

SELECT COMMITTEE ON
INTELLIGENCE
UNITED STATES SENATE



**Prehearing Questions
for
Lisa O. Monaco
Upon her Nomination to be
The Assistant Attorney General for National Security**

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 not only to the Director of National Intelligence (DNI) but to the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities. Section 503 establishes a similar requirement concerning covert actions. Sections 502(a)(2) and 503(b)(2) provide that these officials shall furnish to the congressional intelligence committees any information or material concerning intelligence activities or covert actions, including the legal basis for them, that is requested by either of the committees in order to carry out its authorized responsibilities. 28 C.F.R. § 0.72(a) provides that the Assistant Attorney General for National Security (AAG/NS) shall conduct, handle, or supervise the briefing of Congress, as appropriate, on matters relating to the national security activities of the United States.

- a. What is your understanding of the obligation of the Attorney General and the Director of the Federal Bureau of Investigation (FBI) to keep the congressional intelligence committees, including all their Members, fully and currently informed?

Answer: As I understand it, the obligation imposed by Section 502 of the National Security Act of 1947 is keep the Intelligence Committees of the Congress “fully and currently” informed of “significant intelligence activities” and that obligation includes providing information regarding “significant intelligence failures.” I also understand that the National Security Act further specifies that this responsibility must be exercised “consistent with the due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.” These obligations apply to the Director of National Intelligence and to “the heads of all departments.” As the question further explains, the applicable regulation provides that the Assistant Attorney General for National Security shall “brief Congress, as appropriate, on matters relating to the national security activities of the United States,” and shall “advise and assist the Attorney General in carrying out his responsibilities...related to intelligence, counterintelligence, or national security matters.”

- b. To what activities of the Department of Justice (Department), including the FBI, does this obligation ordinarily apply?

Answer: As I understand it this obligation applies to “intelligence activities,” which ordinarily includes many of the activities of the FBI’s National Security Branch and to the related activities of the National Security Division of the Department of Justice. This obligation would also apply to the activities of the Drug Enforcement Administration’s Office of National Security Intelligence, which is an Intelligence Community element.

- c. What is your understanding of the obligation of the Attorney General to provide to the congressional intelligence committees any information or material concerning the legal basis for intelligence activities or covert actions which either committee requests in order to carry out its legislative or oversight responsibilities?

Answer: I understand that the Congress and the Intelligence Committees have a unique and important role in authorizing and overseeing national security activities of the Executive Branch, and I recognize that it is important for the Committees to receive information on the legal basis for intelligence activities or covert actions as provided under sections 502 and 503. The intelligence agencies have the obligation to provide that information to the Committees. The Attorney General, like all department heads, has responsibility for ensuring that Intelligence Community elements within his department fulfill this obligation.

- d. The Committee utilizes detailed information on the overall national security threat environment and other intelligence matters to appropriately fulfill its intelligence authorization and oversight functions. Do you agree that the Department should comply with requests from the Committee for information relating to intelligence matters? Do you agree that the Department and FBI should fully brief the Committee on potential counterterrorism and counterintelligence threats to the United States, as well as FBI intelligence-related activities to thwart such threats?

Answer: Yes. I would expect that the Committees would be briefed on significant counterterrorism and counterintelligence threats in the context of briefings about intelligence activities. The obligation to keep the committees “fully and currently informed” encompasses an expectation that the committees will be provided with information sufficient to understand counterterrorism and counterintelligence threats and activities. Since September 11, 2001, the FBI has substantially transformed itself into an intelligence-focused, threat-driven agency whose first priority is to identify and disrupt national security threats. I understand the seriousness with which the Department and in particular, the FBI, takes the fulfillment of its intelligence mission and that it is important to keep the Committee informed about those matters.

Liaison to the Director of National Intelligence

QUESTION 2: Pursuant to 28 U.S.C. §507A(b)(2), the AAG/NS shall serve as primary liaison to the DNI for the Department. In response to a prehearing question during his nomination proceeding, David Kris summarized a report published by the Department in April 2008 on the liaison relationship between the National Security Division (NSD) and the DNI.

- a. What is your understanding of how this responsibility has been performed in the time since that report?

Answer: I understand that since the creation of the National Security Division (NSD), the Assistant Attorney General for National Security (AAG), has formed a strong relationship with the Office of the Director of National Intelligence (ODNI) and the Office of General Counsel for ODNI. The AAG regularly consults with the ODNI and with the Office of the General Counsel. In addition, the NSD staff and DNI staff meet regularly on issues related to FISA, the NSD's responsibility to represent the Executive Branch before the Foreign Intelligence Surveillance Court (FISC) as well as on counterintelligence matters, the handling of United States person information in multiple contexts and on numerous operational, and legal and policy issues that arise in the course of intelligence investigations and operations.

- b. Have you discussed with the DNI, and with personnel in the Office of the Director of National Intelligence (ODNI), your respective understandings of that responsibility? If so, describe.

Answer: Yes. I have met with the Director of National Intelligence as well as with the General Counsel of the ODNI and discussed with both of them the role of the AAG as the primary liaison to the DNI for the Department. In particular, we have discussed issues of priority to the Intelligence Community, and the importance that NSD places on its responsibilities in representing the Executive Branch before the FISC and in providing expeditious and accurate legal advice and guidance to the Intelligence Community.

- c. Describe the principal matters that should be addressed in performing this responsibility.

Answer: As the Department's primary liaison to the DNI, the AAG and by extension NSD as a whole, should ensure that there is a strong and productive relationship with the Intelligence Community in order to facilitate timely collection of intelligence consistent with the law. The matters that should be addressed in this regard include NSD's responsibility to represent the Executive Branch before the FISC, its work with Intelligence Community elements to develop and implement guidelines for activity under

Executive Order 12333, and its role in coordinating with its partners in the Intelligence Community on matters of law and policy that arise in investigations and intelligence operations.

- d. Given the extensive role of the NSD in intelligence matters, do you believe the NSD should be made a part of the Intelligence Community and funded through the National Intelligence Program?

Answer: NSD has an important role as a provider of advice and guidance to the Intelligence Community and in representing the Executive Branch before the FISC. NSD also performs an important oversight function with regard to the FBI's activities. For that reason, I believe it is important for NSD to foster and maintain productive, respectful working relationships with its partners in the Intelligence Community, including the FBI. However, I also believe that it is important for NSD's effectiveness that it maintain its position structurally outside the Intelligence Community in order to better, and more legitimately, exercise independent judgment in the discharge of its oversight functions and its representation of the government before the FISC. In addition, the NSD has the unique prosecutorial role in conducting and overseeing national security prosecutions and its placement formally outside the Intelligence Community better enables it to perform that function with the appropriate level of independence required to ensure the integrity of the prosecutorial process.

Priorities of the Attorney General

QUESTION 3: Have you discussed with the Attorney General his specific expectations of you, if confirmed as Assistant Attorney General, and his expectations of the NSD as a whole? If so, please describe those expectations.

