

SELECT COMMITTEE ON INTELLIGENCE

UNITED STATES SENATE



Additional Prehearing Questions
for
Ms. Caroline D. Krass
upon her nomination to be
the General Counsel of the
Central Intelligence Agency

Role of the General Counsel

QUESTION 1: By statute, the General Counsel of the Central Intelligence Agency (CIA) is the "chief legal officer" of the CIA and must perform such functions as the Director of the CIA may prescribe.

- Is the General Counsel or the Office of the General Counsel (OGC) limited to providing legal advice? Under what circumstances may the General Counsel or other OGC attorneys provide policy advice? When is it appropriate or inappropriate for them to do so?

ANSWER: Because I have not worked in CIA's OGC, my response is based on my experience working with OGC from the Department of Justice and National Security Staff. My understanding is that the CIA General Counsel serves multiple roles, including: as chief legal officer providing authoritative legal advice and guidance to the DCIA and other Agency officers; as supervisor of the Office of General Counsel; as counselor; and as a member of the Agency's leadership team. I would therefore expect that the views of the General Counsel and the other attorneys in OGC are considered as part of decision making by the Agency in a wide variety of situations, including with respect to questions that involve mixed questions of law and policy, particularly in areas of high legal and/or policy risk. When providing advice, I believe it is important for the General Counsel, as well as the other attorneys in OGC, to clearly distinguish between law and policy. In addition, it is critical for the legal advice provided by OGC to be balanced and objective. Where the law is unclear or still developing, OGC attorneys should discuss the available interpretations, including, as a matter of legal policy, their advantages and disadvantages.

- In the context of U.S. law, to what extent should the legal advice offered by CIA attorneys provide an assessment of the legal and policy risks associated with a proposed intelligence activity, as opposed to a binary resolution of the legality or illegality of the activity?

ANSWER: To the extent possible, I believe CIA attorneys should assess all legal risks associated with any proposed intelligence activity and should assist in the assessment of policy risks by operational officers and policy makers, while distinguishing between legal and policy risks.

- To what extent should CIA attorneys advocate for the lawfulness of a proposed intelligence activity, as opposed to providing an assessment of whether the proposed activity is lawful?

ANSWER: In the first instance, CIA attorneys should assess whether a proposed intelligence activity is lawful, based on a balanced and objective approach to the law, and without engaging in advocacy. In some circumstances (for instance, in the context of an interagency legal discussion) it may also be appropriate to explain to others the reasoning underlying the view that a proposed activity is lawful. Of course, CIA attorneys should never advocate for the lawfulness of a proposed intelligence activity that in their professional judgment would not be lawful.

- What are the responsibilities of the General Counsel, or other OGC attorneys, if CIA officials seek to engage in intelligence activities that are lawful but that the attorney has nonetheless advised against on policy grounds?

ANSWER: The General Counsel, assisted by other OGC attorneys, has the responsibility to ensure that all CIA activities are undertaken in accordance with U.S. law. Senior operational officers and policy makers (and not OGC) ultimately have responsibility for deciding whether to engage in lawful intelligence activities after fully considering any policy issues.

- Under what circumstances, if any, is the Director of the CIA, or another CIA official, empowered to disregard the legal advice of the General Counsel or other OGC attorneys? What are the responsibilities of the General Counsel or other CIA attorneys in such a circumstance?

ANSWER: The General Counsel has an obligation to ensure that all Agency activities are undertaken in accordance with U.S. law. If an OGC attorney has advised that a particular course of conduct would not be lawful, and that advice is disregarded, that matter should be brought to the attention of the General Counsel. The General Counsel should bring the matter to the attention of the DCIA and report any unlawful activity, as required by law or as otherwise appropriate, including by reporting the matter to the CIA Inspector General and the Intelligence Committees, as required by the National Security Act.

The DCIA, like all officers of the Executive Branch, has taken an oath to uphold the Constitution and laws of the United States. Were the DCIA to disagree with

the General Counsel's legal advice, the DCIA could seek legal advice from the Attorney General.

- Is it within the authority and a worthwhile activity of the CIA's Office of the Inspector General (OIG) to review the legal analysis and other activities of the OGC, as the OIG does regularly for other CIA components?

