

SELECT COMMITTEE ON
INTELLIGENCE
UNITED STATES SENATE



**Prehearing Questions
For
Robert S. Litt
Upon his Selection to be
General Counsel
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 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 National Intelligence and the heads of all departments, agencies and other entities of the United States 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 is it appropriate to brief the Chairman and Vice Chairman and not the full committee membership?

ANSWER: I believe that Congressional oversight is particularly important in the area of intelligence, because of the importance of intelligence to protecting our national security, the power of the tools given to the Intelligence Community and their potential risks to privacy and civil liberties if used improperly, and the necessarily secret nature of much of what the Intelligence Community does. As the question notes, Section 502 of the National Security Act requires the Director of National Intelligence, and the heads of all departments and agencies with intelligence components, to keep the two intelligence committees “fully and currently informed” of all U.S. intelligence activities (excepting covert actions that are covered in section 503), including “significant anticipated intelligence activities” and “significant intelligence failures.” By its terms, section 502 contemplates that the committees will be notified of all significant intelligence activities before they are undertaken, and section 503 imposes a similar requirement for covert actions.

Director Blair has emphasized the importance of timely and complete congressional notification. On March 24, 2009, he issued a memorandum to the heads of all components of the Intelligence Community reminding them of their obligation in this regard and directing that they review their internal procedures to ensure full and timely compliance. Like Director Blair, I believe that congressional notification must be timely to be effective, and I anticipate that, if confirmed, my responsibilities as General Counsel will include assisting him in ensuring that the entire Intelligence Community carries out this critical responsibility.

Although Section 502 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 sources and methods or other exceptionally sensitive matters,” I

believe that this phrase does not limit the obligation to keep the intelligence committees “fully informed” but rather provides the DNI a degree of latitude in deciding how he will bring extremely sensitive matters to the committees’ attention. In certain rare circumstances, I believe it could be appropriate to brief the Chairman and Vice Chairman of the intelligence committees on particularly sensitive matters. Limited notification should be undertaken only in the most exceptional circumstances, by analogy to the provision of Section 503 that permits limited briefing on covert actions “to meet extraordinary circumstances affecting the vital interests of the United States.” Even in those circumstances, however, I expect that the DNI would discuss his concerns about further briefings with the Chairman and Vice Chairman and have an on-going dialogue with them about how and when the full committee membership should be briefed on the matter.

Priorities of the Director of National Intelligence

QUESTION 2:

Have you discussed with the Director of National Intelligence his specific expectations of you, if confirmed as General Counsel, and his expectations of the Office of the General Counsel as a whole? If so, please describe those expectations.

ANSWER: Director Blair and I have had such discussions. He has made clear that his principal expectation is that, if I am confirmed, I as General Counsel and the Office of General Counsel as a whole will be responsible for providing him timely and accurate advice about the law to enable him to exercise his important responsibilities, but also, as any good lawyer should do, for providing counsel and judgment going beyond the technical requirements of the law and dealing with such issues as whether a particular course of action is wise, prudent or appropriate. He also expects that we will not have a narrow focus on the Office of the Director of National Intelligence but would consider the interests of the Intelligence Community as a whole and the national interest. Finally, he has indicated that he expects to have an open door for his General Counsel and expects me promptly to bring to his attention any legal or policy issues that concern me.

More particularly, Director Blair recognizes that the General Counsel has an important role to play in helping to coordinate overlapping responsibilities within the ODNI and within the Intelligence Community as a whole. He particularly mentioned to me his desire that his General Counsel work closely with the Civil Liberties Protection Officer and Inspector General to help him ensure, as he is required to do by Section 102A(f)(4) of the National Security Act, that intelligence activities are carried out in “compliance with the Constitution and laws of the United States.” For example, the critical function of overseeing compliance with Foreign Intelligence

Surveillance Act is shared among a number of different entities, and he expects that the Office of General Counsel would help coordinate that oversight for maximum effectiveness.

The Office of the General Counsel

QUESTION 3:

The Office of the General Counsel of the Office of the Director of National Intelligence has a myriad of roles and responsibilities. What are your expectations for the Office?

ANSWER: My expectations for the office are much the same as the DNI's expectations. I would expect that its lawyers would provide both sound legal advice and wise counsel, and that they would make clear to the recipients of their advice when that advice is legal and when it reflects judgment and policy considerations. I would expect them to work with the various components of the Intelligence Community to try to enable them to take all necessary steps to protect the nation while not hesitating to tell them where the bounds of the law are. I would expect them to keep their focus on the needs of the Intelligence Community and the nation as a whole, and to work cooperatively, rather than adversarially, with the legal counsel to all other components of the intelligence community. Finally, I would expect them to be proactive rather than reactive as much as possible – to maintain the sorts of relationships with the components of the Intelligence Community that would encourage those components to consult with them on an ongoing basis rather than at the end, typically when things have gone off the rails.