Answer: I have discussed with the Attorney General his expectations of the AAG and of NSD in general in fulfilling the Department's top priority of protecting against national security threats. I understand that the Attorney General believes the NSD is responsible for leading the Department's coordinated approach to national security matters and providing a single area of focus within the Department for its national security functions. If I am confirmed, I expect to communicate consistently with the Attorney General to ensure that the Division is fulfilling its mission to address the Department's top priority.

Evaluation of National Security Division

QUESTION 4: On the basis of your experience in the Department, and the observations or recommendations of preceding Assistant Attorneys General for National Security, do you have

any observations on the strengths or weaknesses of the NSD, including matters which you would like to study further, relating to organization, tasks, allocation of personnel, skills and training, or any other factors that you believe are relevant to a successful mission for the NSD? If so, please describe.

Answer: Based on my experience at the Department of Justice – including at the FBI – and on my work with each of the previous Assistant Attorneys General, I believe NSD has successfully implemented the goals of the legislation guiding its creation. Today, NSD leads the Department’s efforts to centrally manage counterterrorism and counterintelligence prosecutions, foreign intelligence surveillance, and coordination of policy and operations on national security issues. NSD has established a comprehensive oversight program and is continuing to develop training for the Intelligence Community elements to enable them to maintain their operational effectiveness in a manner that is consistent with the applicable laws. Having been in senior positions in the Department of Justice and the FBI, I was personally able to witness former Assistant Attorneys Generals Ken Wainstein and Pat Rowan establish a coherent structure to realize the key goals of NSD’s creation -- to integrate intelligence lawyers with prosecutors and agents in order to focus all the Department’s national security functions under one roof. The prior leadership focused increased resources to ensure productive and efficient work of the Office of Intelligence which performs the critical function of representing the Executive Branch before the FISC. David Kris built upon that structure and furthered the maturation of a distinct national security culture. Based on my experience, I believe the current structure and focus of the Division are sound.

If confirmed, it would be my priority to ensure the Division is able to adapt to and anticipate future threats to the national security. To that end, I will make it a priority to review the operations of the Division and to learn more from its national security professionals and partners in the Intelligence Community.

Oversight of Intelligence Activities

QUESTION 5: 28 C.F.R. § 0.72(17) provides that the Assistant Attorney General for National Security shall provide oversight of intelligence, counterintelligence, and national security matters by executive branch agencies to ensure conformity with applicable law, regulations, and departmental objectives and report to the Attorney General.

- a. What is your understanding of the NSD’s oversight role, including the manner in which it has been exercised, concerning intelligence activities of the FBI?

Answer: The NSD is responsible for overseeing and coordinating the foreign intelligence, counterintelligence and counterterrorism activities of the Department to

ensure its national security activities are conducted in conformity with applicable laws, regulations, and the Constitution. NSD performs oversight through its representation of the Executive Branch before the FISC and through the Oversight Section of its Office of Intelligence. In addition to its role as government counsel before the FISC, NSD also conducts other oversight functions in its review of investigative activities of the FBI including:

- Review of certain investigative activities under the Attorney General Guidelines
- Implementation and compliance reviews of FISA minimization procedures in FBI Field Offices
- Review of the accuracy of FISA applications
- Review of certain undercover operations regarding national security

Through its National Security Reviews conducted with lawyers from FBI's Office of General Counsel, NSD reviews national security investigations conducted by FBI Field Offices. These National Security Reviews include review of the use of National Security Letters by the FBI.

- b. What is your understanding of the NSD's oversight role, including the manner in which it has been exercised, concerning intelligence activities, and related prosecutorial activities, undertaken in the offices of United States Attorneys?

Answer: NSD is responsible for ensuring that national security activities conducted by United States Attorneys Offices are coordinated pursuant to a national program. As part of the Department's coordinated national security program, NSD develops, enforces and supervises the application of most Federal criminal laws related to counterterrorism and counterespionage. Through its authority to approve the use of certain statutes in national security prosecutions, NSD seeks to ensure a coordinated and consistent approach in combating national security threats. NSD also ensures that the Department's national security activities are coordinated with other members of the Executive Branch's national security apparatus and provides notification to Congress as appropriate.

NSD interacts with United States Attorneys Offices in many other ways as well. NSD utilizes the Anti-Terrorism Advisory Councils (ATACs) in each United States Attorneys Office as a mechanism for coordination between NSD's counterterrorism and counterintelligence prosecutors and counterespionage prosecutors in the field. The ATAC program facilitates a process of information sharing and coordination that serves as the focal point for the Department's national security initiatives.

NSD also provides support and training to United States Attorneys Offices and works with the Executive Office of United States Attorneys (EOUSA) to ensure a robust mechanism for exchanges with the United States Attorney community and Main Justice.

If confirmed, my goal would be to continue to advance the partnership between United States Attorneys Offices and NSD in pursuing the Department's top priority of combating terrorism and protecting the American people, while ensuring prosecutions are carried out in a manner consistent with Intelligence Community equities.

- c. What is your understanding of the NSD's oversight role, including the manner in which it has been exercised, concerning intelligence activities of IC elements outside of the Department of Justice?

Answer: My understanding is that NSD exercises its oversight responsibilities with respect to elements of the Intelligence Community outside of the Department of Justice in several ways. First, through its role as the government's representative before the FISC, NSD reviews all FISA applications from outside the Department of Justice and monitors Intelligence Community elements' compliance with orders from the FISC. Together with the Office of the Director of National Intelligence, NSD reviews acquisition under Section 702 of FISA to ensure compliance with targeting and minimization procedures in place from authorities granted under that statute. In addition NSD performs oversight through its role as the liaison to the Director of National Intelligence. In that role, NSD reviews policies that require consultation and approval by the Attorney General under Executive Order 12333.

- d. Are there improvements, in terms of resources, methodology, and objectives in the conduct of this oversight that you believe should be considered?

Answer: If I am confirmed, one of my top priorities will be to gain a full understanding of the current oversight activities being performed by NSD – including the resources and methods currently devoted to those efforts – in order to evaluate whether any changes or adjustments should be made to those efforts.

- e. What are the most significant lessons that have been learned with respect to the conformity with applicable law, regulations and departmental objectives of entities subject to NSD oversight?

Answer: Based on my experience in the Department, including my time at the FBI, I believe significant lessons have been learned by those entities subject to NSD's oversight. For instance, in the wake of the Inspector General's report on the use of

National Security Letters, the FBI and NSD put into place a series of reforms and compliance mechanisms to ensure this vital national security tool is used with appropriate predication and documentation, that there are processes and procedures in place to minimize human error and that there is a robust program of review after the fact to monitor compliance and to identify and correct expeditiously any instances of noncompliance.