ANSWER: If confirmed, I would welcome a close and productive relationship with the CIA's Office of the Inspector General (OIG). By statute, the Inspector General is responsible for inspecting, investigating and auditing the programs of the Agency to ensure they are conducted efficiently and in accordance with applicable law, as well as identifying fraud and other serious problems, abuses and deficiencies. *See* CIA Act of 1949, § 17(c). I believe those IG authorities extend to the activities of OGC, but not to the IG's review of legal advice provided by OGC.

The CIA General Counsel is the chief legal officer of the CIA. *Id.* § 20(b). Congress has recognized that, although the CIA Inspector General needs a counsel to advise him, the CIA General Counsel must retain his role in providing final authoritative legal advice to the Agency. This is reflected in the statutory language of the Intelligence Authorization Act for Fiscal Year 2010, in which Congress authorized a counsel to the Inspector General and noted that nothing in the Act "shall be construed to alter the duties and responsibilities of the General Counsel of the Central Intelligence Agency." Pub. L. No. 111-259, § 425(f). Thus, if there are any concerns regarding OGC's legal interpretations, I would expect the IG to raise those concerns with the General Counsel.

- What is your understanding of the history and purpose of the establishment by Congress of the General Counsel of the CIA as a Senate-confirmed position?

ANSWER: It is my understanding that the Senate Select Committee on Intelligence first recommended the establishment of the CIA General Counsel as a Senate-confirmed position in the Fiscal Year 1994 Intelligence Authorization bill. *See* S. Rep. No. 104-258, at 34 (1996). This proposal, which had been recommended by both the Church Committee and the Iran-Contra Committee, was initially opposed by the Clinton administration. *Id.* In 1996, that opposition was dropped, and section 813(a) of the Intelligence Authorization Act for Fiscal Year 1997, Pub. L. No. 104-293 (Oct. 11, 1996), established the General Counsel of the CIA as a Senate-confirmed position.

In reporting its Fiscal Year 1997 Intelligence Authorization bill, the Committee stated: "The Committee believes that the confirmation process enhances accountability and strengthens the oversight process. It is also important to note that currently, all elements of the Intelligence Community—except the CIA—are part of departments that have statutory general counsels who are Senate confirmed." S. Rep. No. 104-258, at 34.

- If confirmed, what changes, if any, would you make to the organization and/or management of the OGC?

ANSWER: I believe that it is important to be working within an institution before deciding what organizational and/or management changes are needed. If confirmed, I would evaluate the structure and management of the OGC, determine what is already working well, and assess whether any changes are needed.

- Lawyers within the OGC are regularly assigned to mission components within the CIA to gain expertise in those offices' work and to provide direct legal support to them. If confirmed, how do you intend to manage CIA lawyers that operate within other components? How would you determine what legal matters would appropriately be raised to the management of the OGC as opposed to being handled within operational units?

ANSWER: As the chief legal officer of the CIA, the General Counsel is responsible for the management and evaluation of all attorneys providing legal advice to the Agency. If confirmed, I intend to work with OGC leadership to ensure that I have visibility into the legal advice being provided by OGC attorneys throughout the Agency. That visibility will provide an opportunity for additional discussion within OGC, as needed. I would also communicate to the attorneys throughout OGC that I welcome and expect that they discuss significant legal and policy issues with me. Once I were in the job, I would assess whether there are other effective measures to ensure that I stay abreast of issues requiring legal advice, such as by holding regular meetings with the CIA's division chiefs.

Covert Action

QUESTION 2: The Director of the CIA is authorized by the National Security Act of 1947 to "perform such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct." These functions and duties may include the use of force.

The National Security Act also places limits on the conduct of "covert actions," which are defined, in pertinent part, as "activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly," but which do not include "traditional . . . military activities."

- Where it is intended that the role of the United States Government will not be apparent or acknowledged publicly, what are the factors that guide whether a use of force is carried out covertly by the CIA as a "covert action" under Title 50 of the U.S. Code or clandestinely by the military as "traditional military activity" under Title 10 of the U.S. Code?