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

ANSWER: Obviously, my observations on the operations of the Office of General Counsel to date are extremely limited, but they are very favorable. I have been impressed with the competence, experience, knowledge and dedication of the lawyers I have met so far. The office appears to be integrated into the daily routine of the entire ODNI, well respected within ODNI and the larger legal community, and effective.

- 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: Generally, it has been my experience that it is best to spend some time in a new position or a new office before starting to make decisions about what to change. If confirmed, I will get to know the attorneys and the office better, and evaluate how effective the office is in helping the Director accomplish his statutory responsibilities. Moreover, if confirmed I would

expect to consult with the Intelligence Committees to obtain their views as to the operations of the office. As an initial matter, however, if confirmed I expect that I would continue the practice of having several of the attorneys in the office be detailed from other legal offices in the Community. These detailees provide the DNI General Counsel's Office a broader Community perspective and a better understanding of the variety of legal issues facing the elements of the Intelligence Community, and when the detailees return to their components they take with them a Community perspective.

QUESTION 4:

Describe your understanding of the responsibilities of the Director of National Intelligence and the General Counsel of the Office of the Director of National Intelligence in reviewing, and providing legal advice on, the work of the Central Intelligence Agency, including covert actions undertaken by the Central Intelligence Agency.

ANSWER: By statute, the Director of the Central Intelligence Agency reports to the Director regarding the activities of the CIA, and the Director of National Intelligence is specifically charged with many responsibilities relating to the CIA. For example, he is responsible for ensuring compliance with the Constitution and laws of the United States by the CIA, monitoring the implementation and execution of the National Intelligence Program (NIP) and keeping the Congress fully and currently informed of intelligence activities and covert actions. If confirmed, I will assist the Director in the execution of these responsibilities by working with the CIA General Counsel to ensure that legal issues and NIP-funded programs, including covert actions, are carefully evaluated and reviewed and, when appropriate, that any unresolved legal issues are referred to the Department of Justice for additional review.

QUESTION 5:

Describe your understanding of the responsibilities of the General Counsel of the Office of the Director of National Intelligence in the process set forth in the President's Executive Orders of January 22, 2009, with respect to ensuring lawful interrogations, review and disposition of individuals detained at Guantanamo Bay Naval Base and closure of detention facilities, and review of detention policy options.

ANSWER: The Director of National Intelligence has an important role in carrying out each of those Executive Orders. He is Co-Vice Chair of the Special Interagency Task Force on Interrogation and Transfer Policies established by E.O. 13491, a participant in the detainee review process established by E.O. 13492, and a member of the Special Interagency Task Force on Detainee Disposition established by E.O. 13493. The General Counsel's role is to provide

legal advice and counsel to the Director and those officials he has designated to assist him with the implementation of these Executive Orders. The Executive Orders raise important and complex legal and policy issues and it is my understanding that the Office of General Counsel has been working closely with ODNI officials and the Intelligence Community on them.

QUESTION 6:

Explain your understanding of the role of the General Counsel of the Office of the Director of National Intelligence in resolving conflicting legal interpretations within the Intelligence Community.

ANSWER: By virtue of its relationship with the entire Intelligence Community, the General Counsel's Office is well positioned to identify conflicting legal interpretations within the Community. Because the General Counsel does not have decisional authority to resolve such conflicts, if there are conflicting legal views on an issue, I would bring the relevant general counsels together to discuss the issues and attempt to resolve any differing opinions. I would also involve, as appropriate, the experienced attorneys at the National Security Division and the Office of Legal Counsel at the Department of Justice. This process would correspond to the provision of Section 102A(f)(4) of the National Security Act, which charges the Director with ensuring compliance with the Constitution and laws, but generally "through the host executive departments" that contain elements of the Community.

I have worked in the past with several of the Intelligence Community general counsels, or lawyers on their staff, as well as many of the senior attorneys and officials at the Department of Justice, and I would expect that through this cooperative process we could resolve the great majority of legal issues. However, if we are unable to do so, either the General Counsel of the ODNI or any of the other general counsels could refer a legal question to the Department of Justice. Even in that case, I would expect that the Office of General Counsel of ODNI would be involved in the Department of Justice's decision-making process.