Administration of the Foreign Intelligence Surveillance Act—Section 215 Applications

QUESTION 6: 28 C.F.R. § 0.72(6) provides that the Assistant Attorney General for National Security shall administer the Foreign Intelligence Surveillance Act (FISA). Audits by the Inspector General of the Department of Justice in 2007 and 2008 found that the processing of FBI requests for Section 215 orders for “tangible things” (Title V of FISA) had been subject to significant delays. The audits found the FBI had not used Section 215 orders as effectively as it could have because of legal, bureaucratic, or other impediments to obtaining these orders.

- a. What is your understanding of the findings of the IG audits and the response of the Department? Please include in this response your assessment whether problems identified in these audits, with respect to processing of Section 215 applications, have been adequately addressed.

Answer: The Inspector General audited the Department of Justice on the use of its investigative authority under Section 215 of the Patriot Act, pursuant to the USA Patriot Improvement and Reauthorization Act of 2005. The Inspector General’s audits of 2007 and 2008 collectively focused upon the use of Section 215 authority in the period from 2002 through 2006. As I understand it, 2006 was the last year analyzed by the Inspector General audits. Since that time the Department of Justice has undergone many changes relating to the use of Section 215 authority. One of the most consequential of these changes was the formation of the National Security Division itself, which was created in 2006 for the very purpose of bringing the full national security resources of the Department into one consolidated Division, in part to streamline and coordinate the Department’s national security efforts. Specifically, the creation of the National Security Division resulted in the creation of a new Operations Section within the Office of Intelligence, as well as additional resources, and enhanced training on FISA matters. Based on my experience within the Department, it is my sense that the National Security Division has worked to make requests for operational authority under FISA - including Section 215 requests - more efficient while maintaining the highest standards for the Department of Justice’s work before the FISA Court.

If I am confirmed, one of the areas of important focus will be the overall functioning of the Division with regard to its representation before the Foreign Intelligence Surveillance Court. I will endeavor to understand fully the Section 215 review process and to minimize any delays.

- b. What additional steps should be taken by the Department to ensure that unnecessary delays are eliminated?

Answer: Although my current responsibilities do not involve interaction with the processing of Section 215 authority by the National Security Division's Office of Intelligence, if confirmed as the Assistant Attorney General for National Security, I would review the operations and, if I identified efficiencies that could be made consistent with the overall integrity of the process, implement those efficiencies.

- c. Given that Section 215 applications to the FISA Court are submitted without an Attorney General certification, would you support attorneys from the Office of General Counsel of the FBI presenting applications directly to the FISA Court?

Answer: The National Security Division's Office of Intelligence represents all Executive Branch agencies before the FISA Court. This is consistent with NSD regulations and the practice of the Department of Justice in which attorneys from litigating divisions and United States Attorneys Offices appear on behalf of investigative agencies. I understand that attorneys from the Office of Intelligence have developed significant expertise through NSD's frequent dealings with the FISC. Because of the unique nature of the practice before the FISA court, the Intelligence Community benefits from having consistency in representation before the FISC. I understand that FBI lawyers regularly are present at FISC proceedings offering important insight and assistance.

Obtaining Approvals from the Department/National Security Undercover Operations

QUESTION 7: In general, if a particular investigative authority has been under-utilized because of administrative burdens imposed by the Department of Justice, are you committed to eliminating unnecessary administrative burdens so that intelligence professionals are more willing to use the authority?

Answer: Yes. If I am confirmed, my goal will be to provide advice and guidance, working in partnership with the Intelligence Community, and to ensure that agents and operators have the tools they need to keep pace with the evolving threat.

- a. In particular, how long does it now take for the FBI to obtain authority for exemptions in national security undercover operations?

Answer: In my current duties, I am sometimes involved with this authorization process and I understand that the length of the process varies depending upon several factors, including the complexity of the undercover operation, the policy interests presented by the proposed operation, and the amount of information contained in the authorization request. I understand that these exemption requests can vary and, while some can be reviewed in short order, others may require additional time for consideration of the issues they raise. If I am confirmed, I would want to understand whether there are concerns with the current process and whether there are any efficiencies that may be realized.

- b. What steps have been taken to implement Section 366 of the Intelligence Authorization Act for Fiscal Year 2010 (Public Law 111-259) which changes the delegation level for approval of exemptions within the FBI and the Department for national security undercover operations? Has this statutory change improved the process for obtaining such exemptions?

Answer: It is my understanding that changes to the delegation level for approval of exemptions are currently being considered within the Department.

- c. What additional steps should be taken by the Department to ensure that unnecessary delays are eliminated?

Answer: Should I become the Assistant Attorney General for National Security, I will review all processes within the National Security Division, including the process for reviewing undercover exemptions, to determine whether additional efficiencies are possible and advisable. If I am confirmed, I will focus on eliminating unnecessary delays in this and other processes vital to the operational functions of national security investigators.

Reauthorization of FISA Provisions

QUESTION 8: Three FISA provisions—lone wolf coverage, roving wiretaps, and orders for business records and other tangible things—sunset on May 27, 2011. A fourth, collection against persons reasonably believed to be outside the United States which was added by the FISA Amendments Act of 2008, sunsets on December 31, 2012.

- a. Do you support, and for what principal reasons, reauthorization for a period of years or making permanent these provisions?

Answer: I believe the reauthorization of these expiring provisions is critically important to the nation's security. I believe these provisions should be reauthorized for as long as possible in order to provide the agents and operators in the field with clarity

and stability in the tools they use. This clarity and stability could be achieved through a permanent reauthorization of these critical tools. If Congress determines that it should revisit these authorities, and if I am confirmed as the Assistant Attorney General for National Security, I will work with Congress to ensure that the operators charged with detecting and disrupting threats have the tools they need to do so consistent with the rule of law.

Based on my experience, the three expiring provisions are critical tools that have given national security investigators many of the same capabilities that have long been available to criminal investigators. For instance, the roving wire tap provision has permitted investigators to track spies and terrorists who are trying to evade surveillance and the business record provision has permitted investigators access to key documents and data in national security, espionage and terrorism cases. The lone wolf provision, although not used to date, permits investigators to keep up with the growing threat of the lone or self-radicalized offender.

- b. What is the impact of additional short-term extensions for one year or less of the authorities now scheduled to sunset on May 27?

Answer: Each time these authorities are reauthorized for only a short period it creates uncertainty about whether and for how long they will remain in effect. This uncertainty contributes to a lack of stability in the tools available to agents and operators and it diverts resources that would be otherwise spent on national security matters.

- c. Does the Department of Justice support the alignment of the four authorities with respect to any future sunset date?

Answer: Yes.

Declassification of FISA Opinions

QUESTION 9: On February 28, 2011, the Department of Justice wrote to this Committee to confirm that representatives of the ODNI Office of General Counsel and the NSD had established a process to declassify relevant opinions of the FISA courts (both the Foreign Intelligence Surveillance Court and the Court of Review) without compromising intelligence sources and methods or other properly classified information.

- a. Is the Department applying this process not only to new decisions but also to prior decisions that contain important rulings of law?

Answer: Yes, to my knowledge.