ANSWER: The first factor is whether either CIA or the U.S. military has the authority to use force in the contemplated operation(s). For CIA to conduct a covert action, there must be a Presidential finding, properly notified to Congress, authorizing CIA to use force for the contemplated operation(s). Traditional military activities are not included in the definition of covert action and must be conducted under authorities granted to the Secretary of Defense. Assuming both CIA and the U.S. military have—or would be given—the authority to use force, the President selects which element is best suited for the particular mission based on his assessment of how best to further the national interest.

- Are there circumstances in which the CIA is authorized to engage in activities to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government *will be* apparent or acknowledged publicly? Please explain.

ANSWER: Under section 104A(d)(4) of the National Security Act of 1947, as amended, the President or the Director of National Intelligence could direct CIA to engage in such activities.

- Under what circumstances must covert action involving the use of force comply with treaties to which the United States is a party, including the United Nations Charter and the Geneva Conventions?

ANSWER: The President may direct covert action to the extent authorized by Article II of the Constitution and through the process and within the limits imposed by Congress. Congress has regulated covert action through the National Security Act of 1947, as amended. Section 503(a)(5) of the Act explicitly provides that a

covert action finding “may not authorize any action that would violate the Constitution or any statute of the United States.” By this language, Congress did not prohibit the President from authorizing a covert action that would violate a non-self-executing treaty or customary international law. Such a covert action would, however, need to comply with treaty provisions implemented in a domestic statute. For example, the War Crimes Statute, 18 U.S.C. § 2441, implements certain provisions in the Geneva Conventions.

As a general matter, and including with respect to the use of force, the United States respects international law and complies with it to the extent possible in the execution of covert action activities.

- Do you consider the United Nations Charter and the Geneva Conventions self-executing treaties, such that they are legally binding upon actions carried out by the U.S. government, including covert actions?

ANSWER: I am not aware of any provisions in the U.N. Charter or the Geneva Conventions that are self-executing as a matter of U.S. domestic law. To my knowledge, all of the federal courts of appeals that have considered the question have found the provisions of the U.N. Charter or the Geneva Conventions at issue in the case to be non-self-executing. *See, e.g., Medellin v. Texas*, 552 U.S. 491, 508-09 (2008) (finding Article 94 of the U.N. Charter non-self-executing); *United States v. Bahel*, 662 F.3d 610, 629-30 (2nd Cir. 2011) (finding Articles 17 and 19 of the U.N. Charter non-self-executing); *Al-Bihani v. Obama*, 619 F.3d 1, 20 (D.C. Cir. 2010) (finding the Geneva Conventions of 1949 non-self-executing); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373-75 (7th Cir. 1985) (finding Articles 55 and 56 of the U.N. Charter non-self-executing); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) (finding Articles 1 and 2 of the U.N. Charter, as well as the Third and Fourth Geneva Conventions of 1949, non-self-executing); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (finding “no evidence” to suggest that language in Articles 24 and 49 of the Fourth Geneva Convention “was intended to be self-executing”).

- Are there circumstances in which a use of force, or other action, by the U.S. government that would be unlawful if carried out overtly is lawful when carried out covertly? Please explain.

ANSWER: As a matter of domestic law, I cannot think of any circumstances in which a use of force or other action by the U.S. government that would be

unlawful if carried out overtly would be lawful when carried out covertly, but I have not studied this question.

The CIA's Relationship with the Office of Legal Counsel of the Department of Justice

QUESTION 3: The OGC has on a number of occasions sought legal opinions from the Office of Legal Counsel (OLC) of the Department of Justice (DOJ).

- What criteria guide when the OGC seeks a legal opinion from the OLC and when it resolves a legal question internally?

ANSWER: I am not familiar with all of the factors that CIA considers when determining whether to request advice from OLC. From my experience, I am aware as a general matter that agencies may seek OLC's advice, in particular, when presented with activities that raise significant legal issues of first impression, when existing case law is unclear, or when there is a legal dispute among agencies. If confirmed, I would continue to seek OLC's judgment and expertise on such issues and on any other matters appropriate for OLC advice.