Guidelines under Executive Order 12333

QUESTION 7:

One of the fundamental documents governing the activities of the Intelligence Community 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, describe the principal matters to be addressed by each of the required Attorney General-approved guidelines or procedures, the main issues you believe need to be resolved in addressing these

guidelines or procedures, and your understanding of the schedule and priorities for completing them (or indicate whether the existing named guidelines or procedures are deemed sufficient)

ANSWER: In general, I understand that the General Counsel of the ODNI plays a role in determining the schedule and priorities for drafting required guidelines and procedures. If confirmed, I expect to be involved in that prioritization process as well as the substantive process of developing the actual guidelines.

- 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 Intelligence Community, 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).

ANSWER: I would expect these guidelines to address a variety of legal issues and privacy protections in order that information collected by Federal Government agencies outside the Intelligence Community can be shared with the Intelligence Community to the greatest extent possible consistent with protecting the privacy, civil liberties, and statutory rights of U.S. persons. (It is my understanding that intelligence and information-sharing *within* the Intelligence Community is governed by section 1.3(b)(9)(B) of the Order, and guidelines governing this information sharing are contained in ICD 501, issued in January of this year.) Much of the information collected by other Federal Government agencies is protected by various laws, such as the Privacy Act, the Bank Secrecy Act, etc., and it could contain a great deal of information about U.S. Persons. Whether the information can be accessed by the Community, who within the Community can access the information, under what conditions it can be accessed, requirements for handling information related to U.S. persons, and restrictions on how the information can be further used and shared within the Intelligence Community all need to be addressed in the guidelines.

- b. Procedures under section 1.3(b)(18) for implementing and monitoring responsiveness to the advisory tasking authority of the Director of National Intelligence for collection and analysis directed to departments and other U.S. entities that are not elements of the Intelligence Community.

ANSWER: It is my understanding that advisory tasking is a process whereby the Director of National Intelligence asks a Federal Government agency that is not part of the Intelligence Community to collect information that is relevant to national intelligence. I would expect guidelines for advisory tasking to focus on the legal authorities that a non-intelligence agency could or should use to collect national intelligence information for the Intelligence Community. All collection activities would need to be consistent with the responding agency's legal authorities and would need to protect appropriately the privacy and civil liberties of Americans.

Section 1.5(d) of Executive Order 12333 also provides that the heads of departments or agencies shall respond to advisory taskings “to the greatest extent possible, in accordance with applicable policies established by the head of the responding department or agency.” This provision allows responding departments or agencies to issue policies regarding how a particular department or agency would respond to these advisory taskings.

- 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.

ANSWER: This section of the Executive Order is directed to the heads of Intelligence Community elements and tells them to participate in the development of these procedures. Under the revised Order, I believe the procedures for the “production and dissemination” of information or intelligence would be covered by the guidelines under section 1.3(a)(2) of the Executive Order, which is discussed in my answer to question 7a, above, and that the relevant Intelligence Community elements would participate in the development of these guidelines.

- d. Regulations under section 1.7(g)(1) for collection, analysis, production and intelligence by intelligence elements of the FBI of foreign intelligence and counterintelligence to support national and departmental missions.

ANSWER: The new procedures for the FBI called for by section 1.7(g)(1) were signed by the Attorney General in the fall of 2008, after consultation with the Director of National Intelligence. It is my understanding that they were drafted before the changes to Executive Order 12333 and that the only thing that was affected by the signing of the new Order was the addition of the requirement to consult with the DNI before the Attorney General could approve the procedures, a requirement that was complied with. Both the Acting General Counsel of ODNI and the Civil Liberties Protection Officer tell me that they were actively engaged in reviewing these new procedures before they were signed last fall.

- 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 Intelligence Community element to determine where the information is relevant to its responsibilities.

ANSWER: The requirement that elements of the Intelligence Community have procedures approved by the Attorney General under section 2.3 for the collection, retention, and dissemination of U.S. person information is unchanged from the prior version of Executive Order 12333, except for the new requirement that the Attorney General consult with the Director

of National Intelligence before approving any new guidelines. In addition, section 2.3 of the new Executive Order, unlike the prior version, permits information derived from signals intelligence to be disseminated to Intelligence Community elements for the purpose of allowing the recipient element to determine whether the information is relevant to its responsibilities and can be retained by it, but only in accordance with procedures established by the Director in coordination with the Secretary of Defense and approved by the Attorney General.

