

**SELECT COMMITTEE ON
INTELLIGENCE**

UNITED STATES SENATE



**Additional Prehearing Questions for
Mr. Christopher Fonzone upon his nomination to be
General Counsel for the Office of the Director of National Intelligence**

Keeping the Intelligence Committee Fully and Currently Informed

QUESTION 1: Section 502 of the National Security Act of 1947 provides that the obligation to keep the congressional intelligence committees fully and currently informed of all intelligence activities applies to the Director of National Intelligence (DNI) and to the heads of all departments, agencies, and other entities of the U.S. Government involved in intelligence activities. What is your understanding of the standard for meaningful compliance with this obligation by the Office of the Director of National Intelligence (ODNI) and the heads of all departments, agencies and other entities of the U.S. Government involved in intelligence activities to keep the congressional intelligence committees, including all their Members, fully and currently informed of intelligence activities? Under what circumstances do you believe it is appropriate to brief the Chairman and Vice Chairman and not the full committee membership?

ANSWER: Section 502 of the National Security Act states that the DNI and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities “shall keep the congressional intelligence committees fully and currently informed of all intelligence activities, other than covert actions” (which are covered in Section 503).

I am aware that DNIs have issued IC-wide directives on the subject of congressional notifications to ensure timely reporting to Congress consistent with Section 502. In particular, the publicly available Intelligence Community Directive (ICD) 112, issued by Director Coats in 2017, establishes Intelligence Community (IC) policy with respect to providing written notification to the House and Senate intelligence committees in order to keep them fully and currently informed of intelligence activities. If confirmed, I will help to ensure IC elements comply with their legal and policy requirements regarding congressional notification, including Section 502 and ICD 112.

Section 502 also provides that congressional notification must be made “[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.” Consistent with Director Haines’s statements during her confirmation process, I do not believe this provision limits the obligation to keep the intelligence committees fully informed, but I do understand it to afford the DNI a degree of latitude in deciding how she will bring extremely sensitive matters to the committees’ attention. This could mean, as Director Haines noted, that it might be appropriate to brief the Chairman and Vice Chairman of the intelligence committees on particularly sensitive matters, although such limited notification should be undertaken only in the most exceptional circumstances. Moreover, my understanding is that, where exceptional circumstances have required limited congressional notification, it has been the case that committee leadership would work with the Executive Branch to determine when to expand access to the information to the full committee.

Priorities of the Director of National Intelligence

QUESTION 2: Have you discussed with the DNI her specific expectations of you, if confirmed as General Counsel, and her expectations of the Office of the General Counsel

as a whole? If so, please describe those expectations.

ANSWER: Director Haines and I have discussed her expectation that, if confirmed as General Counsel, I would work with the career lawyers in the Office of General Counsel to provide her and other officials at ODNI with sound, timely, and relevant legal advice and ensure that the IC's activities comply with the Constitution and laws of the United States. She also expressed her view that the Office of General Counsel has an important role to play in furthering ODNI's integration mission by helping to coordinate legal issues that cut across IC components. Finally, and most importantly, she emphasized the importance she places on integrity and the rule of law—and how she wants her legal counsel to help her address the issues and challenges that cross her desk, but to be unafraid to deliver tough advice when doing so, if necessary. This is a view of the lawyer's role that I very much share.

The Office of the General Counsel

QUESTION 3: The Office of the General Counsel of the ODNI has many roles and responsibilities. What are your expectations for the Office?

- a. Do you have any preliminary observations on its responsibilities, performance, and effectiveness?

- b. If confirmed, will you seek to make changes in the numbers or qualifications of attorneys in the office, or the operations of the office?

ANSWER: By statute, the ODNI General Counsel is “the chief legal officer of the Office of the Director of National Intelligence” and “shall perform such functions as the Director of National Intelligence may prescribe.” During her confirmation process, Director Haines stated that she expects the responsibilities of the ODNI General Counsel to include ensuring that intelligence activities comply with the Constitution and laws of the United States.

If confirmed, I would expect the lawyers in ODNI's Office of the General Counsel to assist me in performing this and other responsibilities with the highest levels of professionalism and integrity. In particular, if confirmed, I would expect to work with the attorneys in the Office to advise ODNI's senior officials and other employees on the full range of legal and ethical issues before the agency; to advance ODNI's integration mission, working with lawyers from across the IC on cross-cutting legal questions; and to maintain an effective working relationship with Congress.

During my previous government service, I worked closely with lawyers from the ODNI Office of the General Counsel, and I was always impressed with their professionalism and effectiveness. My more recent and limited interactions with lawyers in the office's current management, as well as others who have worked for, or interacted with, the office, have left the same impression. If confirmed, I would thus consult with the current management and staff before determining whether changes in numbers or qualifications of attorneys in the office or the operations of the office would benefit the office, ODNI, or the broader IC.

QUESTION 4: Please describe who or what you understand to be your client or clients

in the position of General Counsel of the Office of the Director of National Intelligence (ODNI/GC). As part of your answer, please address how that will guide your relationship with and obligations to the ODNI, the DNI, the Intelligence Community (IC) as a whole, and the President.

ANSWER: Section 103C of the National Security Act states that the ODNI General Counsel is the chief legal officer of ODNI and performs such functions as the DNI may prescribe. The General Counsel's principal clients are thus the DNI and other senior ODNI officials and employees, and, if confirmed, I would anticipate working with lawyers from ODNI's Office of General Counsel to provide legal counsel to these officials in a manner consistent with the oath I would take to support and defend the Constitution.

If confirmed, I would also expect to engage cooperatively with my counterparts in the IC, other departments and agencies, and the Executive Office of the President. It is my understanding that not only does the Office of General Counsel support the DNI as she fulfills her responsibility to ensure IC elements comply with the Constitution and laws of the United States, but it also can play a key role in supporting ODNI's role in integrating the IC. In particular, I understand that the Office of General Counsel is well positioned both to identify and, where appropriate, coordinate efforts to resolve cross-cutting legal issues within the IC, and to present the IC's consensus legal positions to other parts of the Federal Government.

QUESTION 5: Please explain how you would respond to each of the following scenarios:

- a. If the President or a White House official asks you to perform an action that is in the President's interest, but contrary to the interests of the IC and/or the ODNI.
- b. If you become aware that the President or a White House official has asked the DNI to perform an action that is in the President's interest, but contrary to the interests of the IC and/or the ODNI.

ANSWER: I expect the President and the members of his national security team to perform their responsibilities with the highest levels of professionalism and integrity, while working tirelessly to protect the national security of the United States. As the principal advisor to the President and his leadership team for intelligence matters related to national security, the DNI must ensure that these senior government officials receive the best intelligence possible on which to base policy decisions that provide for the security of the nation as a whole. The DNI also has the statutory responsibility to ensure compliance with the Constitution and laws of the United States by the CIA and by other elements of the IC through the host executive departments of those elements. If confirmed, I would support the DNI in performing these vital responsibilities, working with my counterparts across the Executive Branch to do so, in a manner consistent with the oath I would take to support and defend the Constitution.

QUESTION 6: Describe your understanding of the responsibilities of the DNI and the GC/ODNI in reviewing, and providing legal advice on, the work of the Central

Intelligence Agency (CIA), including covert action undertaken by the CIA.

ANSWER: The National Security Act makes the DNI the head of the IC, states that the Director of the CIA shall report to the DNI regarding the activities of the CIA, and charges the DNI with many responsibilities relating to the IC, including the CIA. These responsibilities include ones relating to budget requests and appropriations for the National Intelligence Program, oversight of intelligence priorities and taskings, and governance of intelligence activities. In addition, the DNI has a specific mandate to ensure that the activities of CIA, including covert action, comply with the Constitution and laws of the United States. The ODNI General Counsel plays a central role in helping the DNI carry out these responsibilities and works closely with the General Counsel of the CIA to do so.

QUESTION 7: Explain your understanding of the role of the ODNI/GC in resolving conflicting legal interpretations within the IC.

ANSWER: By statute, the DNI is both the head of the IC and responsible for ensuring compliance with the Constitution and laws of the United States by the CIA and by other elements of the IC through the host executive departments of those elements. Given these dual roles, it is my understanding that ODNI – and the Office of General Counsel, in particular – is well positioned to identify cross-cutting legal issues or conflicting legal interpretations within the IC, and, where appropriate, to coordinate efforts to resolve those issues. If confirmed, I would expect to work with lawyers from the Office of General Counsel and counterparts across the Executive Branch to undertake these efforts at resolving interpretive conflicts.

Guidelines under Executive Order 12333

QUESTION 8: One of the fundamental documents governing the activities of the IC is Executive Order 12333. Under Executive Order 12333, as amended in July 2008, there are requirements for Attorney General-approved guidelines. For each of the following requirements, please update the Committee on the principal matters to be addressed by each of the required Attorney General-approved guidelines or procedures, any issues you believe need to be resolved, and your perspective on where things stand at present.