- In responses to questions during his recent confirmation process, former CIA General Counsel Stephen Preston wrote that "... I believe CIA's efforts fell well short of our current practices when it comes to providing information relevant to OLC's legal analysis" as part of the CIA's detention and interrogation program. From your experience at the OLC and as the nominee to be the CIA's General Counsel, what is the appropriate exchange of information between an agency seeking OLC guidance and the OLC?

ANSWER: OLC's advice is only helpful to its clients to the extent that it rests on the provision of all relevant information. I believe that it is in the best interest of any agency seeking OLC's advice to provide all relevant facts and context, and to respond fully to any OLC request for additional information. If confirmed, I would ensure that the Agency would work closely and effectively with OLC, so that OLC's judgments are well-informed.

QUESTION 4: The CIA's June 27, 2013, response to the Committee's Study of the CIA's Detention and Interrogation Program included a recommendation for revalidating OLC guidance to the Agency.

- Please describe your views on how to implement this recommendation.

ANSWER: I have not had the opportunity to review the Committee's Study or the Agency's response. If confirmed, I would of course familiarize myself with any of the Study's recommendations affecting OGC, as well as the Agency's response, and I would be happy to engage further with the Committee on this matter.

- Under what circumstances does a covert action program require an OLC opinion?

ANSWER: A covert action program requires an OLC opinion if the finding authorizing the program were to specifically impose such a requirement. The President, agency head, or other authorized Executive Branch official also may request such an opinion.

- Under what circumstances does a CIA collection program require an OLC opinion, and should this recommendation apply to collection programs as well as covert action programs?

ANSWER: The President, DNI, DCIA, or other authorized Executive Branch official may request such an opinion, but I am not aware of any situations in which an OLC opinion is automatically required.

- Please describe the relationship between the OGC and other components of the DOJ, including the National Security Division.

ANSWER: As I have not served within OGC, I am not familiar with its relationships with DOJ components other than the Office of Legal Counsel. I currently have close working relationships with many DOJ components, including in particular the National Security Division, the Civil Division, and the Criminal Division, as well as with the General Counsel's Offices of many other agencies. If confirmed, I would ensure that OGC would continue to maintain close relationships with DOJ and other Executive Branch agencies, as appropriate.

QUESTION 5: The National Security Act of 1947 requires that the Director of National Intelligence and heads of departments or agencies involved in intelligence activities, including the Director of the CIA, furnish the congressional intelligence committees with information or material concerning the legal basis under which

intelligence activities and covert actions are conducted. OLC opinions often establish the legal basis for such intelligence activities and covert actions carried out by the CIA and other intelligence agencies, and provide the clearest and most comprehensive written expression of that legal basis.

- Would you support making all such opinions available, upon request, to the intelligence committees of the House and Senate? Why or why not?
- Do you believe such opinions are privileged, such that the Executive branch may refuse to disclose them, upon request, to the intelligence committees of the House and Senate? If so, please explain the legal basis for any such privilege(s), whether such privilege(s) extend to legal opinions that have not been solicited and received by the President or a close advisor, and whether such privilege(s) are absolute or rebuttable?

ANSWER: I fully support the need to provide the Intelligence Committees with an explanation of the legal basis for the government's intelligence activities, including covert actions. If confirmed, I commit to you that I will make every effort to ensure that the Committees are provided with a clear and comprehensive explanation of the legal basis for the CIA's conduct, as required by sections 502(a)(2) and 503(b)(2) of the National Security Act of 1947, as amended in 2010. As Director Brennan has stated, the CIA should provide the Committees with an explanation of why its conduct was or is consistent with applicable law.

The CIA itself, and in particular the General Counsel, is in the best position to explain to the Committees why its conduct is or was consistent with applicable law. For example, even where OLC provides the CIA with advice, it is the CIA that decides whether to engage in an activity, how to conduct an activity, and how the legal standards apply to particular activities. And particularly given my experience at OLC, I am confident that I would be able to provide the Committees with the full and comprehensive explanation they need, with the important additional legal understanding that only the CIA's General Counsel would have. If confirmed, I would view it as a critical part of my responsibilities as General Counsel to work with the CIA to provide the Committees with the necessary explanation of the legal basis for the CIA's conduct and to respond to the Committee's questions and concerns.