All Intelligence Community elements are required to operate under so-called “U.S. person rules” when collecting, retaining, or disseminating information regarding U.S. persons. All of the established elements of the Community have had these guidelines in place for years and those guidelines remain in effect, in accordance with section 3.3 of the amended E.O. 12333. I understand that several of the newer elements of the Intelligence Community, such as the ODNI, DHS Intelligence & Analysis, and the Coast Guard intelligence element have drafted U.S. person rules and are currently coordinating their guidelines with the Department of Justice and the ODNI. A few other elements are also updating or revising their U.S. person rules. If confirmed, I expect to be actively involved in this process. I understand that there is an effort to harmonize these guidelines across the Intelligence Community to as great an extent as possible, given the varying missions and requirements of the different components of the Intelligence Community. This project certainly seems desirable, particularly as we move to a more integrated Intelligence Community with ever greater information-sharing.

- f. Procedures under section 2.4 on the use of intelligence collection techniques to ensure that the Intelligence Community 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: The guidelines discussed in my answer to question 7e also include the procedures regarding the requirement for the use of least intrusive techniques and the procedures for undisclosed participation in organizations. These provisions of Executive Order 12333 are unchanged from the prior version of the order, except for the addition of a requirement for the Attorney General to consult the Director of National Intelligence before approving guidelines for use of these procedures. If confirmed, I intend to play an active role in that consultation process.

Implementation of the FISA Amendments Act of 2008

QUESTION 8:

Under section 702 of the Foreign Intelligence Surveillance Act, as added by the FISA Amendments Act of 2008 (FISA Amendments Act), 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. The FISA Amendments Act was signed into law in July 2008. Thus, the process for one or more new annual authorizations may occur at some time proximate to the first anniversary of the FISA Amendments Act and annually thereafter. The FISA Amendments Act also provide for semiannual or annual assessments and reviews, as described in section 702(1) of FISA.

- a. Describe your understanding of the matters that the Attorney General and DNI, with the assistance of the General Counsel of the Office of the DNI (GC/ODNI), should evaluate in order to determine, on the basis of the first year's experience under the FISA Amendments Act (and annually thereafter), whether there should be revisions in the substance or implementation of (1) targeting procedures, (2) minimization procedures, and (3) guidelines required by the FISA Amendments Act, in order to ensure both their effectiveness and their compliance with any applicable constitutional or statutory requirements.

ANSWER: Under the FISA Amendments Act, as under other statutes and Executive Order 12333, the Intelligence Community has the responsibility both to protect the nation from foreign threats and to protect the civil liberties of Americans. At this point, of course, I do not have knowledge of the classified details of how the Intelligence Community has implemented the FISA Amendments Act. However, section 702(1) of the Act requires the Director of National Intelligence and the Attorney General jointly to conduct semi-annual assessments of compliance with the targeting and minimization procedures adopted in accordance with sections 702(d) and (e), and with the guidelines adopted under section 702(f) to ensure that applications for court orders are properly filed and that the substantive limitations of section 702(b) are complied with. At its core, this assessment is concerned with ensuring that the targets of surveillance under section 702 are really in a foreign country and are not U.S. persons, and that the privacy and civil liberties interests of U.S. persons who may be in communication with the target are protected.

It is my understanding that the Office of General Counsel participates in these semi-annual reviews and other reviews required by FISA. I would expect that the information obtained from these reviews would serve as the basis for evaluating whether changes are required to the targeting or minimization procedures or to the guidelines.

- b. Describe how the semiannual or annual assessments and reviews required by the FISA Amendments 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 FISA Amendments Act, including in applicable targeting and minimization procedures and guidelines.

ANSWER: Without a detailed knowledge of the implementation of the FISA Amendments Act it would be premature for me to speculate on the appropriate timing or substance of the assessments and reviews required by the statute. However, as noted above, the data obtained from the reviews and assessments should inform any reauthorizations under the Act.

- c. In addition to the matters described in the FISA Amendments 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 FISA Amendments Act?

ANSWER: It is also premature for me to comment on additional matters that should be reviewed to improve oversight of the FISA Amendments Act without a better understanding of the precise manner in which the authorities granted by the Act have been used and in which the existing oversight and implementation authorities have been employed. However, if confirmed, I look forward to discussing the issue with the Director, the Attorney General, relevant officials of the Intelligence Community, and the Congress.

QUESTION 9:

Title III of the FISA Amendments Act of 2008 provides for a comprehensive report by certain inspectors general on the President's Surveillance Program during the period beginning on September 11, 2001 and ending January 17, 2001. The final report is to be submitted, within one year of the signing of the law in July 2008, in unclassified form but may include a classified annex.

- a. Describe your understanding of the purpose of a public report.

Answer: I believe that the report will provide an important mechanism for ensuring that the facts about this program are available to Congress and the American people, consistent with the protection of intelligence sources and methods. Because the FISA Amendments Act provides for the dismissal of ongoing litigation related to these activities, this report will help to ensure appropriate accountability for the program.