- b. Please describe the concrete steps that the Department and the ODNI are taking, if any, to review both new and previous opinions of the FISA courts for declassification?

Answer: I understand that the National Security Division has provided the ODNI with all of the opinions and orders that have been submitted to Congress pursuant to FISA Section 601(c), that is, opinions issued by the FISA Courts that include significant constructions or interpretations of FISA, and the review process is ongoing.

- c. Please describe the priority that you will give to this effort if confirmed.

Answer: If confirmed, I will work to ensure that the Department continues to work with the ODNI to make this important body of law as accessible as possible, consistent with national security, and in a manner that protects intelligence sources and methods, and other properly classified and sensitive information.

National Security Letters and Administrative Subpoenas

QUESTION 10: National security investigators seeking certain types of records must use specific national security letter authorities, each with its own statutory requirements. In the USA PATRIOT Improvement and Reauthorization Act of 2005, Congress directed the undertaking of a Department of Justice Inspector General audit on the use of national security letters.

- a. What is your understanding of the administrative reforms implemented by the FBI in response to that audit?

Answer: Following the report of the Inspector General (IG) in 2007 on the FBI's use of National Security Letters, the FBI took a number of steps to address the problems identified in that report. These steps included structural, procedural and operational reforms. Among the reforms instituted as a result of the IG's report, the FBI has implemented an automated system (the NSL Subsystem) that allows standardized implementation and issuance of NSLs pursuant to the appropriate statute and minimizes the ability of human error to result in the issuance of NSLs under the wrong statutory provision. The FBI also now requires that predication for the requested NSL be documented in an electronic communication. That documentation is retained and available for audit. The FBI now requires legal review within the Field Office or Headquarters Division that is seeking the NSL.

The FBI also established the first ever federal government compliance office modeled on corporate compliance programs -- the FBI's Office of Integrity and Compliance. This Office reports to the Deputy Director of the FBI and provides for a layered system of checks to ensure NSL policies and procedures are being carried out and complied with consistent with their design. It also serves to provide an early warning system of any noncompliance. Finally, in the wake of the IG's reports, a comprehensive system of oversight has been implemented in which NSD and attorneys from the FBI Office of General Counsel conduct National Security Reviews in FBI Field Offices around the country, reviewing national security investigations, including the use of NSLs, to ensure compliance with applicable statutes and policies. The IG's 2008 report noted the significant progress made by the FBI in adopting corrective actions to address the problems identified in the prior report.

- b. What is your view on whether to place into law any administrative improvements, any other changes to improve the effectiveness or lawfulness of national security letters, or to enact further improvements in response to any judicial decisions about national security letters?

Answer: In general, I believe the system of reporting and oversight mechanisms that has grown up around the use of NSLs has worked well since the IG audit. As a result of Congressional reporting requirements and the Executive Branch's adoption of reforms in response to identified shortcomings from the IG, there is now a robust system of training, legal review, compliance and oversight for the use of this vital tool. To the extent additional protections can be implemented without adverse operational effect on the use of these vital tools, we should explore them. For instance, I understand the Department has worked with the Intelligence Community and Congressional staff to codify procedures that the Department has put in place to address the Doe v. Mukasey decision identifying the need for a process of government-initiated litigation to challenge NSL nondisclosure provisions.

- c. Please compare the availability of administrative subpoenas to investigators in solely criminal matters—regarding the procedures for those subpoenas, their scope, or any other relevant comparison—with the national security letters available in national security investigations.

Answer: There are numerous instances where Congress has granted federal agencies administrative subpoena power to make an administrative or civil investigatory demand compelling document production or testimony without prior judicial approval. In criminal investigations, administrative subpoenas are routinely used in cases such as those involving health care fraud, child abuse, and Inspector General investigations.

While the scope and exercise of these authorities vary by statute, many authorize federal agencies to issue subpoenas for testimony, documents, and records, provide for judicial enforcement, and include non-disclosure requirements.

National Security Letters (NSLs) are an invaluable investigative tool similar to administrative subpoenas that allow the FBI to obtain information of great foreign intelligence value from records in which an individual has no constitutionally-protected privacy interest and in a manner that is far less intrusive than many other investigative tools. Compared with the scope and exercise of administrative subpoenas used in criminal investigations, the exercise of NSLs is limited in two important respects. First, NSLs are only available for authorized national security investigations (international terrorism or foreign intelligence/counterintelligence investigations), not general criminal investigations or domestic terrorism investigations. Second, unlike some administrative subpoenas, NSLs can only be used to seek certain transactional information permitted under the five NSL provisions, and cannot be used to acquire the content of any communications. With these appropriate limitations in place, use of NSL authorities has significantly aided the FBI's performance of its national security mission.

- d. What is your view of the pros and cons of creating a single statutory national security administrative subpoena? Is this a concept that you would support? If so, please describe the scope and procedures that should be applicable to any such administrative subpoena authority.

Answer: While the adoption of a single NSL statute to replace the current regime of five separate authorities may have some appeal in terms of simplicity and clarity, I would be reluctant to adopt a new regime for the use of this tool at this juncture. Substantial lessons have been learned, through the IG's reviews, the adoption of new training, procedures and processes as well as the creation of new NSL information technology infrastructure, all with the purpose of ensuring these tools are being used appropriately. One of the primary findings of the IG was that agents needed better guidance, training and clarity in the use of NSLs. As a result the FBI adopted the reforms noted above in response to question 10a. The FBI is now accustomed to the system and has incorporated it into standard FBI practice. The development and implementation of yet another new regime – albeit one that seeks to consolidate these authorities into one statute – risks injecting new uncertainty in operations and requiring yet more new training and procedures. At this time, and in light of the successful implementation of corrective actions as noted by the IG, I do not think a new administrative regime is necessary.

QUESTION 11: What is your assessment of the effectiveness of the High Value Detainee Interrogation Group? In answering this question, please include your assessment of its effectiveness with respect to interrogation of terrorist suspects in different settings and circumstances, such as those in custody within the United States, those in U.S. custody outside the United States, and those in the custody of foreign countries.

Answer: The High Value Detainee Interrogation Group (HIG) was developed as a result of an interagency task force that included representatives from across the Intelligence Community. The purpose of the HIG is to integrate the most critical resources from across the government – including experienced interrogators, subject matter experts, intelligence analysts, and linguists – to conduct interrogations of terrorists, wherever they are encountered with the best expertise focused on targets of the most intelligence value. I understand that elements of the HIG have been deployed both internationally and domestically and that the HIG has contributed to the productive interrogation of terrorist suspects in all these settings.

Unauthorized Disclosures of Classified Information

QUESTION 12: 28 C.F.R. § 0.72(a) assigns to the Assistant Attorney General for National Security the responsibility to advise the Attorney General, the Office of Management and Budget, and the White House on matters relating to the national security. In addition, the Assistant Attorney General is assigned the responsibility to prosecute crimes involving national security, foreign relations, and terrorism.