While I believe that the CIA should fully inform the Intelligence Committees of the legal basis for its intelligence activities, legal opinions from the Office of Legal Counsel provide confidential, pre-decisional legal advice. This does not diminish

in any way the CIA's responsibility to provide the Committees with a full explanation of the legal basis for any action it takes, and I consider this a crucial component of the CIA General Counsel's responsibilities.

Intelligence Collection Under Executive Order 12333

QUESTION 6: Part 2 of Executive Order 12333 establishes procedures for the conduct of intelligence activities, including activities carried out abroad and directed against non-U.S. persons. The order was signed by President Reagan in 1981 and requires each intelligence agency to adhere to Attorney General-approved procedures for the collection, retention, or dissemination of information concerning United States persons.

- Do you believe Executive Order 12333 continues to provide sufficient guidance for the conduct of intelligence activities, to include procedures for handling incidentally acquired information concerning United States persons?

ANSWER: While Executive Order 12333, which was most recently amended by Executive Order 13470 in 2008, does not contain specific requirements for the handling of incidentally acquired U.S. person information, section 2.3 requires that the collection, retention, and dissemination by elements of the Intelligence Community of information concerning U.S. persons must comply with internal agency regulations that are approved by the Attorney General. If confirmed, I would study the CIA's Attorney General-approved guidelines and other applicable law to formulate a view on whether, particularly in light of emerging technological changes, Executive Order 12333 provides sufficient guidance with respect to incidentally acquired U.S. person information.

- Do you believe it is necessary to update the CIA's Attorney General-approved procedures for the collection, retention, or dissemination of information concerning United States persons? Please describe, in general terms, any updates you believe are necessary?

ANSWER: I am not personally familiar with the CIA's Attorney-General approved procedures, and I would make it a priority to examine whether they need to be updated if I am confirmed as the General Counsel for CIA.

Unauthorized Disclosures of Classified Information

QUESTION 7: If confirmed as the CIA General Counsel, please describe the actions you will take to prevent, detect, and report unauthorized disclosures of classified information.

ANSWER: In my positions at the National Security Council and DOJ, I have witnessed first-hand the significant harm to national security that results from unauthorized disclosures. If confirmed I will fully support Justice Department investigations into the unauthorized disclosure of classified CIA information. There is no question that unauthorized disclosures can have a significant negative impact on CIA operations. They can compromise sensitive sources, damage relations with foreign partners, and decrease the effectiveness of intelligence activities – thereby harming our ability to protect the nation against terrorist attacks and other threats from abroad.

- What actions do you believe to be appropriate for cases of unauthorized disclosures of classified information that the Department of Justice has declined to investigate?

ANSWER: I am not personally familiar with current procedures, but would expect any General Counsel to provide advice and counsel to agency senior leaders regarding any civil lawsuits or administrative, security or personnel actions that may be appropriate after a review of the facts.

Legal Authorities

QUESTION 8: Are there legal authorities that the CIA does not possess but that it should? Are there any legal authorities that the CIA possesses that it does not need or should not have?

ANSWER: If confirmed this is an area I expect to review with the Agency's senior leaders, in consultation with the leadership of the Office of General Counsel. I would also look forward to working with the Committee on these questions.

Transparency

QUESTION 9: While the CIA conducts most of its work in secret, it must make decisions on when and how to make some of its activities public, whether through

the Freedom of Information Act, mandatory declassification reviews, or voluntary measures.

- How would you seek to determine or advise others on what information about the CIA should be made public?

ANSWER: If confirmed, my focus as the General Counsel would be on the legal issues surrounding potential disclosure, for example under the Freedom of Information Act (FOIA). I am familiar with FOIA from my time at OLC, as well as with discretionary (voluntary) releases under that Act.

Decisions whether to disclose particular information to the public through declassification and voluntary release are weighty and fact-specific policy issues. In assisting the senior leadership of the Agency in their efforts to balance the goal of transparency with the equally important mandate of protecting intelligence sources and methods, I would see my role as counselor or advisor; it is the DCIA, in consultation with senior Administration officials, who is the final arbiter of what CIA information should be made public.

- How do you view the tension between transparency and protection of intelligence sources and methods?