- b. Describe the responsibility that you anticipate that the GC/ODNI will have in recommending what should be declassified and the standards that should be applied to that determination.

ANSWER: In general, section 1.3(b)(9) of Executive Order 12333 gives the Director of National Intelligence considerable authority over the classification and declassification process for information classified by the Intelligence Community. Transparency into the workings of the government is vital and I believe information that is of interest to the public should be made publicly available to the greatest extent possible. However, balancing that public interest with national security concerns is a difficult challenge. Executive Order 12958 requires that information be declassified when it no longer meets the standards for classification, and also contemplates that at times the public interest in the disclosure of certain information will outweigh the need to protect it. Certainly there are times when information that is of interest to the public can be disclosed without revealing truly sensitive intelligence sources and methods.

I expect that the unclassified report required by the FISA Amendments Act will be a good example of the balancing required in this difficult area and I would expect the General Counsel of the ODNI to play an important role in striking the proper balance in this context.

December 2009 Sunset of Three FISA Provisions

QUESTION 10:

Three FISA provisions—lone wolf coverage, roving wiretaps, and orders for documents—sunset on December 31, 2009.

- a. In your view, what evidence and issues should be considered by the Administration and by Congress in the consideration of whether to modify these provisions and either extend the sunsets or make the provisions, with or without amendments, permanent?

ANSWER: As a general matter, I think that the experience of the government in executing these authorities, the value of the information obtained, the degree of intrusion upon civil liberties, and the extent of the continued need for these authorities would all be relevant factors to consider. Without knowing precisely how these authorities have been implemented by the government, I cannot comment more specifically, but if confirmed I expect that I will work with the Congress in evaluating these provisions.

- b. Are there any benefits, in your view, in aligning the sunset of these provisions with the sunset under the FISA Amendments Act of 2008 for Title VII of FISA on procedures regarding persons outside of the United States?

ANSWER: Again, without knowing precisely how the authorities have been implemented, it is difficult to assess the impact of aligning the sunsets of these provisions.

Declassification of FISA Opinions

QUESTION 11:

At the end of last year, the FISA Court of Review released to the public a redacted version of its most recent opinion. What are your views regarding the issues to be considered in creating a regular process under which important rulings of law and key decisions of the FISA Court and the FISA Court of Review could be publicly released in an unclassified form?

Answer: Balancing the public interest with national security concerns always presents a difficult challenge. There is a public interest to be served in the release of important rulings of law and key decisions of the FISA Court and the FISA Court of Review, including providing a better understanding of the Court's decision-making process and permitting informed public participation in debate over issues relating to FISA. However, these are unique courts whose entire docket relates to the collection of foreign intelligence. Release of these opinions has the potential to expose details of critical intelligence operations, sources, and methods. In my view, the Intelligence Community and the Department of Justice should identify opinions of legal significance the release of which would serve the public interest, and work with the Court to consider release to the extent it can be done in a manner that protects national security information and intelligence activities.

Evaluation of Office of the Director of National Intelligence

QUESTION 12:

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: I have not yet had the opportunity to observe the operation of the Office of the Director of National Intelligence and therefore do not have any informed observations on the strengths or weaknesses of its authorities. The Office of the Director of National Intelligence is unlike any other organization in the Federal Government, in that it has responsibilities over Intelligence Community elements that reside in six independent Departments and thus remain accountable to the heads of those Departments as well as to the Director. This arrangement clearly has the potential to complicate the job of the Director. Whether the ODNI has all of the authorities necessary to integrate and lead the Intelligence Community is something that will require further study and experience working under the current authorities. If confirmed, I pledge to work with the Committee during the annual Intelligence Authorization process on legislation to implement any additional authorities that may be necessary for the ODNI to carry out its mission.

Pending Legislation

QUESTION 13:

The Senate and House of Representatives have considered legislation over the course of several Congresses on subjects such as providing conditions for the federally compelled disclosure of information by certain persons connected with the news media, the state secrets privilege, and whistleblower protections. In your view, what evidence and issues should be considered by the Administration and by Congress in the consideration of whether legislation on these subjects should be enacted? Please discuss each subject separately.

ANSWER: Each of these legislative proposals shares a common goal—striking an appropriate balance between ensuring transparency and openness in government and protecting the national security. From my current vantage point, it appears that the evidence and issues that the Administration and Congress should consider with regard to such legislation are similar. For example, section 102A(i)(1) of the National Security Act requires the Director of National Intelligence to “protect intelligence sources and methods from unauthorized disclosure,” a responsibility shared by everyone who has access to classified information. Accordingly, both Congress and the Administration must assess whether any legislative proposal would put intelligence sources and methods at risk or could result in the unauthorized disclosure of classified information. For example, we should jointly consider whether the legislation would encourage or prevent leaks of classified information. Similarly, both Congress and the Administration should assess whether the legislation respects the President’s constitutional obligation to protect and control classified information, and whether it provides appropriate deference to Executive Branch determinations that the disclosure of classified information has or will cause damage to the national security. In addition, Congress and the Administration should assess whether the legislation would impede the effective operations of the Intelligence Community.