- a. Guidelines under section 1.3(a)(2) for how information or intelligence is provided to, or accessed by, and used or shared by the IC, except for information excluded by law, by the President, or by the Attorney General acting under presidential order in accordance with section 1.5(a).
- b. Procedures under section 1.3(b)(18) for implementing and monitoring responsiveness to the advisory tasking authority of the DNI for collection and analysis directed to departments and other U.S. entities that are not elements of the IC.
- c. Procedures under section 1.6(g) governing production and dissemination of information or intelligence resulting from criminal drug intelligence activities

abroad if the elements of the IC involved have intelligence responsibilities for foreign or domestic criminal drug production and trafficking.

- d. Regulations under section 1.7(g)(1) for collection, analysis, production, and intelligence by intelligence elements of the Federal Bureau of Investigation (FBI) of foreign intelligence and counterintelligence to support national and departmental missions.
- e. Procedures under section 2.3 on the collection, retention, and dissemination of United States person information and on the dissemination of information derived from signals intelligence to enable an IC element to determine where the information is relevant to its responsibilities.
- f. Procedures under section 2.4 on the use of intelligence collection techniques to ensure that the IC uses the least intrusive techniques feasible within the U.S. or directed at U.S. persons abroad.
- g. Procedures under section 2.9 on undisclosed participation in any organization in the United States by anyone acting on behalf of an IC element.

ANSWER: It is my understanding that, since the 2008 amendments to Executive Order 12333, a number of IC elements have engaged in a process to issue new or updated procedures consistent with the requirements set forth in the Executive Order (and captured by this question). It is also my understanding that the ODNI Office of General Counsel has been substantially involved in developing these procedures and has primarily sought to ensure that their requirements are, to the greatest extent possible, consistent across the IC, while accounting for elements' unique missions and authorities. In particular, I am aware that last year the DNI issued new Attorney General-approved procedures governing the conduct of ODNI intelligence activities concerning U.S. persons. My understanding is that those procedures, which took effect in March of this year, are the first set of U.S. person procedures to apply to all ODNI directorates and centers.

If confirmed, I plan to review the approach IC elements have taken to the requirements laid out in this question and continue to make engagement in the process of developing new or updated procedures under the Executive Order a priority for the ODNI Office of General Counsel.

Foreign Intelligence Surveillance Act

QUESTION 9: The FISA Amendments Reauthorization Act of 2017 (P.L. 115-118) was enacted on January 19, 2018 (hereinafter, the Act). Under section 702, the Attorney General and the DNI may authorize jointly, for a period up to one year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information. Section 702(l) also provides for semiannual or annual assessments and reviews.

- a. Describe your understanding of the matters that the Attorney General and DNI,

with the assistance of the ODNI/GC, should evaluate in order to determine whether there should be revisions in the substance or implementation of (1) targeting procedures, (2) minimization procedures, (3) querying procedures, and (4) guidelines required, to ensure both their effectiveness and their compliance with any applicable constitutional or statutory requirements.

- b. Describe how the semiannual or annual assessments and reviews required by the Act should be integrated, both in substance and timing, into the process by which the Attorney General and DNI consider whether there should be revisions for the next annual authorization or authorizations under the Act, including in applicable targeting, minimization, and querying procedures and guidelines.
- c. In addition to the matters described in the Act for semiannual or annual assessment or review, are there additional matters that should be evaluated periodically by the Attorney General or the DNI to improve and ensure the lawful and effective administration of the Act?

ANSWER: Section 702 of the Foreign Intelligence Surveillance Act (FISA) authorizes the Attorney General and the DNI to make annual certifications that allow IC elements to target non-U.S. persons reasonably believed to be located outside the United States to acquire specific categories of foreign intelligence information. By statute, these certifications must include certain representations regarding procedures and guidelines required under the statute, including that they are consistent with the requirements of the Fourth Amendment to the Constitution of the United States. In making these certifications, it is my understanding that the Attorney General and DNI rely on information they have learned through the regular and extensive oversight of the Section 702 program the Department of Justice and ODNI perform. This oversight includes the assessments made pursuant to Section 702(m) of FISA, which requires the Attorney General and the DNI to assess compliance with the procedures and guidelines adopted pursuant to the statute and submit these assessments to the Foreign Intelligence Surveillance Court (FISC) and the relevant congressional oversight committees at least once every six months.

I understand that the ODNI Office of General Counsel plays an integral role in conducting oversight of Section 702 activities, including the assessments required by subsection (m). If confirmed, I will ensure that ODNI Office of General Counsel remains closely involved in these oversight activities, consider whether any additional oversight or evaluation would improve the law and effective administration of the program, and inform the Committee if such additional oversight or evaluation would be appropriate.

QUESTION 10: The USA FREEDOM Act of 2015 (P.L. 114-53) reauthorized three national security tools – Business Records collection, Roving Surveillance, and the Lone Wolf provision – that expired on March 15, 2020.

- a. Given your experience at the Department of Justice, what concerns do you have with the expiration of these authorities?

- b. If confirmed as ODNI/GC, what efforts would you undertake to address these concerns?

ANSWER: The provisions of FISA that expired on March 15, 2020, have bipartisan support and provide tools to protect Americans while protecting their rights. Director Haines thus stated during her confirmation process that she supports reauthorization of the expired provisions, and, if confirmed, I look forward to working with Congress to this end.

Encryption

QUESTION 11: The IC has faced growing issues with encryption and the “Going Dark” problem in pursuing national security investigations.

- a. What do you see as the greatest challenge facing the IC regarding encryption and the Going Dark problem?
- b. How do you plan to work with other elements of the IC and the Department of Justice to tackle the Going Dark problem?
- c. What federal, state, and local partners do you foresee engaging in these efforts?

ANSWER: I agree with Director Haines, who stated during her confirmation process that the encryption of data is essential, that strong encryption promotes cyber security, thwarts criminals, and preserves privacy, but that encryption can present challenges for law enforcement investigations. Like Director Haines, I do not have the answer for how to approach this incredibly challenging issue, but I believe it is integral that the IC ensure that policymakers throughout the Executive Branch and in Congress have the information they need to understand the implications of encryption on privacy and national security. If confirmed, I would work with the General Counsels of the other IC elements, as well as lawyers from the Department of Justice and elsewhere in the federal government, to provide this information, as well as work with any appropriate partners to seek pragmatic and constructive approaches to the challenges posed by encryption.

Other Surveillance Matters

QUESTION 12: Section 4 of PPD-28 calls on each IC element to update or issue policies and procedures to implement principles for safeguarding all personal information collected through SIGINT. Those policies and procedures are currently posted publicly. Will you ensure that the IC continues to post these policies and procedures as well as any modifications, superseding policies and procedures, or significant interpretations?

ANSWER: If confirmed, I will seek to ensure that the IC follows all legal requirements relating to PPD-28, including its provision requiring IC elements to release publicly certain implementation policies to the maximum extent possible, consistent with classification

requirements. I believe that doing so is a critical element of the IC's transparency efforts, which, as PPD-28 recognizes, can enhance public understanding of, and public trust in, intelligence activities.

QUESTION 13: Are there any circumstances in which an element of the IC may *not* conduct a warrantless search for a U.S. person of communications that have been collected pursuant to Section 12333? If so, please describe.

ANSWER: As set forth in Section 2.3 of Executive Order 12333, IC elements are authorized to collect, retain, and disseminate information concerning U.S. persons only in accordance with Attorney General-approved procedures. These procedures set forth the circumstances when IC elements may lawfully collect, retain, and disseminate U.S. person information and the limitations on their ability to do so. If confirmed, I would work with General Counsels throughout the IC, as well as the Department of Justice, to ensure that all IC activities are carried out in accordance with these IC elements' Attorney General-approved procedures, as well as the Constitution and all other applicable federal law.

Transparency

QUESTION 14: Executive Order 13526 (December 29, 2009) provides that: "In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to: (1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of national security." Executive Order 13292 (March 25, 2003) and Executive Order 12958 (April 17, 1995) prohibited classification based on the same factors. Do you agree with the prohibitions in these Executive Orders?

ANSWER: Yes.

QUESTION 15: If, for any reason, you make a public statement that is inaccurate, do you commit to making a public statement correcting the record?

ANSWER: I intend for any public statements that I make to be entirely accurate. However, if confirmed, if I inadvertently make a public statement that is inaccurate, I would publicly correct the statement, consistent with the requirement to protect properly classified information. Moreover, if I am not able to make a public correction because of a requirement to protect such information, I will inform the intelligence committees of the inaccuracy in a classified setting.

