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EXECUTIVE OFFICE OF THE PRESIDENT
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OFFICE OF FEDERAL PROCUREMENT POLICY

FAX COVER SHEET

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TO:

Brett Kavanaugh

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United States Senate

COMMITTEE ON
 GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

August 7, 2002

The Honorable Mitch Daniels, Director
 Office of Management and Budget
 Eisenhower Executive Office Building
 Washington, D.C. 20503

Dear Mr. Daniels:

I am writing to seek your assistance as the Senate prepares to consider a proposal to authorize the inclusion of indemnification provisions in government contracts procuring products and services to aid in our nation's Homeland Security efforts.

During its consideration of the Homeland Security Act, the House of Representatives narrowly defeated an amendment that would have authorized the Federal government to indemnify companies that sell counterterrorism technology to Federal, State and local government agencies. A similar amendment may be offered when the Senate considers its version of the Homeland Security legislation.

Supporters of this proposal argue that such authority is needed because sellers of services and technologies that could help protect the homeland are refusing to contract with the government for fear of facing unquantifiable – and in their view unjustified – liability costs in the event of a terrorist attack. They point to the government's authority to offer indemnification in other, more narrow circumstances, and suggest that extending that authority will ensure that the government and the American people have access to the products and services they need to protect the homefront from the war on terrorism.

Thus far, however, the debate over this issue has proceeded without significant input from the Federal government – the party in the best position to know whether, in fact, we are being denied important products due to liability concerns and whether indemnification authority is therefore needed. Given OMB's has government-wide authority and responsibility over procurement matters, I am hoping that you can help remedy this problem and make sure the Senate has the information it needs to have a meaningful and informed debate over this proposal. Specifically, I would greatly appreciate your providing the following information:

- (1) The government currently has authority to offer indemnification in a narrow set of contracts. What has the government's experience been in using this existing authority, whether under Public Law 85-804 or otherwise? For example, how often are indemnification clauses included in government contracts? Are they included in all cases in which they are authorized? If not, in what portion are they included, and what criteria are used to determine whether to use them? Do they

usually carry limits on the government's liability or imposed specific requirements on the indemnified party? Has the use of these provisions resulted in actual costs to the government? If so, what has been the cost of these provisions to the government? What lessons has the government learned from the use of these provisions?

- (2) The request to expand indemnification authority rests on the premise that the government is having, or will have, difficulty in obtaining the technology and products it needs to protect the homeland in the war on terrorism. What is the executive branch's experience in this regard? Has it been difficult or impossible to get the needed products? If so, how extensive has the difficulty been? Has it been government-wide or limited to just a few Departments or agencies? To what do you attribute any difficulty that exists? Is it due to the absence of indemnification authority? Would greater indemnification authority resolve the problem? If so, what should the scope of statutory authority for such provisions be?
- (3) The amendment before the House would have allowed the Secretary of Homeland Security to indemnify contractors with State and local governments. Has the Federal government ever before entered into agreements indemnifying contractors with State or local governments? Does the Administration believe there is a need to do so? Should Congress consider different factors when evaluating this part of the proposal than when reviewing the expansion of authority for federal government contracts?
- (4) I understand that the Administration issued a Statement of Administration Policy opposing the House indemnification proposal, but that this view may be evolving. What is the Administration's current view? Even if the Administration still opposes the specific proposal offered in the House, is that opposition a blanket one to any expansion of indemnification authority, or do you believe a narrower authorization would be appropriate? If so, I would appreciate your providing guidance on the parameters of a proposal you believe would be appropriate.

As you know, the Senate will begin considering the Homeland Security on September 3, 2002. I therefore greatly would appreciate receiving your response by August 26, 2002, so that we may be prepared when the debate begins. If your staff has any questions about this request, please have them contact Lee Ann Brackett of my staff at 224-2627.

Thank you in advance for your response to this request. I appreciate any information you can provide on this issue.

Sincerely,



Joseph I. Lieberman