At the same time, Congress and the Administration need to evaluate whether existing laws and procedures have hindered the free flow of information to the public or the Congress or have resulted in unjust results in particular cases, and whether these legislative proposals would effectively remedy any such problems. Finally, as these proposals share a common goal, they should be evaluated as a collective whole rather than in isolation.

Cyber Security

QUESTION 14:

The Bush Administration launched a major initiative to improve government cyber security, the Comprehensive National Cybersecurity Initiative (CNCI), with a prominent role for the Intelligence Community. The Obama Administration has undertaken a 60-day review of cyber security.

- a. What are the major legal, privacy and civil liberties issues concerning the CNCI, or successor, that you believe should be addressed?

ANSWER: Computer security has been a particular concern of mine since my time at the Justice Department. Our nation's cybersecurity policy addresses a wide range of issues that cut across multiple mission areas and therefore multiple legal authorities. We are faced with adversaries who have the ability to infect our supply chain with malevolently modified hardware and software, to hack remotely into our networks, and to take advantage of insiders to steal, alter, or destroy information and control critical infrastructure systems. Moreover, a pressing but under-appreciated privacy issue is that our sensitive data, including corporate intellectual property, government secrets, and U.S. person data held by government and private industry alike, is not only vulnerable but is actually being stolen by criminal organizations and foreign nations on a daily basis and almost at will.

To guard against exploitation of these vulnerabilities, our government must bring to bear all of its capabilities, including those within the Intelligence Community, to ensure the privacy and security of our global information and communications infrastructure. This will require a focus on intrusion detection and prevention monitoring, information-sharing policies, data accuracy, and analysis. At the same time, we must remain vigilant to ensure that the use of government authorities meant to detect our adversaries and thwart their efforts complies strictly with the Constitution and the law. If confirmed, I will work closely with the ODNI Civil Liberties Protection Officer to ensure that there is adequate oversight of these authorities.

- b. What overarching guidelines for the Intelligence Community do you believe should be in place with respect to the implementation of any successor to the CNCI?

ANSWER: I am not fully familiar with the CNCI or the Administration's ongoing study of cybersecurity, the recommendations of which have not yet been made public. If confirmed, I will take an in-depth look into appropriate, overarching guidelines. In doing so, I expect to work closely with the Civil Liberties Protection Officer, as well as the Department of Justice and the elements of the Intelligence Community.

Executive Branch Oversight of Intelligence Activities

QUESTION 15:

Are there improvements, in terms of resources, methodology, and objectives that you believe should be considered concerning Executive Branch oversight of the intelligence activities of the United States Government?

ANSWER: Intelligence oversight is an essential tool to achieve the important goal of balancing the protection of our civil liberties with the protection of our national security. As the chief legal officer for the Office of the Director of National Intelligence, the General Counsel has the responsibility to assist the Director in carrying out his statutory authority under section 102A(f)(4) of the National Security Act to "ensure compliance with the Constitution and laws of the United States." The authorities granted to the Intelligence Community are of necessity powerful ones, and the public needs to be reassured of our continued commitment to compliance with the important limitations imposed by our laws. If confirmed as General Counsel, I will assist the Director in using intelligence oversight to achieve this goal.

It is premature for me to comment on specific improvements that I might recommend in the resources, methodology and objectives of this oversight. However, if confirmed, I would expect that ensuring the Intelligence Community provides timely, accurate, and thorough intelligence oversight reporting will remain a priority for the Office of General Counsel. Moreover, if confirmed, I will consult with my staff, with the General Counsels of all elements of the Intelligence Community, and with Department General Counsels, to determine whether any improvements are needed in intelligence oversight.

Relationship with the Other Officials of the Intelligence Community

QUESTION 16:

What should be the relationship of the General Counsel of the Office of the Director of National Intelligence with respect to the following officers of the Intelligence Community:

- a. General Counsel, Central Intelligence Agency

ANSWER: Section 102A(f)(4) of the National Security Act, concerning the responsibility of the Director of National Intelligence to “ensure compliance with the Constitution and laws of the United States” by the Intelligence Community, recognizes the special relationship that the Central Intelligence Agency has to the DNI, by giving him direct responsibility to ensure compliance “by the Central Intelligence Agency” while providing that he should ensure compliance by other elements of the Community “through the host executive departments” containing those elements. The statute thus clearly contemplates a very close working relationship between two agencies and, by extension, their General Counsels. I have known Steve Preston for many years and have great respect for his abilities and judgment, and if we are both confirmed, I look forward to a close and open relationship with him on a wide range of issues.