- a. Describe the personnel resources, both attorneys and others, within the NSD that are devoted to the prosecution of media leak cases, and how the NSD divides responsibility on these matters with the Criminal Division.

Answer: The Counterespionage Section of the National Security Division supervises the investigation and prosecution of espionage and related statutes, and provides coordination and advice on cases involving unauthorized disclosures of classified information. It is my understanding that currently, the Counterespionage Section is composed of 21 attorneys and 11 non-attorneys.

If the National Security Division is recused from a case, matters may be handled through the Criminal Division. The Criminal Division also retains responsibility for some cases which predated the formation of the National Security Division.

- b. Describe the role that the NSD has played since its inception in media leak prosecutions in United States district courts and on appeal to the U.S. courts of appeals. Please

provide up-to-date information on the status of major prosecutions during the last two years.

Answer: The NSD's Counterespionage Section, working with the FBI and other agencies, pursues cases in which government employees and contractors entrusted with national defense information are suspected of willfully disclosing such classified information to those not entitled to it, including to members of the news media. NSD has also provided support to other agencies investigating and prosecuting unlawful leaks of classified information

There have been a number of significant prosecutions in the past two years wherein the NSD or Criminal Division, working in conjunction with the relevant United States Attorney Office, has charged individuals in connection with the unlawful disclosure of classified information to the media:

- Jeffrey Sterling – (Criminal Division) -- On Jan. 6, 2011, former CIA officer Jeffrey Alexander Sterling was arrested pursuant to a Dec. 22, 2010 indictment in the Eastern District of Virginia charging him with six counts of unauthorized disclosure of national defense information, and one count each of unlawful retention of national defense information, mail fraud, unauthorized conveyance of government property and obstruction of justice. The indictment alleges that Sterling engaged in a scheme to disclose information concerning a classified program and a human asset – first, in connection with a possible newspaper story to be written by an author employed by a national newspaper in early 2003, and, later, in connection with a book published by the author in 2006. This prosecution is pending.
- Stephen Kim – (National Security Division) -- On Aug. 27, 2010, prosecutors in the District of Columbia unsealed a federal indictment charging Stephen Jin-Woo Kim with unlawfully disclosing national defense information to a reporter for a national news organization and for making false statements to the FBI. Kim was an employee of a federal contractor at a national laboratory who was on detail to the State Department at the time of the alleged disclosure. According to the indictment, in June 2009, Kim knowingly and willfully disclosed information contained in a classified intelligence report to a reporter for a national news organization. This prosecution is pending.
- Thomas Drake – (Criminal Division) -- On April 15, 2010, a federal grand jury in the District of Maryland returned a 10-count indictment charging former National Security Agency (NSA) senior executive Thomas A. Drake with the willful

retention of classified information, obstruction of justice and making false statements. According to the indictment, Drake was a high-ranking NSA employee from 2001 through 2008, where he had access to highly classified documents and information. The indictment alleges that between approximately February 2006 and November 2007, a newspaper reporter published a series of articles about the NSA. The indictment alleges that Drake served as a source for many of those articles, including articles that contained classified information. This prosecution is pending.

- Shamai Leibowitz – (National Security Division) -- On Dec. 17, 2009, Shamai Kedem Leibowitz pleaded guilty in the District of Maryland to a one-count information charging him with disclosing to an unauthorized person five FBI documents that contained classified information concerning the communication intelligence activities of the United States. From January 2009 through August 2009, Leibowitz was employed by the FBI as a contract linguist. In April 2009, he caused five classified documents to be furnished to a person who was the host of an Internet blog. The recipient then published on the blog information derived from the classified documents. On May 24, 2010, Leibowitz was sentenced to 20 months in prison followed by three years supervised release.
- c. Are there any steps that the Department could take to increase the number of individuals who are prosecuted for making unauthorized disclosures of classified information to members of the news media? If so, please describe.

Answer: As the cases referenced above indicate, the Department of Justice has been engaged in the last several years in efforts to identify and prosecute individuals responsible for unauthorized disclosures. Based on my experience in the Department, while finding the source of such a classified leak is often a daunting task, when the Department is able to compile solid evidence to prove in court beyond a reasonable doubt, the government will pursue criminal prosecution. Over the past two years, the NSD has been working closely with the Intelligence Community to expedite and improve the handling of such cases, as well as to ensure that the Intelligence Community and other agencies may utilize remedies of their own to address employees suspected of leaking classified information in those instances where criminal prosecution is not feasible.

- d. Are there any steps that should be taken to improve the civil enforcement of nondisclosure agreements under the authority of *Snepp v. United States*? If so, please describe.

Answer: I have not had an opportunity to fully review the use of civil enforcement authority and therefore am not in a position to provide recommendations regarding possible changes to those authorities at this time. It is my understanding that the Department's Civil Division is responsible for enforcement of nondisclosure agreements under Snepp and that that division uses that authority in the context of enjoining authors from publishing books that the government may learn in advance contain information subject to such an agreement. I further understand that the Civil Division may also use this authority to enjoin publishers from making additional copies of books already published if its use has been limited.

- e. Are there any additional steps that the U.S. government as a whole should take to prevent the unauthorized disclosures of classified information from occurring? If so, please describe.

Answer: As noted in response to question 12c above, there are a number of agencies involved in the investigation and prosecution of leak cases, and those efforts are a priority. I believe continued enforcement efforts regarding unauthorized disclosures and leaks may have a deterrent effect. In addition, where prosecution is not feasible, use of administrative penalties should also be considered.

- f. Please describe the prepublication review responsibilities of the NSD and the administrative and judicial review which is available to an officer or employee, or former officer or employee, with respect to the Department's exercise of prepublication authorities, including those applicable to the FBI. In answering this question, please provide your evaluation of the extent to which present and former officers and employees of the Department adhere to their prepublication obligations.

Answer: The pre-publication review process is described in detail in 28 CFR 17.18.

In short, DOJ employees who sign non-disclosure agreements for access to Secure Compartmented Information agree to submit any writings or texts of prepared remarks to the Assistant Attorney General for National Security for pre-publication review. The AAG for National Security (or the AAG's designee) is responsible for reviewing each submission to ensure that it does not contain any national security information. I further understand the National Security Division has established a specific unit for pre-publication and Declassification Review. I further understand that an employee's obligation continues even if the individual is no longer employed by the Department of Justice. Decisions of the AAG for National Security can be appealed to the Deputy Attorney General. Submitters who are not satisfied with the Deputy Attorney General's determination may obtain judicial review in the U.S. District Court.

The obligation to submit material rests with the employee (or former employee). I am not aware of the extent to which current or former employees adhere to their obligation and therefore cannot provide an informed evaluation at this time.

- g. Please describe how the NSD ensures the protection of information within the organization itself, including the use of auditing and monitoring of information technology systems. Who is responsible for counterintelligence and security at NSD?