Evaluation of Office of the Director of National Intelligence

QUESTION 16: Members of the Committee have expressed concern that the ODNI does not have all of the legal authorities necessary to fulfill congressional expectations for the office. Do you have any preliminary observations on strengths or weaknesses of the authorities of the Office with respect to a successful mission of the ODNI? If so, please

describe.

ANSWER: As Director Haines stated during her confirmation process, the Intelligence Reform and Terrorism Prevention Act of 2004, which amended the National Security Act to establish the DNI and the ODNI, provides significant authority to the DNI in the execution of her IC management role. If confirmed, I will have an opportunity to better understand how this authority is exercised in practice and evaluate its strengths and weaknesses. If, based on this evaluation, I believe additional authority may be necessary for the ODNI to carry out its mission, I pledge to inform the Committee and work with them on the matter.

QUESTION 17: Members also have expressed concerns that the ODNI's bureaucracy has resulted in inefficiencies. Do you have any preliminary observations on strengths or weaknesses of the authorities of the Office with respect to the ability of the General Counsel's office to function within the ODNI bureaucracy? If so, please describe.

ANSWER: I have not yet had a sufficient opportunity to observe the operation of the ODNI's organizational structure, or the authorities that underlie it, to form an opinion on how that structure may affect the functioning of the Office of General Counsel. If confirmed, I will consider this question and work closely with the Committee should I identify any impediments.

Intelligence Community Whistleblowers

QUESTION 18: Do you believe that IC whistleblowers currently have all the protections they need to interact directly with the congressional intelligence committees?

- a. If not, what legal authorities are required to ensure these protections?
- b. If so, what legal authorities provide the basis for those protections?

ANSWER: I agree with the views expressed by Director Haines during her confirmation process: that whistleblowers serve a vital role within the IC—and the federal government more broadly—by promoting government accountability, maintaining the integrity of the workforce, and addressing allegations of wrongdoing without improperly disclosing classified information. The Intelligence Community Whistleblower Protection Act provides IC whistleblowers the means to report to Congress complaints or information pertaining to "urgent concerns" by first reporting such complaints or information to the IC Inspector General (IG). If confirmed, I will have an opportunity to better understand both how this statute has been exercised in practice and more broadly whether existing authorities provide sufficient protections to protect whistleblowers, and I pledge to work closely with the Committee should I identify a need for additional authorities to achieve that important objective.

QUESTION 19: What is your view of the ODNI/GC's role relative to advancing an IC "whistleblower" complaint to Congress, pursuant to the Intelligence Community Whistleblower Protection Act?

ANSWER: As the chief legal officer of ODNI, the General Counsel is responsible for advising the DNI and other ODNI senior leadership on carrying out their duties consistent with the Constitution and laws of the United States. As part of this responsibility, the General Counsel must support the DNI's exercise of her responsibilities under the Intelligence Community Whistleblower Protection Act, which provides IC whistleblowers the means to report to Congress complaints or information pertaining to "urgent concerns" by first reporting such complaints or information to the IC IG. If confirmed, I commit to supporting the DNI in her exercise of her responsibilities under this statute with the utmost integrity, ensuring that every whistleblower complaint is handled in compliance with all legal requirements and whistleblowers are afforded all legal protections to which they are entitled.

QUESTION 20: Under what circumstances would you judge it appropriate to intercede in advancing a whistleblower complaint to Congress?

ANSWER: As noted in the response to the last question, the General Counsel, as chief legal officer of ODNI, is responsible for advising the DNI and other ODNI senior leadership on carrying out their duties consistent with the Constitution and laws of the United States, including the Intelligence Community Whistleblower Protection Act. During her confirmation process, Director Haines committed to transmitting to Congress whistleblower complaints determined by the IC IG to be an urgent concern under that Act, and I cannot envision a plausible scenario in which it would be appropriate for the ODNI General Counsel to "intercede" to stop such a transmission. More broadly, if confirmed, I commit to ensuring that whistleblowers can bring complaints to Congress to the full extent allowed by law.

QUESTION 21: How would you address a situation in which you disagree with the IC Inspector General's determination that a whistleblower complaint qualifies as an "urgent concern," for the purposes of advancing a complaint to Congress?

ANSWER: During her confirmation process, Director Haines committed to transmitting to Congress whistleblower complaints determined by the IC IG to be an urgent concern, and I cannot envision a plausible scenario in which it would be appropriate for the ODNI General Counsel to intercede to stop such a transmission. The ODNI General Counsel is responsible for supporting the DNI in the exercise of her responsibilities under the Intelligence Community Whistleblower Protection Act, and, if confirmed, I commit to performing this responsibility with the utmost integrity and ensuring that every complaint is handled in compliance with all legal requirements.

QUESTION 22: Under what circumstances would you inform a party named in a whistleblower complaint that he or she is the subject of the complaint?

ANSWER: As Director Haines stated during her confirmation process, whether the subject of a complaint should be notified of the complaint must be decided on a case-by-case basis, while protecting the integrity of the IG mission and any investigations.

Executive Branch Oversight of Intelligence Activities

QUESTION 23: Are there improvements, in terms of resources, methodology, and

objectives that you believe should be considered for Executive Branch oversight of the intelligence activities of the United States Government?

ANSWER: As I learned during my previous government service, IC elements and their activities are subject to rigorous and multi-layered oversight to ensure compliance with applicable laws and procedures. All three branches of government play an important role in conducting this oversight, with many entities within the Executive Branch doing their part. This includes the general counsel's offices, civil liberties and privacy officials, and inspectors general of IC elements, and other entities like the Privacy and Civil Liberties Oversight Board (PCLOB). The Department of Justice also plays a key role, including by conducting oversight of activities under FISA.

If confirmed, I anticipate that oversight would be a particularly important part of my role. The DNI has a specific statutory obligation to ensure compliance with the Constitution and laws of the United States by elements of the IC, and it is my understanding that the ODNI General Counsel plays a significant role in helping the Director to carry out this obligation. If confirmed, I thus believe I will have an opportunity to better assess whether improvements to the existing oversight structure are warranted, and I pledge to work closely with the Committee should I identify a need for additional authorities, organizational changes, or other reforms.

Relationship with Other Officials

QUESTION 24: What should be the relationship of the ODNI/GC with respect to the following officers of the IC:

- a. General Counsel, CIA;

ANSWER: As stated in my response to Question 6, the DNI is specifically charged, under the National Security Act, with many responsibilities relating to the CIA. The statute thus clearly contemplates a very close working relationship between the two agencies and, by extension, their General Counsels. During my previous service in government, I observed there to be a close and collaborative relationship between the ODNI General Counsel and the General Counsel of the CIA, with the two officials working together on a range of legal issues. If confirmed, I would seek to replicate this effective working relationship.

- b. Assistant Attorney General for National Security, Department of Justice;

ANSWER: Although the National Security Division of the Department of Justice is not part of the IC, there are a number of areas where the DNI and Attorney General share responsibilities. For example, activities under Section 702 of FISA must be jointly authorized and overseen by the Attorney General and the Director and many of the procedures required by Executive Order 12333 must be approved by the Attorney General in consultation with the DNI. Given this, it is my understanding that the ODNI General Counsel and the Assistant Attorney General for National Security, and their respective offices, have traditionally maintained a close working relationship. If confirmed, I would seek to maintain this strong relationship.

- c. Inspector General, ODNI; and

ANSWER: The IC IG is among the core group of officials responsible for overseeing the activities of the ODNI and other IC elements, and by statute reports directly to the DNI. As a result, I believe the ODNI General Counsel must have a strong working relationship with the IC IG, and my understanding is that there has historically been such a relationship with both the IC IG and the IG's legal counsel. If confirmed, I would seek to continue this practice.

d. Civil Liberties and Privacy Officer, ODNI.

ANSWER: The ODNI's Civil Liberties Protection Officer heads the ODNI Office of Civil Liberties, Privacy, and Transparency, reports directly to the DNI, serves as the Chief Transparency Officer for the ODNI, and is among the core group of ODNI officials – alongside the General Counsel – responsible for overseeing the activities of the ODNI and other IC elements. This range of duties clearly implicates a number of issues with legal equities; consistent with this, during my previous service in government, I observed the Civil Liberties Protection Officer and ODNI General Counsel, and their respective offices, working collaboratively. I understand that this close working relationship has continued, and, if confirmed, I will seek to maintain it.

QUESTION 25: Do you see the ODNI/GC in a supervisory role in relation to other IC agency General Counsel?

ANSWER: No. The ODNI General Counsel does not supervise other IC agency General Counsels, although it does play a significant role in helping the DNI carry out her statutory responsibility to ensure compliance with the Constitution and laws of the United States by the CIA and by other elements of the IC through the host executive departments of those elements. In addition, I understand that the Office of General Counsel is well positioned to identify cross-cutting legal issues or conflicting legal interpretations within the IC, and, where appropriate, to coordinate efforts to resolve those issues, as well as present the consensus views of the IC legal community to the broader Federal Government.