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

ANSWER: The position of Assistant Attorney General for National Security did not exist during my time at the Department of Justice, but if confirmed, I look forward to the opportunity to work closely with David Kris, whom I have known since we worked together at the Department. Although the National Security Division is not part of the Intelligence Community, its responsibilities obviously touch on many matters of significance to the Community. For example, the General Counsel of ODNI and the Assistant Attorney General for National Security must routinely work together to assist the Director and the Attorney General in their respective authorization and oversight roles under the FISA Amendments Act. The recent Executive Orders on rendition, detention, and interrogation also require a close working relationship between the offices. The General Counsel’s Office and the National Security Division have implemented a program to have a detailee from the National Security Division at the ODNI General Counsel’s office. I understand that this arrangement has been tremendously valuable to both agencies.

- c. Inspector General, Office of the DNI

(see below)

d. Civil Liberties and Privacy Officer, Office of the DNI

ANSWER: I believe that it is essential that the ODNI General Counsel have a close working relationship with both the ODNI Inspector General and the Civil Liberties Protection Officer. If confirmed, I would expect my interactions with these officers to be both formal and informal. On the one hand, because the oversight roles that the three offices fulfill for the ODNI and for the Intelligence Community are very similar, we will need formal processes to coordinate our roles to make sure that we are as effective as possible while minimizing unnecessary duplication. On the other hand, conflict and duplication can best be minimized if the three officers consult informally and work together whenever possible. The three offices have many similar, but distinct, responsibilities and approach those responsibilities from different perspectives. This provides a unique opportunity for collaboration that should allow each of us to get a more comprehensive picture of any problem and also of possible solutions. I have known the new ODNI Inspector General, Roslyn Mazer, for many years and served with her in the Department of Justice; I met Alex Joel, the Civil Liberties Protection Officer, during my preparation for the hearings, and was impressed with his energy and abilities. If confirmed, I look forward to working closely with both of them.

Professional Experience

QUESTION 17:

For each of the following, describe specifically how your experiences will enable you to serve effectively as the General Counsel for the Office of the Director of National Intelligence. Include within each response a description of issues relating to the position that you can identify based on those experiences.

a. Partner, Arnold and Porter LLP

ANSWER: At Arnold & Porter I have represented several employees of the Central Intelligence Agency on matters arising out of their employment, some of which are classified, and have dealt extensively on those matters with the CIA and its Office of General Counsel and Office of Inspector General. These have given me familiarity not only with the particular substantive matters that were the subject of the representations but also with personnel and administrative matters that I believe are relevant to the duties of the General Counsel for the Office of the Director of National Intelligence.

In addition I have represented two clients in criminal matters that related to the intelligence community, one of which involved extensive litigation under the Classified Information Procedures Act (CIPA). It is my understanding that dealing with CIPA issues in individual cases and on a policy basis is part of the responsibility of the Office of General Counsel.

Finally, while at Arnold & Porter I have remained actively involved in matters relating to intelligence policy and national security, through bar associations and speaking and writing engagements. I have also benefited greatly from the knowledge and wisdom of my partner Jeff Smith in this regard.

b. Principal Associate Deputy Attorney General, Department of Justice

ANSWER: See below.

c. Deputy Assistant Attorney General, Criminal Division, Department of Justice

ANSWER: As Deputy Assistant Attorney General in the Criminal Division, and as Principal Associate Deputy Attorney General, I interacted regularly with components of the Intelligence Community on such matters as crimes reports, requests for opinions on the legality of proposed conduct, FISA applications, criminal investigations that involved classified information (including criminal investigations relating to al Qaeda), and covert actions. As a result I acquired a working familiarity with some of the legal authorities governing the Intelligence Community, and how those authorities operate in practice.

I also dealt extensively with matters relating to computer security, privacy and electronic surveillance, which are critical to the effective functioning of the Intelligence Community and to protection of our national security. I helped to create and stand up the Department's Computer Crime and Intellectual Property Section and served as the Department's representative on matters relating to encryption and the Communications Assistance to Law Enforcement Act (CALEA).

In addition, I developed personal relationships with other Intelligence Community lawyers that will be important, if I am confirmed, in enabling me to perform the coordinative function for the General Counsel for the Office of the Director of National Intelligence for the intelligence legal community.