Answer: I am informed that the NSD employs multiple practices, procedures, and layers of physical and technical security to safeguard information within the organization. All Justice Department employees, including all NSD employees, must complete annual training on information security. Furthermore, all NSD attorneys must possess and maintain a Top Secret security clearance, which must be updated every five years and includes non-disclosure requirements. All NSD employees also receive mandatory initial and refresher briefings on the proper handling of classified information from the Department security officials. FBI and intelligence community officials also provide additional counterintelligence awareness training to new NSD attorneys and paralegals, including information on safeguarding classified information.

In addition to vetting and training its personnel, the NSD has its own dedicated security staff to coordinate the oversight of information security within the division. NSD security staff members conduct random, periodic inspections of all sections within NSD and provide regular, recurring security briefings to NSD employees.

Furthermore, the NSD maintains Sensitive Compartmented Information Facilities (SCIFs) as well as secure classified computer networks, safes, faxes, telephone and video equipment for the proper handling of classified information. With respect to information technology systems, NSD is required to comply with regulations set forth by the Office of Management and Budget as well as the Committee on National Security Systems regarding the security of information technology systems that process national security information. NSD information technology systems are also subject to annual reviews by information technology security officials in the Justice Department's Justice Management Division as well as periodic audits and reviews by the Justice Department's Office of Inspector General.

Free Flow of Information Act

QUESTION 13: In the past Congress, the House and Senate considered legislation on federally compelled disclosure of information from the news media through subpoena, court order, or other compulsory legal process. What is your opinion of the Free Flow of Information Act of

2009, S. 449, as reported from the Senate Judiciary Committee on December 11, 2009, and any modifications that should be made in that proposed legislation?

Answer: While I have not had occasion to revisit the referenced legislation and to study it in detail, my understanding is that S.448¹ reflects work between the Administration and the bill's sponsors to balance the protection of journalists' confidential sources with the Government's responsibility to take measures necessary to protect national security and enforce our criminal laws. Under current Department policy, the United States Attorneys Manual (USAM) provides for careful review and ultimately approval by the Attorney General before the government can seek to compel information from a journalist. As I understand S.448, as amended, it requires the Attorney General to certify that the request for compelled disclosure is made in a manner consistent with the requirements in the USAM and the significant protections for the news media already contained therein from subpoenas that might impair the newsgathering function. S. 448 also includes the requirements – also contained in the USAM – that the Government exhaust all reasonable alternative sources of the protected information, show there are reasonable grounds to believe a crime has occurred, and demonstrate reasonable grounds for believing that the information is essential to the investigation or prosecution. At the same time, S. 448 contains important protections for national security. It provides that in cases where the material sought would assist the Government in preventing, mitigating or identifying an act of terrorism or other significant harm to national security, the court could compel the production of the information without triggering the bill's balancing test. S.448 also would permit the Government to make its submissions in camera and ex parte where necessary, thereby fostering protection of national security information and intelligence sources and methods. Should the bill be reintroduced I would want to consult with professionals within the National Security Division and others, and consider carefully whether any modifications to the bill as reported would be appropriate.

Attorney General Guidelines for Domestic FBI Operations/Miranda Warnings

QUESTION 14: In September 2008, Attorney General Mukasey issued guidelines on the domestic operations of the Federal Bureau of Investigation. To implement the guidelines, the FBI developed and put into effect a Domestic Investigations and Operations Guide, referred to as the DIOG. Revisions to the DIOG have been under consideration within the Department for some time.

- a. What is your understanding of the main decisions made by the Attorney General in the September 2008 guidelines for domestic FBI operations?

¹ The question refers to S.449. However, S.448, as amended, was reported from the Judiciary Committee as the Free Flow of Information Act of 2009 on December 11, 2009.

Answer: The September 2008 guidelines issued by Attorney General Mukasey sought to harmonize into one set of guidelines what had previously been several different sets of guidelines that govern the FBI's domestic operations. For example, under the prior guidelines, if a matter were labeled as "criminal," an FBI agent could conduct physical or photographic surveillance based on a tip; the procedural requirements were more exacting in national security investigations. Similarly, human sources could be tasked to seek information when the purpose was to check leads in ordinary criminal investigations, but the standards were more restrictive when the purpose was to gather information about threats to the national security. The 2008 guidelines addressed these differences and established two categories of investigative activity – assessments and predicated investigations -- regardless of whether the investigation was categorized as a criminal or national security investigation.

The most significant change brought about by the 2008 Guidelines was the establishment of consistent policy for the FBI when it is acting proactively to identify threats and vulnerabilities, whether from criminals, terrorists or spies. The guidelines sought to further the FBI's change from a reactive model (where agents must wait to receive leads before acting) to a model that emphasizes the early detection, intervention, and prevention of terrorist attacks and other criminal activities. For instance, the ability to conduct assessments enables the FBI to conduct important intelligence gathering central to its ability to detect and disrupt national security and criminal threats by using non-intrusive investigative techniques. Assessments must have a proper purpose but need not be based on specific factual predication of criminal activity. As a matter of FBI policy, assessments conducted in sensitive circumstances – such as those affecting a religious institution – must be conducted pursuant to specific levels of supervisory approval. The need for clear, consistent policy in this area was a critical aspect of the FBI's effort to continue to transform itself from a law enforcement agency (focusing on solving crimes after the fact) into an intelligence-driven organization that anticipates threats to the national security and public safety before they have fully materialized.

The 2008 guidelines also confirmed that national security activities present special needs for coordination and information sharing with other components and agencies. Finally, the guidelines recognized the importance of effective oversight by, among other things, requiring notification and reports to NSD concerning the initiation of national security and foreign intelligence activities in various contexts

- b. What is your understanding of the principal concerns raised by civil liberties groups and others about these Attorney General guidelines, such as concerns about pretext interviews and physical surveillance?

Answer: I understand that some have raised concerns regarding those portions of the 2008 Guidelines which permit FBI agents to conduct assessments, and in particular the ability of agents within an assessment to task informants, conduct “pretext interviews,” and conduct physical surveillance (i.e., surveillance that does not involve intrusion where there is a reasonable expectation of privacy). I also understand that some have expressed concern that these techniques were not previously available to investigators for use during threat assessments, although some were permissible under the General Crimes Guidelines for the prompt and limited checking of leads. I also understand that some were concerned generally about the notion of the FBI collecting any information regarding individuals if there is not individualized suspicion that the person has committed a crime or poses a national security risk. I further understand that some have expressed concern about the use of race and ethnicity as a factor that can sometimes be relevant during an assessment.

- c. In what ways, and how well or not, do you believe that the Attorney General guidelines and the implementing FBI DIOG address those concerns?

Answer: I believe the 2008 Guidelines and DIOG strike a proper balance between providing agents the tools they need to identify threats and vulnerabilities proactively and protecting privacy and civil liberties. The balance is enhanced by transparency: the vast majority of the Guidelines are unclassified, a departure from previous National Security guidelines, and the FBI made large portions of the DIOG public. The Department and the FBI briefed the Guidelines and the DIOG to their oversight committees as well as major civil rights and civil liberties groups. That level of transparency has facilitated the identification and understanding of the manner in which information is and is not used.