ANSWER: I see it as a need to balance rather than a tension between the two. All democratic societies must address the appropriate balance between transparency and the protection of intelligence sources and methods. Our democratic values demand an open and transparent government, with a well-informed public. On the other hand, we must protect certain information essential to safeguarding our national security and the success of our intelligence efforts.

Congressional Oversight

QUESTION 10: 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 and to the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities.

- What is your understanding of the standard for meaningful compliance with this obligation of the Director of the Central Intelligence Agency to keep the

congressional intelligence committees, including all their Members, fully and currently informed of intelligence activities?

ANSWER: Section 502 of the National Security Act of 1947 requires that the DCIA keep all members of the Intelligence Committees, with limited exceptions, informed of the Agency's intelligence activities in a comprehensive and timely manner. From my perspective, this mandate directs that the Agency must provide all members of the oversight committees with complete reporting and notification whenever possible. The Agency should only limit the dissemination of reporting and notifications in accordance with established practice based on a mutual understanding of the "due regard" clause.

- Under what circumstances is it appropriate to brief only the Chairman and Vice Chairman, and not the full Committee membership?

ANSWER: Though I am not privy to specific instances, I can envision situations in which the DCIA must limit notification to the Chairman and Vice Chairman, at least initially, in exceptional circumstances to relay information regarding highly sensitive matters or where broader dissemination is not consistent with national security. I also recognize that the Intelligence Committees have a need for and are statutorily entitled to meaningful access to information so that they may perform their oversight and other legislative functions.

The Committee's Study of the CIA's Detention and Interrogation Program

QUESTION 11: The Committee's Study of the CIA's Detention and Interrogation Program, approved on December 13, 2012, was provided to the Department of Justice and for comment in late 2012. As of December 3, 2013, the Committee has not received a response from the Department of Justice.

- As Principal Deputy Assistant Attorney General, did you review the Committee Study, in particular the 128-page section of the Study entitled *CIA Representations to the Department of Justice Related to Intelligence, Effectiveness, and Operation of the Interrogation Program*? If not, please review it.

ANSWER: As noted above in my response to Question 4, I have not reviewed any part of the Committee's Study or the Agency's response, nor was I asked to do so by DOJ. I will read the section of the Study you have identified and, if

confirmed, will further familiarize myself with the Study's Executive Summary as well as the Agency's response, in preparation for engaging with the Committee on the important issues that I understand they raise.

- Have the OLC and/or the DOJ developed views with regard to the Committee Study? If so, please describe those views.

ANSWER: I am not aware of any OLC or DOJ views relating to the Study.

- Please provide your views of the Committee Study, in particular the extent to which the CIA did or did not provide accurate and up-to-date information to the OLC on matters material to the OLC's analysis of the program.

ANSWER: Please see my answers above.

QUESTION 12: Significant information on the CIA's now-discontinued enhanced interrogation techniques, as well as the conditions of confinement for CIA detainees, has been declassified, in some cases with regard to their application to individual, named detainees. What is your personal view on the declassification of the remaining classified material, in particular the use of specific interrogation techniques against specific detainees, in light of Executive Order 13526, and given that the President has stated that the techniques are no longer sources and methods of the U.S. government?

ANSWER: I am not familiar with the remaining classified material and therefore I am unable to give a meaningful view on the feasibility or impact of further RDI-related declassifications. If confirmed, I will ensure that OGC provides any necessary legal advice to facilitate the Agency's process for assessing these issues, and I will sufficiently inform myself so that I can direct OGC's efforts in this regard.

As a general matter, I support providing the maximum amount of transparency to the public on national security issues, consistent with protecting sources and methods and achieving national security objectives, as defined by the President. The standard provided in section 3.1 of Executive Order 13526 is that information must be declassified as soon as it no longer meets the Order's standards for classification. Information that continues to meet those standards should be declassified only in exceptional circumstances where the need to protect such information is outweighed by the public interest in disclosure.

QUESTION 13: What is your personal view on the impact of the CIA classification rules related to the program on the U.S. military commissions at Guantanamo Bay, Cuba?

ANSWER: I am not aware of the issues at play, including the nature of the CIA's classification rules, and thus have neither a personal nor a professional view on the matter.