More generally, my experience in the Department of Justice familiarized me with the operation of the interagency process, with the mechanisms of congressional oversight, and with the process of developing legislation, all of which will be an important part of my role as General Counsel if I am confirmed. In addition, my years at the Department of Justice gave me valuable experience in managing an office of government lawyers.

d. Special Advisor to the Assistant Secretary of State for European and Canadian Affairs

ANSWER: During my year at the Department of State I was a consumer of intelligence and acquired some understanding of the importance of intelligence to our foreign relations and national security.

e. Assistant U.S. Attorney, Southern District of New York, Department of Justice

ANSWER: One of the important issues that faces the government as a whole, including the General Counsel of the Office of the Director of National Intelligence, is how to handle suspected terrorists who we now have in custody or who may subsequently come into our custody. The President has appointed task forces to analyze these issues and I understand that the Office of General Counsel of ODNI is participating in the work of those task forces. If I am confirmed, I believe that my experience as a prosecutor who has actually investigated and tried criminal cases will be valuable both in helping to make the policy decisions about how our legal system should handle accused terrorists, and in assisting the Intelligence Community in responding to the exigencies of particular cases in the judicial system.

QUESTION 18:

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 connection with the nomination process, I have consulted with the Office of Government Ethics and the Office of the Director of National Intelligence's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the ODNI's designated agency ethics official and that has been provided to this Committee.

With respect to my current or former clients, I have represented a State Department employee in a criminal matter and currently represent several present and former employees of the CIA in DOJ, congressional and IG investigations. In addition, my law firm represents a number of telecommunications and high-tech companies on matters on which I have been consulted from time to time. Some of these matters have been classified. My law firm also was appointed by the United States Court of Appeals for the Fourth Circuit to represent Zacarias Moussaoui on appeal. In 2007-08 I assisted the lawyers who handled the matter by providing legal advice about the criminal law and by participating in moot courts.

Should a conflict arise, in accordance with the terms of my ethics agreement, I will not participate personally and substantially in any particular matter involving specific parties in which 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). I also understand that I am required to sign the Ethics Pledge (Executive Order 13490) and that I will be bound by its requirements and restrictions. I am not aware of any potential conflicts of interest not covered under the terms of the ethics agreement or the Ethics Pledge.

Opinions of the Office of Legal Counsel

QUESTION 19:

On April 16, 2009, the Department of Justice released four opinions issued by the Office of Legal Counsel (OLC) for the Acting General Counsel or Senior Deputy General Counsel of the Central Intelligence Agency. With respect to these opinions, issued August 1, 2002, May 30, 2005, and two issued on May 10, 2005:

- a. From the information contained in the opinions, what are your views concerning the role of the Office of the General Counsel of the Central Intelligence Agency in providing information to the OLC in this matter, and whether any lessons for the future should be learned from these opinions regarding that role for the General Counsel of the Central Intelligence Agency or any other general counsel of an entity of the Intelligence Community, including the General Counsel of the Office of the Director of National Intelligence?

ANSWER: I am not sufficiently familiar with the full details of the interaction between the General Counsel of the Central Intelligence Agency, the Office of Legal Counsel, and other parts of the Executive Branch to offer any specific comments on their role in the preparation of these opinions. In general, however, from my prior experience in government I know that the Office of Legal Counsel's work in providing authoritative legal opinions to the Executive Branch depends upon obtaining full and accurate information from any agency that requests its views. In addition, it is my view, as noted above, that an agency general counsel should provide not only technical legal advice to the agency but judgment and policy guidance. I would expect the General Counsel of the ODNI to be involved in any opinions that relate to the Intelligence Community.

- b. If confirmed, will you expect to be informed of requests by agencies of the Intelligence Community for opinions from the Office of Legal Counsel?

ANSWER: Yes. However, it is certainly possible that a Department Secretary could independently ask the Department of Justice for a legal opinion. A close working relationship with the National Security Division, the Office of Legal Counsel, and other offices at the

Department of Justice can help ensure that the General Counsel's Office participates in the process of preparing legal opinions that could affect the Intelligence Community.

- c. What is your assessment of the legal reasoning and conclusions of each of these four opinions?

ANSWER: These opinions have been withdrawn by the Department of Justice, indicating that their reasoning and conclusions may not be relied upon. In addition, the President has ordered that interrogation techniques be limited to those authorized by the Army Field Manual, and has established a task force, of which the Director of National Intelligence is co-vice chair, to review interrogation policies for the future. If confirmed, I would expect that I would carefully review any proposed interrogation techniques and ensure that any legal opinions that are rendered are based upon a full understanding of the relevant facts and law.