QUESTION 26: Do you see the ODNI/GC in a supervisory role in relation to the Inspector General of the IC?

ANSWER: No. By statute, the IC IG reports directly to and is under the general supervision of the DNI.

QUESTION 27: What is your understanding of the relationship between the ODNI/GC and the White House Counsel's Office (WHCO)? When do you believe it is appropriate to include WHCO in your legal deliberations?

ANSWER: During my prior service in government, I saw how important it was for the ODNI General Counsel to have a close working relationship with the White House Counsel's Office, as the ODNI General Counsel plays an important role in, among other things, making sure that IC equities are represented during the interagency legal process and coordinating and presenting the consensus views of the IC legal community to the broader Federal Government.

If confirmed, I would endeavor to maintain close collaboration between the offices, which is critical to supporting the DNI in her roles as the head of the IC and the principal advisor to the President for intelligence matters related to the national security.

QUESTION 28: What do you believe the relationship is between the Office of General Counsel at ODNI and the Office of Legal Counsel (OLC) at the Department of Justice? Do you consider OLC opinions to be binding on the ODNI/GC? Please describe the circumstances under which you believe soliciting an opinion from OLC is appropriate.

ANSWER: By delegation from the Attorney General, OLC provides legal advice to the President and all Executive Branch agencies, and its opinions are generally understood to be binding on Executive Branch agencies. I thus believe it is essential for the ODNI General Counsel and OLC to have a strong working relationship and that collaboration between the offices is critical to supporting the DNI in fulfilling her statutory obligation to ensure compliance with the Constitution and laws of the United States by elements of the IC. Based on my prior experience in government, departments and agencies typically consult OLC on legal issues of particular complexity or importance or in situations where two or more agencies are in disagreement. If confirmed, I would plan to take a similar approach.

Recruitment to the ODNI Office of General Counsel

QUESTION 29: What are your plans to recruit and retain top talent in the Office of General Counsel at ODNI? Do you plan to offer additional detailee options at all career levels so that attorneys from other agencies can bring their expertise to ODNI and, in turn, bring ODNI experience back to their home agency?

ANSWER: During my previous government service, I worked closely with lawyers from the ODNI Office of the General Counsel and was always impressed with their professionalism and effectiveness. My more recent and limited interactions with lawyers in the office's current management, as well as others who have worked for, or interacted with, the office, have left the same impression.

While I have very positive views of the existing office, I do not have a great deal of familiarity with the specifics of its recruitment processes. If confirmed, I would thus review these processes and consult with the current management and staff about whether changes in recruitment practices or additional detailee options would benefit the office, ODNI, or the broader IC.

Executive Privilege

QUESTION 30: Please describe your understanding of Executive Privilege: its general contours; to whom it can apply; and the time period during which it may apply. Please include your understanding of when the privilege can be waived.

ANSWER: Executive privilege is a Constitutionally based privilege that protects certain confidential information within the Executive Branch against compelled disclosure. The

purpose of the privilege is to preserve the President's ability to carry out his constitutional functions, including his responsibility to take care that the law is faithfully executed. Consistent with this purpose, the information the privilege may protect includes Presidential communications, deliberative communications, and information relating to foreign relations and national security. My understanding is that there are often good-faith disagreements about the proper scope of the privilege and that Presidents only invoke it after efforts to reach an accommodation with respect to information access have failed to bring resolution.

QUESTION 31: Please define the phrase "executive branch confidentiality interests." What are "executive branch confidentiality interests" and when/how do they differ from a claim of Executive Privilege?

ANSWER: As noted in my response to the last question, my understanding is that Presidents only invoke executive privilege after efforts to reach an accommodation fail to bring resolution. Given this, my understanding is that the Executive Branch uses the phrase "executive branch confidentiality interests" during the accommodation process to refer to those confidentiality interests that might be protected by a formal invocation of the privilege.

QUESTION 32: At what point would you refer information or material to WHCO to review for executive privilege issues?

ANSWER: As noted in the responses above, my understanding is that Presidents only invoke executive privilege after efforts to reach an accommodation fail to bring resolution. Given this, when a co-equal branch of government seeks information that might implicate executive branch confidentiality interests from agencies within the Executive Branch, those agencies will seek to engage in good faith discussions with representatives of the co-equal branch in an attempt to accommodate the legitimate interests of the other branch, while safeguarding Executive Branch confidentiality interests. During this accommodation process, it is a routine practice for agencies to consult with the White House Counsel's Office, the Department of Justice, and other elements of the Executive Branch in order to ensure that they understand any confidentiality concerns and what, if any, information may ultimately be subject to a privilege invocation.

Professional Experience

QUESTION 33: For each of the following, describe specifically how your experiences will enable you to serve effectively as the ODNI/GC. Include within each response a description of issues relating to the position that you can identify based on those experiences.

- a. Deputy Assistant and Deputy Counsel to President Obama and the Legal Adviser to the National Security Council;

ANSWER: I believe my time as Legal Adviser to the National Security Council (NSC) provided a number of experiences that would help me serve effectively as the ODNI General Counsel, if I am confirmed.

First, as the Deputy Legal Adviser and then Legal Adviser to the NSC, I worked closely with lawyers from across the U.S. Government, including the ODNI and elsewhere in the IC, on a wide range of national security and intelligence-related issues. This allowed me to develop familiarity with many of the legal frameworks that govern intelligence collection and operations, such as the National Security Act, FISA, and key Presidential Directives (e.g., Executive Order 12333), as well as numerous other issues the ODNI General Counsel may have to address, such as U.S.-EU cross-border data transfers, IC transparency matters, and encryption.

Second, my work at the NSC enabled me to form relationships and gain experience working with lawyers throughout the IC and U.S. Government more broadly – relationships and experiences that would hopefully be beneficial not only in performing ODNI’s essential integrating role, but also in contributing to the interagency legal process.

Third, as the NSC Legal Adviser, I was able to lead an Executive Branch legal office, managing a team of senior U.S. Government national security lawyers and learning how to support them as they used their expertise to address the many legal issues that came before the office. I also was able to gain substantial experience counseling senior officials on pursuing their national security objectives consistent with the law, being careful to distinguish legal advice from more general counseling on risks and opportunities. I believe this experience would help me serve effectively as ODNI’s General Counsel, if I am confirmed.

b. Senior Counsel to General Counsel of the Department of Defense;

ANSWER: During my time at the Department of Defense (DOD), I worked in the General Counsel’s front office on a range of issues, including military operations, sensitive litigation matters, and personnel issues. This experience exposed me to a wide range of topics that might be relevant if I am confirmed as ODNI’s General Counsel, and, perhaps even more importantly, provided an excellent vantage point to see how DOD’s Office of General Counsel is structured and operates. Given that a large portion of the IC is part of DOD, my understanding is that lawyers from ODNI work with lawyers from DOD quite frequently. I thus believe my familiarity with the DOD Office of General Counsel will be a significant help in allowing me to hit the ground running if confirmed as ODNI’s General Counsel.

c. Department of Justice, Office of Legal Counsel;

ANSWER: OLC plays an important role providing legal advice to Executive Branch agencies, including on national security matters; and I thus believe my time in that Office would help me serve effectively if I am confirmed as ODNI General Counsel. During my time at OLC, much of my work involved the analysis of sensitive national security and intelligence issues. In addition to enhancing my substantive familiarity with such issues, that work provided me with insight into, and experience with, how OLC works with agencies on legal questions and how it approaches the legal analysis of such issues. This experience will ensure that I am able to work with career lawyers in the ODNI General Counsel’s office to communicate to OLC both ODNI’s legal views on any questions before OLC and the factual information necessary for OLC to contextualize its legal analysis, allowing OLC to provide the most informed advice possible.

d. Department of Justice, Civil Division; and

ANSWER: Since the Department of Justice generally represents ODNI before the courts, I think my experience working at the Department will be beneficial in various ways if I am confirmed as ODNI's General Counsel. During my time in the Civil Division, I served on the appellate staff, drafting briefs for cases in a number of courts of appeals, often working closely with agency counsel in doing so; participating in the Department's process for making litigation decisions, including whether to appeal adverse decisions or settle claims; and arguing a case in the District of Columbia Circuit. This knowledge of how the Department of Justice litigates cases would be beneficial if I were confirmed as ODNI's General Counsel, as it would help me work with the career lawyers in the General Counsel's office to ensure that we convey ODNI's litigation equities to the Department in an effective and timely manner.

e. Sidley Austin, LLP

ANSWER: Since leaving government, a large portion of my practice has focused on cybersecurity and other issues regarding the information economy, such as information security and compliance with cybersecurity regulations; data privacy, including cross-border data flows; and the application of established and changing legal regimes to new technologies. This experience has kept me abreast of many of the legal developments in these important areas (at least those that are unclassified) over the past few years, experience that will help me serve effectively if I am confirmed as ODNI's General Counsel.

