-specific agencies and with your own people on what a plan ought to be. You may not be medical experts, but you do understand the kind of systematic thought and preparation that comes into effect when you try to put together a contingency plan for this kind of an eventuality.

So what is the lever or the mechanism or the incentive if you have to go to the board of directors and say, you need to spend money on preparedness, or you need to spend money on protection? After all, we all know the challenge you have when you're dealing with a board is, does this contribute to the bottom line; is this going to make me more profitable? The short answer is, in the same way that putting money into good accountants contributes to the bottom line, in a sense that if you don't have them, you're going to find yourself in a whale of trouble, and that's going to really hit you in the bottom line, so, too, homeland security adds value, because it manages risk. And, increasingly, risk management has to be regarded as a fundamental legal and business obligation to the management of companies.

We saw this, by the way, in the arena of criminal law enforcement -- and I know Joe remembers this -- when corporate liability became a big issue, 10, 15 years ago and compliance programs started to become fashionable. And it was recognized that a compliance program was like an insurance deposit against the possibility of something happening that could be a corporation or business destroying event.

I suggest to you that homeland security is a comparable type of challenge and requires a comparable type of response. In the wake of even September 11th, which was clearly an act of terror deliberately perpetrated by people who were coming in from outside, even there the courts have maintained some liability about the need to prepare for the possibility of a terrorist attack. And nobody can say after 9/11 that the possibility of terrorism is unforeseeable or that one shouldn't take reasonable and prudent steps to protect, prepare a response and have some resiliency in case there is an attack. And the same goes with respect to natural disasters.

So from your standpoint as lawyers, I suggest to you that homeland security is very much now an issue that has a legal dimension, you've got to get embedded into the whole set of management issues that are faced for businesses, be they big or be they small.

We need to give you clear guidance. We are working with industry to develop standards. Those standards are tools that you can use to give your clients guidance about what they should be doing and what kinds of reasonable things they are required to do, based on kind of general industry consensus standard. One of the benefits of these kinds of guidelines is, rather than having courts discover what the reasonable standard is after the fact, it gives us an opportunity to talk about a reasonable standard before the fact. That gives you clarity, and hopefully it results in better results if we ever wind up in court.

So this is a partnership in which you have a lot of value to add and we have a lot of value to add. And whether it's a matter of crafting regulations that are sensible, cost effective and do the job, or whether it's putting together a set of standards that is reasonable, realistic, but also tough enough to get the job done -- by

working together we're going to serve our interests in making sure we're protecting the country as a government, but your interest in making sure your clients are protected and properly prepared for a 21st century set of challenges which are going to be with us for a very long time to come.

So thank you very much, and I'll take some questions.

Question: Hi, Secretary, thank you very much for the thoughtful comments. It's wonderful you could come and address us today.

My question is just something that was out in CQ last week, which was the high concentration within the DHS headquarters element of Schedule C appointees almost five years after the agency was kicked off. And my concern was that the career ladders for the GS employees end. Also, what are the plans to make sure that when we wake up on January 20, 2009, that we have the same A Team in place that we have today? Thank you.

Secretary Chertoff: Although, a somewhat unexpected, question -- a good question -- -- you're quite right, this Department needs to be built as a department that is professionalized. I think in the last two years we've made a concerted effort to promote that in particular. First of all, we're looking to identify and promote career deputies in many of the critical components in the department. We're looking, in general, to enhance not only senior career personnel, but to develop a culture of jointness in which people move from one component to another, and actually part of their career track is serving in either a joint element or in another element from that in which they have their principle career. The idea here is to bind the organization together.

And part of what we talk about doing is actually building a kind of internal homeland security educational program for the new people who come into place on January 20, 2009, so that they inherit not only a fully functioning department, but have laid out for them what some of us had to discover, really, putting it together for the first time, which is a complete set of plans -- and we're building, by the way, deliberate planning for all the major catastrophic scenarios we envision, as well as a functioning department with a -- I'd say a received wisdom and a culture and embedded in the DNA a sense of shared experience.

So a good deal of our efforts in the next two years is going to be to institutionalize things which we are putting in place for the first time, and to make a conscious effort to make sure that the organization has at a senior level people who will continue to carry forward, even in the transition period that attends any change in the administration.

The enemy will not take the time off between January 20th and September of 2009. And it behooves us to make sure that we have a seamless hand-off, and I can tell you, our senior leadership very much takes that as an important element of our responsibility.

Question: Secretary, I wanted to thank you personally, and on behalf of at least the electric sector for your exercise at the (inaudible) exemption last year, and the process of working with the Sector Coordinating Council. So it's kind of a two-part question. What has been your assessment of that whole process to date, and what are your plans for expanding it or actually making it even more effective as a partnership tool between the department and the private sector?

Secretary Chertoff: Well, I was very pleased that we got our National Infrastructure Protection Plan out. I was very pleased that the sector-specific plans came in. I have not yet seen them. They're working their way up the chain. So I have to withhold judgment as to how they're all going to turn out. I can tell you, for example, that our experience with the chemical sector was a very good experience. We worked very hard with them, and I think we came up with a program that was sensible, that's tough, but that's not rigid. So if the other plans turn out to be comparably well developed, that's going to be a good sign.