In addition, while the Attorney General Guidelines permit a range of activity, the implementing rules adopted by the FBI in the form of the DIOG further guide and in some instances limit the ability of agents to operate to the full limits of those guidelines. Moreover, the FBI has imposed reasonable requirements for legal review and supervisory approval for activities that involve especially sensitive circumstances to ensure that the tools they have been given are being exercised carefully and consistently. The FBI provided extensive training and has conducted several audits of assessments to ensure the tools provided have been used appropriately. Finally, I understand that the National Security Division has added a review of assessments during the course of the “National Security Reviews” that it conducts.

- d. Do you believe the Attorney General guidelines and the DIOG provide sufficient flexibility for the FBI to investigate aggressively alleged terrorists and spies?

Answer: As noted above, I understand the Attorney General Guidelines and the DIOG do provide agents the flexibility they need to identify and investigate national security threats consistent with the rule of law. If confirmed, I would intent to consult with the FBI and the professionals within NSD to determine what changes or adjustments, if any, may be needed to ensure that operators have the tools they need and that they are using them consistent with applicable statutes, regulations and the Constitution.

- e. Are there any revisions that you believe should be made either to the guidelines or the FBI's policies implementing the guidelines?

Answer: I understand that the next iteration of the DIOG is currently under development. If I am confirmed, I will make it a priority to understand what changes are being considered that may or may not be necessary.

- f. What is your view of the FBI policy, incorporated into the DIOG, on Custodial Interrogation for Public Safety and Intelligence Gathering Purposes of Operational Terrorists Arrested Inside the United States with respect to advising terrorist suspects arrested in the United States of their *Miranda* rights? Is there a legal requirement that all terrorist suspects arrested in the United States be advised of their *Miranda* rights prior to custodial interrogation? Under what circumstances do you believe a terrorist suspect should be interrogated based upon exceptions to or without regard to *Miranda*, *Quarles*, and presentment requirements?

Answer: The policy recently issued by the FBI and incorporated into the DIOG makes clear that the first priority for interrogation of terrorists is to gather intelligence. The policy also directs agents to use, to the fullest extent, the public safety exception to the Miranda rule, as articulated by the Supreme Court in Quarles v. New York, in order to gather immediate threat information. The policy recognizes that the terrorism threat we face is complex and evolving, and that agents must exhaust all appropriate avenues of inquiry to identify any threat posed by an operational terrorist that they may confront. The FBI policy reflects that reality and makes clear that gathering intelligence is the first priority. I believe that is sound policy.

With regard to the administration of *Miranda* warnings to terrorist suspects, there is no legal requirement to provide a terrorist suspect with Miranda warnings prior to custodial interrogation. The consequence of not providing Miranda warnings prior to custodial interrogation is that the statements received will not be admissible in court if the questions exceed the scope of the Quarles exception.

Because we face an adaptable and evolving terrorist threat, we must use all tools at our disposal to detect and disrupt threats. This includes using the public safety exception to

Miranda in order to gather intelligence and to identify any imminent threat posed by that individual or others with whom they may be working. If I am confirmed, I would make it a priority to ensure that we bring all tools to the table to detect and disrupt national security threats – military, intelligence, diplomatic as well as prosecution in either the civilian justice system or the reformed military commission system.

Counterterrorism Prosecutions

QUESTION 15: 28 C.F.R. § 0.72(a)(8) assigns to the Assistant Attorney General for National Security the responsibility to prosecute and coordinate prosecutions and investigations targeting individuals and organizations involved in terrorist acts at home or against U.S. persons or interests abroad, or that assist in the financing of or providing support to those acts.

- a. Describe the personnel resources, both attorneys and others, within the NSD that are devoted to the prosecution of terrorism cases.

Answer: The NSD’s Counterterrorism Section (“CTS”) supervises a coordinated national counterterrorism enforcement program through close collaboration with Justice Department leadership, the National Security Branch of the FBI, the Intelligence Community and the 93 U.S. Attorney’s Offices around the country. I understand that currently, the Counterterrorism Section is composed of 53 attorneys and 18 non-attorneys.

- b. Describe the role that the NSD has played since its inception in terrorism prosecutions in United States district courts and on appeal to the U.S. courts of appeals. Please provide up-to-date information on the status of major prosecutions during the last two years.

Answer: The CTS seeks to assist, through investigation and prosecution, in preventing and disrupting acts of terrorism anywhere in the world that impact on significant U.S. interests and persons. The section's responsibilities include overseeing the investigation and prosecution of domestic and international terrorism cases; participating in terrorism prosecutions within district courts and, with assistance from NSD’s appellate attorneys, before courts of appeals; participating in the systematic collection and analysis of information relating to the investigation and prosecution of terrorism cases; and coordinating with other U.S. government agencies to facilitate prevention of terrorist activity through daily detection and analysis and to provide information and support to the field.

Below are examples of major public terrorism prosecutions during the past two years:

- Khalid Aldawsari -- On Feb. 23, 2011, in the Northern District of Texas, Khalid Ali-M Aldawsari was arrested on a federal charge of attempted use of a weapon of mass destruction. According to the complaint, Aldawsari researched online how to construct an Improvised Explosive Device (IED), had acquired most of the ingredients and equipment necessary to construct an IED and conducted online research of potential U.S. targets. In addition, Aldawsari had allegedly described his desire for violent *jihād* and martyrdom in blog postings and a personal journal. This prosecution remains pending.
- Faruq Muhammad -- On Jan. 19, 2011, Faruq Khalil Muhammad 'Isa was arrested in Canada pursuant to a Jan. 14, 2011 criminal complaint in the Eastern District of New York charging him with conspiring to kill Americans abroad and providing material support to that terrorist conspiracy. Faruq was charged in connection with his alleged support for a multinational terrorist network that conducted multiple suicide bombings in Iraq and that is responsible for the deaths of five American soldiers during a suicide truck bomb attack in Iraq in April 2009. This prosecution remains pending.
- Antonio Martinez -- On Dec. 8, 2010, Antonio Martinez, aka Muhammed Hussain, was arrested in the District of Maryland on a criminal complaint for allegedly attempting to murder federal officers and employees and allegedly attempting to use a weapon of mass destruction in connection with a plot to detonate what he believed to be a vehicle bomb at an Armed Forces recruiting center in Catonsville, Md. The arrest was the result of an undercover operation in which Martinez had been monitored closely as his alleged bomb plot developed. The vehicle bomb was inert. This prosecution remains pending.
- Faisal Shahzad – On May 4, 2010 in the Southern District of New York, Faisal Shahzad was charged with attempting to detonate a car bomb in New York's Times Square on the evening of May 1, 2010. Shahzad was charged with attempting to use a weapon of mass destruction, attempting to kill or maim persons in the United States and other violations. He was later indicted on June 17, 2010 on ten counts and pleaded guilty to all counts of the indictment on June 21, 2010. In pleading guilty, Shahzad admitted that, in Dec. 2009, he received explosives training in Pakistan from trainers affiliated with Tehrik-e-Taliban (TTP), the Pakistani Taliban. He also admitted that he received nearly \$5,000 in cash in

Massachusetts in Feb. 2010 from a co-conspirator in Pakistan whom he understood worked for TTP and that, in April 2010, he received an additional \$7,000 in cash in Ronkonkoma, N.Y., also sent at the co-conspirator's direction. Shahzad was sentenced to life in prison on Oct. 5, 2010.