QUESTION 34: What, if any, conflicts might arise from your private practice if you are confirmed as General Counsel, and how would you address these conflicts?

ANSWER: In the course of the nomination process, I have consulted with ODNI's Designated Ethics Official, who in turn, consulted with the Office of Government Ethics to identify potential conflicts of interest. As a result of this process, potential conflicts with Sidley Austin LLP have been identified. Those potential conflicts will be resolved in the manner required by the conflicts of interest statutes, standards of conduct, and the terms of the Ethics Agreement that I have executed and which has been provided to the Committee. For example, as noted in that Agreement, if confirmed, for a period of one year after my resignation from Sidley Austin LLP (which I would tender upon confirmation) I will not participate personally and substantially in any particular matter involving specific parties in which I know the firm is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). Likewise, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

QUESTION 35: For each of your following law firm clients, describe the matters in which you represented the client; the court, administrative, and/or other legal proceedings involved in your representation, and the outcome of such representation.

- a. Huawei Technologies Co. Ltd.;**
- b. Goldman Sachs & Co., LLC;**

- c. Goldman Sachs International;
- d. Ministry of Commerce of the People's Republic of China;
- e. Hong Kong Trade Development Council;
- f. Hyundai Motor America;
- g. Apple Inc.;
- h. Facebook, Inc.;
- i. Microsoft;
- j. Twitter, Inc.;
- k. In-Q-Tel, Inc.; and
- l. Zingbox, Inc.

ANSWER: Three of the listed entities are major clients, which I am considering to be clients to whom I billed more than 50 hours since I joined Sidley Austin in November 2017:

- Apple Inc.: Since 2017, I have advised the client on a range of privacy and cybersecurity matters, including general counseling and addressing security issues, governmental inquiries, and internal policy matters. This work was not substantially related to judicial or administrative proceedings, and I am not aware that any current matter is pending before a court or agency.
- Microsoft: In 2018, I was part of a Sidley team that was advising the client on U.S. and EU legal and policy issues with respect to cross-border requests for lawful access to electronic evidence. To the best of my knowledge, there were no formal judicial or administrative proceedings involved in the representation, and I have provided no advice to the client since 2018.
- Twitter, Inc.: In 2020, I advised the client on election law provisions in numerous states. No specific judicial, administrative, and/or other legal proceedings were involved in the representation, and I have done no work on these issues since September 2020.

I worked fewer hours for the following clients listed above:

- Facebook, Inc.: In 2020, a firm colleague asked me to assist in answering a couple of privacy-related transactional and regulatory questions. I did less than ten hours of work on the questions and provided my analysis to the colleague. I have not received any follow up questions or learned anything further about the matter.
- Goldman Sachs & Co., LLC: In 2018-19, I spent less than ten hours of time providing privacy and cybersecurity advice as part of a Sidley team that advised the client on transactions involving Innovid and Zip Whip. Since those transactions were completed, I have done no further work on the matters.
- Goldman Sachs International: In 2019-20, I provided privacy and cybersecurity advice as part of a Sidley team that advised the client on its investment in LumApps SAS, a French cloud-based intranet collaboration platform with operations in France, the United States, and Japan. The investment was announced publicly in January 2020.
- Ministry of Commerce of the People's Republic of China: In 2018, Sidley Austin LLP filed an amicus brief and argued in the Supreme Court on behalf of the client in

Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd. My sole involvement was participation in a moot court to prepare other advocates for the argument. The case was argued in April 2018 and decided in June of that year.

- Hong Kong Trade Development Council: In 2019-2020, at the request of a partner, I contributed to the U.S. section of a quarterly report on global privacy developments provided to the client. My sole involvement was my contribution to these reports, and I do not recall any follow up after the submission of any of the reports.
- Huawei Technologies Co. Ltd.: In 2018, the firm asked for help in answering general questions from the client about how U.S. administrative law works – specifically in the context of a Notice of Proposed Rulemaking and the subsequent rule-making – including the mechanics of the when and how judicial review might occur. I did less than ten hours of work on the questions and provided my analysis to colleagues at the firm, and have received no follow up since.
- Hyundai Motor America: In 2018, a partner in the firm asked me to assist in answering the client’s question about a regulatory matter involving privacy law. I did less than ten hours of work on the question and provided my analysis to the partner. I have not received any follow up questions or learned anything further about the matter.
- In-Q-Tel, Inc.: In 2020, I advised the client on the privacy implications of a research project that was under development by the client’s open-source division, IQT Labs. The representation ended when I provided the client with the advice, and I have not received any follow up questions.
- Zingbox, Inc.: In 2019, I spent less than ten hours of time providing privacy and cybersecurity advice as part of a Sidley team that advised the client in connection with its purchase by Palo Alto Networks. The investment was announced publicly in September 2019.

Publications

QUESTION 36: In two of your reported publications (*Carpenter and Everything After: The Supreme Court Nudges the Fourth Amendment into the Information Age*, and *Carpenter v. United States: A Revolution in Fourth Amendment Jurisprudence?*), you emphasize that the Supreme Court’s holding as a “decidedly ‘narrow one’”, citing the Court’s statement that “our opinion does not consider other collection techniques involving foreign affairs or national security.” Your publications also maintained the clear limits on the third-party doctrine. Do your publications represent how you will conduct matters if confirmed as General Counsel of ODNI? If not, please explain.

ANSWER: The publications referenced in the question both quoted the Court’s own characterization of its decision as a “narrow one,” as well as the paragraph where the Court stated, among other things, that it was not “disturb[ing] the application” of key third-party doctrine cases or “consider[ing] other collection techniques involving foreign affairs or national security.” The primary purpose of both publications was descriptive and including those statements thus seemed integral.

However, if I am confirmed as the ODNI General Counsel, I do not believe those statements from the Court will necessarily resolve Fourth Amendment questions presented to me. Both of the

publications cited in the question emphasize that *Carpenter* constitutes a potentially important inflection point in Fourth Amendment jurisprudence, given its application of constitutional protection to information created by new technologies. Thus, as the pieces both suggest, the key interpretive questions involving the Fourth Amendment going forward will be how to apply *Carpenter*'s reasoning to new scenarios, including those explicitly reserved by the Court in *Carpenter*.

If I am confirmed as ODNI's General Counsel, I would thus look to a range of sources in trying to resolve Fourth Amendment questions – not only *Carpenter* itself, but also subsequent judicial decisions interpreting *Carpenter* and the views of experts and other lawyers from across the Government, including those from throughout the IC and the Department of Justice.

QUESTION 37: In your publication *The More Things Stay the Same: Why the Trump Administration's Counterterrorism Strategy is Surprisingly Conventional*, you recognize that “terrorist groups increasingly use the internet and encrypted mobile phone apps operationally, including for command and control.” Will you support legislation that would require providers to decrypt terrorist groups' encrypted communications?

ANSWER: The quote mentioned in the question recognizes a point law enforcement and intelligence officials have often made about the challenges posed by encryption, leading to calls for law enforcement access requirements for encryption technologies. At the same time, as Director Haines noted during her confirmation process, the encryption of data is essential, as strong encryption promotes cyber security, thwarts criminals, and preserves privacy.

Like Director Haines, I do not have the answer for how to approach this incredibly challenging issue. If confirmed, I believe my role as General Counsel would be to work with lawyers throughout the IC to understand the legal dimensions of the issue so that I can both advise the Director and other ODNI officials on these legal dimensions and support pragmatic and constructive discussion among policymakers on the way forward.

QUESTION 38: In your publication *Movement on Section 702 of the Foreign Intelligence Surveillance Act (FISA)*, you note the potential impacts on the U.S.-E.U. Privacy Shield. Given the interim events that occurred after this publication, what is your current view of the steps that the U.S. needs to take regarding our national security laws in order to maintain the free and open transfer of data with the E.U.?

ANSWER: In the publication noted in the question, which was drafted in 2018, my co-authors and I noted that the FISA Amendments Reauthorization Act of 2017 “essentially reauthorize[d] what was in effect when the European Commission approved the Privacy Shield in the first place.” Despite this, in July 2020, the Court of Justice of the European Union (CJEU) issued its *Schrems II* decision striking down the Privacy Shield based on its view that U.S. law does not provide protections that are “essentially equivalent” to those provided by EU law.

On March 25, the U.S. Secretary of Commerce and EU Commissioner for Justice issued a joint statement noting that the “U.S. Government and the European Commission have decided to intensify negotiations on an enhanced EU-U.S. Privacy Shield framework to comply with” the

CJEU's *Schrems II* decision. I do not know what, if any, changes to U.S. national security laws are being discussed during these negotiations. If confirmed, however, I would expect to work with lawyers from the IC and elsewhere in the U.S. Government, as well as the Director and other ODNI officials, to ensure that policymakers have the information they need during the negotiations, including regarding the implications of any legal changes that are contemplated; and to provide other support to the negotiations, as appropriate.