I think that we have some challenges in some areas that are greater than in others. In regulated industries, in concentrated industries, particularly those with high acid value, it's comparatively easy. We're dealing with a relatively small number of actors, sophisticated, and it's a very -- kind of a very convenient process.

The hardest is the distributed sector with very small businesses that have widely different needs and circumstances. And there we're looking for a somewhat different model.

One of my ambitions in dealing with the private sector is to try to look at what's emerging with new organization models. And one of the new models that's emerging is networking. And networking -- it's easy to say, but it's a little hard. There's a certain conceptual link you have to make. It's not just about having a lot of

people talking to each other. It's recognizing that you can accomplish things by not necessarily insisting on controlling everything that you want to accomplish.

That's a little hard for government, and frankly, it's a little hard for the press because we tend to measure things in a traditional way. In other words, the government dealt with an issue by passing a law, or we issued a regulation, and we covered 80 percent of the economy. So that did something.

But if you look at what's going on in emerging sectors of the economy, it's all about empowering people to discover how to do things on their own and having them share information, and sometimes let them share laterally without even any central body coordinating that.

That strikes me as a very exciting model. It challenges, however, the traditional way we look at things, because it doesn't -- it means we're not going to necessarily keep track of everything. And so, one of the things I'm looking to do in the right setting is explore that kind of a network partnership going forward.

Question: Earlier this morning when I was on panel, I commended you and your colleagues for your work on the chemical security roles. I just wanted to repeat that for your benefit. It was an exceptional piece of work in an extraordinarily short period of time.

My question has to do with the House bill that was passed to implement the balance of the 9/11 Commission recommendations. And one of the provisions having to deal with NFDA 1600 -- which has to deal with emergency preparedness that you were discussing -- speaks of the department promulgating that standard. And I just hope or perhaps wonder whether -- there are standards that are developed by industries, and then there are standards that are developed by standard-setting communities. And particularly in the latter case, those kinds of products are useful as guidance, but I would hope that you would hesitate before you promulgated them as regulations.

Secretary Chertoff: Well, I think -- the tenor of what I've -- I'm afraid it's not clear what promulgate means, so I guess that's a subject for lawyers -- I'll have my lawyers look at that. I think in general, though, we are mindful of the fact that -- it's kind of what I've said before. We shouldn't necessarily believe that we only do something if we do it with a big stick. I really encourage, particularly members of Congress who come from areas of the country where there's a lot of innovation in the high-tech area to look at models which actually empower people to raise security and share information in a way that actually makes it quicker and more efficient and raises the general level of performance. And I'm not necessarily a big stick type of guy.

Question: Mr. Secretary, the department has made great strides in airport security and airline security, and I was wondering if you could comment on the department's efforts toward passenger rail security. And I don't ask just because I may be on an Acela train in the next couple of hours.

Secretary Chertoff: This is an issue of architecture. I think we all recognize that passenger rail security, particularly inner city security, in terms of subways, but also intercity security is important. The question is, what is the architecture through which we will get that security?

Now some of it is technological. We've done experiments with various kinds of detection equipment that would detect explosives. We've tried portals. I have to tell you, I think the idea of using portals like they use at the airport to get on a subway is not really a realistic thing. We've looked at putting more drop teams, canine teams, and police into terminals in areas where there's a lot of activity. That's a low-tech solution, but happens to be a pretty good solution, particularly if you have some training and behavioral pattern analysis.

We always are looking at cutting-edge innovative solutions, including the kinds of things which could detect ambient explosive vapors or residue that might allow us to monitor a large of the people without necessarily making them stop and go through a particular portal.

The one thing I would emphasize, whenever you look at solutions for this kind of problem, almost invariably, a contractor comes up and says, I've got this thing, and it's a magic thing, and if you just do this, it solves the problem. And often, it solves the problem in a single case. But what it doesn't do is solve the problem in 10 million cases. And we have to make it work over 10 million cases.

A classic example is the issue of explosive detection in liquids. We have a restriction in place on liquids on airplanes. And right after we put it into effect after the London plot, there were a series of stories about people showing, here's a device, you can put a bottle in it, and it shows you in 15 seconds if there's an explosive. And the reporter would go, why don't we have this at the airport? Well, the reason we don't is because if you have

300 people on the airplane, the average person carries two bottles, and you can only do four bottles a minute, that's about 150 minutes, or in 300 minutes, of additional boarding time before the plane. No one is going to accept the system that means you have three to five additional hours to board.

So when we look at anything, whether it's technology or regulation, we try to be mindful of the fact that we've got to examine it in a context of, in millions of transactions, that it's going to have to apply through the course of a week or a month or a year. And that is practically the biggest limiting constraint that we have. It's finding something that operationally and systemically works in the field, and not merely in the laboratory. So that's the challenge on passenger.

We're working it, but my commitment is we're not going to break the system in order to protect you. Because if I wanted to do that, I'd just say, well, let's ban the passenger trains, and that would eliminate the risk. And that would be stupid. And we try to be smart and not stupid.

Thank you.

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This page was last modified on January 18, 2007