Additional Questions from Senator Wyden

Title V of FISA

QUESTION 1:

Do you believe that Section 215 of the USA PATRIOT Act should be used to collect “tangible things” if they do not pertain to:

- a. A foreign power or an agent of a foreign power;
- b. The activities of a suspected agent of a foreign power who is the subject of an authorized investigation; or
- c. An individual in contact with, or known to, a suspected agent of a foreign power who is the subject of an authorized investigation?

If yes, under what circumstances do you believe the application for a Section 215 order could be based on the “relevance” standard without satisfying any of the above three requirements for presumptive relevance?

ANSWER: I believe it is important that the IC gather intelligence lawfully, using its authorities appropriately against valid intelligence targets. To that end, the USA PATRIOT Act of 2001 amended Title V of the FISA to authorize the government to seek a court order to acquire “tangible things” for foreign intelligence purposes—a provision that was further amended by the USA FREEDOM Act of 2015. Although these amendments expired in March 2020, I understand that they may be reauthorized. Given this, if I am confirmed, I may have an opportunity to better understand how Title V is exercised in practice, and I pledge to work with my counterparts across the Executive Branch, including at the other IC elements and at the Department of Justice, to ensure that the IC’s uses of the authority – and, indeed, all IC activities – are carried out in accordance with the Constitution and federal law.

QUESTION 2: In a November 6, 2020, letter, then-DNI Ratcliffe wrote that, “with respect to the use of Title V [of FISA] to obtain records from ISPs, the FBI does not request and obtain pursuant to Title V the content of any communication, to include search terms submitted to an online search engine.”

- a. Do you agree that internet search information constitutes content of communications and thus can only be obtained with a probable cause warrant?
- b. Does this warrant requirement apply regardless of how or from whom the

web browsing information might be obtained?

ANSWER: The USA PATRIOT Act of 2001 amended Title V of the FISA to authorize the government to seek a court order to acquire “tangible things” for foreign intelligence purposes, but these amendments, as well as the further amendments made by the USA FREEDOM Act, expired in March 2020. Nonetheless, the amendments may be reauthorized, and, if confirmed, I may have an opportunity to better understand how Title V is exercised in practice. In doing so, I would pledge to work with my counterparts across the Executive Branch, including at the other IC elements and at the Department of Justice, to ensure that the IC’s uses of the authority – and, indeed, all IC activities – are carried out in accordance with the Constitution and federal law.

QUESTION 3: On November 25, 2020, Director Ratcliffe sent a letter stating that an order pursuant to Title V of FISA had “directed the production of log entries for a single, identified U.S. web page reflecting connections from IP addresses registered in a specified country that occurred during a defined period of time.”

- a. During her confirmation process, Director Haines stated that the ODNI would brief the Committee on this collection pending the outcome of a Department of Justice review. Will you prioritize that briefing?
- b. Does the government have the authority now, or in the event of a reauthorization of Section 215 of the USA PATRIOT Act, to collect log entries for web pages reflecting connections to persons inside the United States?

ANSWER: I share Director Haines commitment to ensuring that the Committee is appropriately briefed on the incident referenced in Director Ratcliffe’s letter, pending the outcome of the Department of Justice’s review.

I am not familiar with the order mentioned in Director Ratcliffe’s letter, but, if confirmed, I will have an opportunity to better understand how Title V authorities are exercised in practice, and I pledge to work with my counterparts across the Executive Branch, including at the other IC elements and at the Department of Justice, to ensure that all IC activities are carried out in accordance with the Constitution and federal law.

Section 702 of FISA

QUESTION 4: During his confirmation process, Assistant Attorney General for National Security John Demers was asked about the prohibition on reverse targeting in Section 702 of FISA. He responded:

“As I understand it, determining whether a particular known U.S. person has been reverse targeted through the targeting of a Section 702 target

necessitates a fact specific inquiry that would involve consideration of a variety of factors. For example, as the Privacy and Civil Liberties Oversight Board noted in its 2014 report, if a Section 702 tasking resulted in substantial reporting by the Intelligence Community regarding a U.S. person, but little reporting about the Section 702 target, that might be an indication that reverse targeting may have occurred. ”

How should this “fact specific inquiry” be implemented through the Section 702 nominations and querying processes of Intelligence Community entities?

ANSWER: My understanding of how IC entities make reverse-targeting determinations aligns with the view that Assistant Attorney General Demers expressed during his confirmation process – i.e., that such determinations are fact-specific and necessitate the evaluation of a variety of factors. I am not familiar with how this approach is specifically implemented through the nominations and querying processes of IC entities, but, if confirmed, I will review the matter and, if I become aware of instances of reverse targeting through ODNI’s Section 702 oversight function, I will ensure they are reported to the FISC and Congress and work with the Department of Justice to determine the cause and implement solutions to ensure the problem does not recur.

QUESTION 5: Do you believe Section 702 of FISA authorizes the collection of communications known to be entirely domestic?

ANSWER: Section 702 explicitly states that the government “may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.”

QUESTION 6: The 2018 legislation reauthorizing Section 702 of FISA codified limitations on the use of U.S. person information in criminal proceedings.

- a. Do you believe these limitations should be extended to other provisions of FISA?
- b. The limitations include an exception for “transnational crime, including transnational narcotics trafficking and transnational organized crime.” Please describe the full scope of “transnational crime” in this context.

ANSWER: I have not had occasion to consider how the 2018 legislation referenced in the question has been implemented, including how “transnational crime” has been interpreted in that context. If confirmed, I will review the implementation of the provision and consult with the Committee, as well as the Department of Justice and other IC elements’ General Counsels, on whether its limitations should be extended to other provisions of FISA or there are areas where further amendments to FISA are needed.

QUESTION 7: Under Section 702 of FISA, the government can direct an

electronic communications service provider to provide “assistance necessary to accomplish the acquisition.” Under Section 702(h)(5), if the provider does not comply with a directive, the government may seek an order from the FISA Court to compel compliance. Prior to the reauthorization of Section 702 in 2018, the government stated that it had “not to date sought an order pursuant to Section 702(h) seeking to compel an electronic communications service provider to alter the encryption afforded by a service or product it offers.”

- a. Do you believe that the government should inform the FISA Court should it issue a directive to a provider to alter the encryption afforded by a service or a product, regardless of whether the government files a motion to compel compliance?
- b. Will you commit to notifying Congress of any such directive?
- c. Do you believe the public should be informed should the facts underlying the government’s public statement related to Section 702(h)(5) change?

ANSWER: During my time in government and in private practice, I have not had occasion to consider these questions concerning the implementation of Section 702 in depth. If confirmed, however, I would work with the Department of Justice and other IC elements’ General Counsels to ensure that the government complies with its obligations under FISA and with the rules of the FISC. It would likewise be my responsibility to ensure that the DNI keeps the congressional intelligence committees fully and currently informed of all intelligence activities, consistent with the requirements of Title V of the National Security Act and other applicable federal law. And, more broadly, I believe that informing the public about the IC’s activities, consistent with protecting sources and methods, is an important part of the IC’s mission, and I would be a strong supporter of such transparency efforts if confirmed.

Other Surveillance Matters

QUESTION 8: Title 50, section 1812, provides for exclusive means by which electronic surveillance and interception of certain communications may be conducted. During her confirmation process, Director Haines stated that “the President must take care that the law be faithfully executed and Title 50, Section 1812 is no exception.” Do you agree that this provision is binding on the President?

ANSWER: I share the view expressed by Director Haines during her confirmation process: that the President must take care that the law be faithfully executed and Title 50, Section 1812 is no exception.

QUESTION 9: Do you agree that the FISA Court amici play an important role in raising significant matters of law with the Court? If yes, do you believe that granting the *amici* access to all FISA information, as provided for in Section 215 reauthorization legislation passed by both houses of Congress, helps the *amici* fulfill the role of raising issues with the Court?

ANSWER: My views are much the same as those expressed by Director Haines during her confirmation process. I believe that FISA Court amici play an important role and, if confirmed, I will work to ensure that they have access to the information necessary to allow them to perform the role envisioned for them by statute.

QUESTION 10: The Privacy and Civil Liberties Oversight Board's (PCLOB's) March 5 on Executive Order 12333 report stated that, "[a]s technology and the law evolve at an ever-faster pace, the IC's review and revision of elements' Attorney General-approved guidelines should proceed at a similar rate. Up-to-date guidelines will better safeguard U.S. persons' privacy and civil liberties and support intelligence mission needs." Do you agree to review the Attorney General-approved guidelines to ensure they are up to date with changes in law and technology?

ANSWER: Yes.

QUESTION 11: The PCLOB's March 5 on EO 12333 report stated:

"As agencies implement their new or revised Attorney General-approved guidelines, such lower-level policies likewise must be updated to reflect new privacy and civil liberties safeguards. For instance, some agencies' new or revised Attorney General-approved guidelines for the first time address 'bulk collection.' As a result, activity-specific policies that relate to such activities must be updated to address the safeguards now afforded by the revised procedures, as well as PPD-28 and other intervening developments in the law. These also may include, for example, new or revised training requirements and updated database user manuals."

Do you agree to prioritize the development of updated privacy and civil liberties safeguards, as well as policies, training, manuals and other guidance to ensure that EO 12333 collection is conducted consistent with the Attorney General-approved guidelines and the public's understanding of the legal and policy framework for such collection?

ANSWER: Yes.

QUESTION 12: The PCLOB's March 5 letter on EO 12333 also stated that IC elements should review their legal and constitutional analysis regularly and revise

them as necessary to reflect changes in the law and technology. For example, technological changes can affect the scope and nature of U.S. person information collected or how the IC queries and retains U.S. person information. Do you agree to conduct a review of IC entities' legal analysis regarding EO 12333 collection to ensure that it reflects changes in the law and technology? How will you ensure that IC entities regularly review their legal and constitutional analysis?

ANSWER: If confirmed, I would work with the General Counsels of the relevant IC elements to ensure those elements review their legal analyses to account for changes in the law and in technology. Moreover, if confirmed, I would consult with the lawyers in the Office of General Counsel on existing practices for reviewing legal analyses in order to ensure that they adequately account for legal and technological change.

QUESTION 13: According to a chart posted by the ODNI, only the Department of the Treasury Office of Intelligence and Analysis does not have finalized Attorney General approved EO 12333 procedures. During her confirmation process, Director Haines committed to prioritizing the completion and public dissemination of those procedures? Will you likewise make this a priority?

ANSWER: Yes.

QUESTION 14: The Department of Justice has published policy guidance on the use of cell-site simulator technology, often referred to as stingrays. The guidance requires law enforcement to obtain a probable cause warrant for the use of stingrays, other than in emergencies. Do you believe that the IC should obtain a FISA probable cause warrant for the domestic use of stingrays consistent with the conduct of electronic surveillance under FISA?

ANSWER: In my prior positions in government and private practice, I have not had occasion to consider this issue in depth. If confirmed, I look forward to doing so and would work with the Department of Justice and the General Counsels of the IC elements to ensure that the IC's intelligence activities are conducted in conformity with the Constitution, applicable federal law, and Executive Orders.

QUESTION 15: In June 2018, in the case of *Carpenter v. U.S.*, the U.S. Supreme Court found that the government's collection of cell-site locational records was a Fourth Amendment search. In November 2019, the government acknowledged that it was not collecting cell-site or GPS information pursuant to Section 215 of the USA PATRIOT Act, which does not require a warrant. In 2020, both houses of Congress passed legislation reauthorizing Section 215 that prohibited such collection, although the legislation was not passed into law.

- a. Do you agree that, should Section 215 be reauthorized, it should not be used to collect cell-site or GPS information?
- b. Do you agree that the constitutional principles enunciated in *Carpenter* and reflected in the government's decision with regard to collection under Section 215 applies generally to the IC's collection under other provisions of FISA and EO 12333?
- c. If confirmed, will you commit to issuing controlling guidance on the application of *Carpenter* to the IC and making that guidance public?

ANSWER: During her confirmation hearing, Director Haines committed to reviewing with IC lawyers whether guidance on the application of *Carpenter* would be useful, as well as to seeking further opportunities for transparency regarding the frameworks within which the IC collects information, while protecting sources and methods. If confirmed, I look forward to supporting DNI Haines's efforts in this area and would look specifically at the issues raised by the question in doing so. More broadly, if confirmed, I would work with the Department of Justice and other General Counsels in the IC to ensure that all intelligence activities are conducted in conformity with the law, including the Supreme Court's *Carpenter* decision.

QUESTION 16: Do you believe that the privacy interests of Americans should depend on whether their information is purchased or obtained voluntarily by the government, as opposed to compelled through legal process?

ANSWER: My views are much the same as those expressed by Director Haines during her confirmation process. I believe strongly in protecting the privacy interests of Americans. If confirmed, I will have an opportunity to better understand current methods of obtaining information and intelligence and determine whether changes are advisable.

QUESTION 17: If confirmed, will you ensure that the IC is transparent about the type of information on Americans that it purchases or obtains voluntarily and the legal basis for that collection?

ANSWER: During her confirmation process, Director Haines committed to seeking to articulate and make public a framework that would help the public understand the circumstances under which the IC purchases commercially available information and the legal basis for doing so, consistent with the protection of sensitive sources and methods. I share Director Haines's commitment to transparency, and, if confirmed, I look forward to supporting her efforts to maximize public transparency on this important topic.

QUESTION 18: NSA Director Nakasone has stated that, absent consent of the U.S. person or certain emergency situations, U.S. person queries of communications collected under Executive Order 12333 "normally must be

approved by the Attorney General on a case-by-case basis after a finding of probable cause.”

- a. To what extent should this requirement apply to other IC entities?
- b. What is the role of the IC in developing and documenting the case for probable cause in this context?
- c. Please describe any exceptions to this requirement.

ANSWER: Under Executive Order 12333, IC elements must operate in accordance with Attorney General-approved procedures that set forth the circumstances and limits under which elements may lawfully collect, retain, and disseminate information concerning U.S. persons. It is my understanding that, among other things, these guidelines were drafted in order to ensure that lawful intelligence activities are carried out in a manner that provides protection for the privacy and civil liberties of Americans. If confirmed, I would work with Department of Justice and other IC elements’ General Counsels, to ensure that IC elements comply with these Attorney General-approved procedures. In doing so, I will have the opportunity to consider how these procedures work in practice and whether any additional requirements or other changes would be appropriate.

QUESTION 19: Do you agree that no element of the IC can request that a foreign entity conduct any activity that it is not authorized to undertake itself?

ANSWER: IC elements may not request any person, including a foreign entity, to undertake activities that the Constitution, federal law, or Executive Order, including Executive Order 12333, forbid the IC elements themselves to take.

QUESTION 20: What limitations do you believe should apply to the receipt, use or dissemination of communications of U.S. persons collected by a foreign partner or source? How should those limitations address instances in which the foreign partner or source specifically targeted U.S. persons or instances in which the foreign partner or source has collected bulk communications known to include those of U.S. persons?

ANSWER: IC elements may not request any person, including a foreign entity, to undertake activities that the Constitution, federal law, or Executive Order, including Executive Order 12333, forbid the IC elements themselves to take. If foreign partners or sources collect and share information concerning U.S. persons consistent with this prohibition, IC elements are only authorized to collect, retain, or disseminate such information in accordance with procedures approved by the Attorney General consistent with Executive Order 12333. If confirmed, I would work with the Department of Justice and the General Counsels throughout the IC to ensure that all elements of the IC adhere to these requirements and engage with foreign partners in a manner wholly consistent with U.S. law and with robust protections for the privacy and civil liberties of U.S. persons. In doing so, I would have the opportunity to understand how those

guidelines work in practice, including with respect to the scenarios identified in the question, and determine whether it would be appropriate to consider any changes to the existing limitations.

QUESTION 21: Do you believe that communications data collected in transit are or should be treated differently than communications data at rest? Please address any distinctions as they may apply to FISA, EO 12333, PPD-28, and USSID 18.

ANSWER: All IC activities involving communications data must be carried out in accordance with the Constitution and applicable federal law, including FISA, as well as Presidential directives, such as Executive Order 12333 and PPD-28, and their applicable implementing procedures, such as USSID 18. If confirmed, I will have an opportunity to better understand current methods of obtaining information and intelligence pursuant to these authorities, including any distinctions in how those authorities treat data collected in transit and data at rest, and I pledge to work closely with the Committee should I identify the need for any changes.

QUESTION 22: In March 2019, the Department of Justice Inspector General released its “Review of the Drug Enforcement Administration’s Use of Administrative Subpoenas to Collect or Exploit Bulk Data.” Do you believe that the subpoena authorities in question, and 21 U.S.C. 876(a) in particular, allow for bulk collection?

ANSWER: I have not had occasion to consider the DEA’s use of administrative subpoenas in light of the Inspector General’s report. If confirmed, I would work with the Department of Justice and the General Counsels of the IC elements to ensure that the IC’s intelligence activities are conducted in conformity with the Constitution, applicable federal law, and Executive Orders.

Whistleblowers

QUESTION 23: The Intelligence Community Whistleblower Protection Act states that the DNI “shall” transmit to Congress any whistleblower complaint determined by the IC Inspector General to be an “urgent concern.” An October 22, 2019, letter sent by the Council of the Inspectors General on Integrity and Efficiency (CIGIE) and signed by inspectors general sixty-eight government departments and agencies, including from across the IC, confirmed that the law requires that such complaints be transmitted to Congress. During her confirmation, Director Haines committed to transmitting to Congress whistleblower complaints determined by the Inspector General to be an urgent concern. Do you agree that the DNI is required by law to transmit to Congress any whistleblower complaint determined by the IC Inspector General to be an “urgent concern”?

ANSWER: During her confirmation process, Director Haines committed to transmitting to

Congress whistleblower complaints determined by the IC IG to be an urgent concern, and I cannot envision a plausible scenario in which it would be appropriate for the ODNI General Counsel to intercede to stop such a transmission.

QUESTION 24: The law states that whistleblowers must obtain from the DNI, through the IC Inspector General, “direction on how to contact the congressional intelligence committees in accordance with appropriate security practices.” Do you agree that this provision does not permit the DNI to deny whistleblowers direct access to Congress altogether?

ANSWER: I do not understand the statute to permit the DNI to deny whistleblowers direct access to Congress, although I do believe it affords the DNI a role in deciding how to bring extremely sensitive matters to the committees’ attention in accordance with appropriate security practices.

PCLOB

QUESTION 25: Do you agree that the reports of the Privacy and Civil Liberties Oversight Board should be released to the public, including the three reports referenced in the PCLOB’s March 5, 2021, report on EO 12333?

ANSWER: While I have not had the opportunity to review the three referenced reports, I believe it is important for the IC to be transparent, consistent with the need to protect classified or otherwise sensitive information. I therefore share the view Director Haines stated during her confirmation process, that the PCLOB’s reports should be made public, consistent with the protection of sources and methods, and, if confirmed, would support efforts to provide such transparency into the PCLOB’s work.

QUESTION 26: Do you believe that the mandate of the PCLOB should be expanded beyond counterterrorism so that it can review any IC program or activity that affects the privacy and civil liberties of Americans?

ANSWER: I share the views expressed by Director Haines during her confirmation process. If confirmed, I will consult with the PCLOB about the effectiveness of its current mandate and assess whether changes to it should be requested of Congress.

QUESTION 27: Will you commit to ensuring that the PCLOB is provided full access to any information it requests?

ANSWER: I share the views expressed by Director Haines during her confirmation process regarding the importance of the PCLOB’s work. If confirmed, I will ensure that the Board has access to the information necessary to allow it to perform the role envisioned for it by statute.

Chief of Mission Authority

QUESTION 28: If a U.S. ambassador directs the Intelligence Community to cease a particular program or operation in the country where the ambassador is serving, is the Intelligence Community obligated to do so, absent or pending intervention by the President?

ANSWER: My views are much the same as those expressed by Director Haines during her confirmation process. If a U.S. ambassador directs the IC to cease certain activities within the country for which they are the U.S. representative, in my view, the IC should either elevate the issue or cease such activities. My experience has been that conflicts between departments generally can be worked out through consultation and negotiation, making it possible to avoid such scenarios.

Detention and interrogation

QUESTION 29: Do you believe that any of the CIA's former enhanced interrogation techniques are consistent with the Detainee Treatment Act, the U.S. statutory prohibition on torture, the War Crimes Act, or U.S. obligations under the Convention Against Torture or Common Article 3 of the Geneva Convention?

ANSWER: During her confirmation process, Director Haines stated that she believed the CIA's former enhanced interrogation techniques included torture, and I believe such techniques are clearly prohibited by U.S. law.

QUESTION 30: Section 1045 of the National Defense Authorization Act for Fiscal Year 2016 prohibits the use of any interrogation technique or approach or treatment related to interrogation not authorized by the Army Field Manual. Is this provision of law absolutely binding on the President?

ANSWER: The Constitution requires the President to take care that the law be faithfully executed, including Section 1045 of the National Defense Authorization Act for Fiscal Year 2016.

QUESTION 31: Executive Order 13491 prohibits the CIA from operating any detention facilities other than "facilities used only to hold people on a short-term transitory basis." During her confirmation process, Director Haines stated that she supported this prohibition. Do you also support this prohibition?

ANSWER: Yes.

QUESTION 32: Section 1045 of the National Defense Authorization Act for Fiscal Year 2016 requires the Secretary of Defense, in consultation with the DNI,

the Attorney General, and the Director of the FBI, to complete a “thorough review” every three years of the Army Field Manual 2-22.3 (Human Intelligence Collector Operations) (“AFM”).

- a. During her confirmation process, Director Haines agreed to advocate for a timely review of the AFM? Will you make the same commitment?

ANSWER: Yes.

- b. Do you agree that the CIA’s former enhanced interrogation techniques should be prohibited under the AFM?

ANSWER: Yes.

- c. Section 1045 requires that the High-Value Detainee Interrogation Group (HIG) submit a report on best practices for interrogation and states that the review of the AFM may include recommendations for revisions based on HIG research. After reviewing the science, the HIG concluded that, “[b]ased on the comprehensive research and field validation studies detailed in this report, it is concluded that the most effective practices for eliciting accurate information and actionable intelligence are non-coercive, rapport-based, information-gathering interviewing and interrogation methods.” During her confirmation process, Director Haines stated that she agreed that the review of the AFM should be consistent with these scientific best practices and added “even if a technique involving cruel, inhuman, or degrading treatment were determined to be effective, I would not endorse its use.” Do you agree?

ANSWER: Yes.

Lethal Authorities

QUESTION 33: Please describe your view of the legal implications of targeting or otherwise knowingly killing a U.S. person in a U.S. government lethal operation. What additional transparency do you believe would be warranted in that situation?

ANSWER: Decisions to use force are extremely serious, particularly in the rare instance when a U.S. person has taken up arms against the United States, and I believe it is essential that such operations are justified and within our legal authorities. If confirmed, I will work in partnership with my IC colleagues and lawyers from across the U.S. Government to ensure that is the case.

With respect to transparency, I believe it is important for the national security community to be transparent, consistent with the need to protect classified or otherwise sensitive information, and, if confirmed, I will thus be an advocate for maximizing public transparency regarding the Government's use of lethal force, especially in relation to U.S. persons.

QUESTION 34: On July 1, 2016, President Obama issued EO 13732, "United States Policy and Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force." Section 3 of the EO directed the DNI to publicly release an annual report on strikes undertaken by the U.S. Government against terrorist targets outside areas of active hostilities. President Trump revoked Section 3 on March 6, 2019. Section 1723 of the Fiscal Year 2020 National Defense Authorization Act included a similar reporting requirement. During her confirmation process, Director Haines committed to advocating for a new or revised Executive Order that includes reporting on strikes taken by and civilian casualties caused by all U.S. Government agencies; to ensuring compliance with Section 1723, including the requirement that the report be submitted in unclassified form; and to supporting making Section 1723 permanent. Will you make the same commitments?

ANSWER: Yes.

Transparency

QUESTION 35: Will you support the declassification and public release of any interpretation of law that provides a basis for intelligence activities but is inconsistent with the public's understanding of the law?

ANSWER: I believe it is important for the IC to be transparent, consistent with the need to protect classified or otherwise sensitive information. If confirmed, I will thus be an advocate for maximizing public transparency regarding interpretations of law that provide the basis for intelligence activities, consistent with the need to protect national security.

QUESTION 36: Executive Order 12333 procedures and guidelines, as they apply to IC entities, are publicly available. Do you commit to continuing to post these procedures and to making public any modifications, superseding policies and procedures, or significant interpretations?

ANSWER: I believe it is important for the IC to be transparent, consistent with the need to protect classified or otherwise sensitive information. If confirmed, I will be an advocate for maximizing public transparency regarding procedures and guidelines issued pursuant to Executive Order 12333, consistent with the need to protect national security.

QUESTION 37: Implementing procedures under PPD-28 for IC entities are publicly available. Do you commit to post these policies and procedures and to make public any modifications, superseding policies and procedures, or significant interpretations?

ANSWER: If confirmed, I will seek to ensure that the IC follows all legal requirements relating to PPD-28, including its provision on the public release of IC elements' implementation policies, consistent with classification requirements. I believe that doing so is a critical element of the IC's efforts to ensure transparency for the public about intelligence activities.

QUESTION 38: If you or any other individual from the Office of General Counsel were to say something pertaining to national security that was factually inaccurate in public, would you correct the public record?

ANSWER: I intend for any public statements that I make to be entirely accurate. However, if I am confirmed and I inadvertently make a public statement that is inaccurate, I would publicly correct the statement, consistent with the requirement to protect classified information. Moreover, if I am not able to make a public correction because of a requirement to protect such information, I will inform the intelligence committees of the inaccuracy in a classified setting.