- David Headley et al -- In March 2010, David Coleman Headley pleaded guilty in the Northern District of Illinois to a dozen federal terrorism charges, admitting that he participated in planning the November 2008 terrorist attacks in Mumbai, India, as well as later planning to attack a Danish newspaper. Among other things, Headley admitted that he attended training camps in Pakistan operated by the terrorist organization, *Lashkar e Tayyiba* on five separate occasions between 2002 and 2005 and that he later traveled five times to India on behalf of *Lashkar* members to surveil targets in advance of the Mumbai attacks that killed approximately 164 people, including six Americans. He also admitted that he conspired with accused Pakistani terror leader Ilyas Kashmiri and others in plotting an attack on a Danish newspaper. This prosecution is pending.
- Najibullah Zazi et al -- In February 2010, Najibullah Zazi pleaded guilty in the Eastern District of New York to a three-count superseding information charging him with conspiracy to use weapons of mass destruction against persons or property in the United States, conspiracy to commit murder in a foreign country and providing material support to al-Qaeda. Among other things, Zazi admitted that he received bomb-making training from al-Qaeda and brought explosives materials to New York as part of an al-Qaeda plot to conduct coordinated suicide bombings on the New York subway system in September 2009. In April 2010, Zazi's associate Zarein Ahmedzay pleaded guilty to terrorism violations stemming from, among other activities, his role in the al-Qaeda plot to bomb New York's subway system. Another alleged Zazi associate, Adis Medunjanin, has also been charged in connection with his alleged role in the subway plot and awaits trial. In July 2010, prosecutors in the Eastern District of New York brought a superseding indictment against additional members of the al-Qaeda conspiracy to carry out the New York plot and a related plot against a target in the United Kingdom. The superseding indictment charged Adnan El Shukrijumah, an accused senior al-Qaeda leader, for his alleged role in working with other al-Qaeda leaders to recruit Zazi, Ahmedzay and Medunjanin to carry out the attacks on the New York subway. Also charged in the superseding indictment are Abid

Naseer and Tariq Ur Rehman, who allegedly participated in a separate plot to bomb targets in the United Kingdom in 2009, as well as Ferid Imam, Adis Medunjanin, and a defendant known as “Ahmad.” This prosecution is pending.

- Umar Farouk Abdulmutallab -- On Dec. 26, 2009, Umar Farouk Abdulmutallab was charged by criminal complaint in the Eastern District of Michigan with attempting to destroy Northwest Airlines flight 253, which was carrying 289 people, as the aircraft made its final approach to Detroit Metropolitan Airport on Dec. 25, 2009 by attempting to detonate an explosive device containing PETN and TATP that was concealed in his underwear. He was later indicted on Jan. 6, 2010 on charges of attempted use of a weapon of mass destruction, attempted murder, attempt to destroy an aircraft, placing a destructive device on an aircraft, use and possession of a firearm / destructive device during a crime of violence. Abdulmutallab was charged with additional violations, including terrorism transcending national boundaries, in a superseding indictment returned Dec. 15, 2010. This prosecution is pending.

- c. Describe the role that the NSD has played with respect to decisions whether to prosecute before U.S. military commissions, and what role it will play, if any, in prosecutions before military commissions.

Answer: NSD attorneys provided advice and support to the Attorney General and the interagency task force in identifying cases that could be prosecuted in military commissions. The Justice Department and NSD stand ready to assist and support the Defense Department’s Office of Military Commissions in the prosecution of Guantanamo Bay detainees before military commissions. Historically, at the request of the Defense Department and the Chief Prosecutor for military commissions, NSD has worked and continues to work in partnership with the Office of Military Commissions Chief Prosecutor's Office in investigating and prosecuting military commission cases.

Counterespionage Prosecutions

QUESTION 16: 28 C.F.R. § 0.72(a)(7) assigns to the Assistant Attorney General for National Security the responsibility to prosecute federal crimes involving national security, foreign relations and terrorism, including espionage statutes.

- a. Describe the personnel resources, both attorneys and others, within the NSD that are devoted to the prosecution of espionage cases.

Answer: As noted in response to question 12.a., the Counterespionage Section of the National Security Division supervises the investigation and prosecution of espionage and related statutes. I understand that currently, the Counterespionage Section is composed of 21 attorneys and 11 non-attorneys.

- b. Describe the role that the NSD has played since its inception in espionage prosecutions in United States district courts and on appeal to the U.S. courts of appeals. Please provide up-to-date information on the status of major prosecutions during the last two years.

Answer: The NSD's Counterespionage Section supervises the investigation and prosecution of cases involving espionage and related statutes, as well as the export of military and strategic commodities and technology. The section has executive responsibility for authorizing the prosecution of cases under criminal statutes relating to espionage, sabotage, neutrality, and atomic energy. It participates in espionage prosecutions within district courts and, with assistance from NSD's appellate attorneys, before courts of appeals. It also provides legal advice to U.S. Attorney's Offices and investigative agencies on all matters within its area of responsibility, which includes 88 federal statutes affecting national security.

Below are examples of major public espionage prosecutions during the past two years. This list does not include any of the Counterespionage Section's export enforcement prosecutions.

- Noshir Gowadia – On Jan. 24, 2011, a federal judge in the District of Hawaii sentenced Noshir Gowadia to 32 years in prison for communicating classified national defense information to the People's Republic of China (PRC), illegally exporting military technical data, as well as money laundering, filing false tax returns and other offenses. On Aug. 9, 2010, a federal jury found Gowadia guilty of 14 criminal violations, including five criminal offenses relating to his design for the PRC of a low-signature cruise missile exhaust system capable of rendering a PRC cruise missile resistant to detection by infrared missiles, as well as three counts of illegally communicating classified information regarding lock-on range for infrared missiles against the U.S. B-2 bomber to persons not authorized to receive such information. Gowadia was also convicted of unlawfully exporting classified information about the B-2, illegally retaining information related to U.S. national defense at his home, money laundering and filing false tax returns for the years 2001 and 2002.

- Glenn Shriver – On Jan. 21, 2011, Glenn Duffie Shriver was sentenced to 48 months in prison after pleading guilty on Oct. 22, 2010 in the Eastern District of Virginia to a one-count criminal information charging him with conspiracy to transmit national defense information to a person not entitled to it, namely intelligence officers of the People’s Republic of China (PRC). According to a statement of facts, Shriver lived in the PRC both as an undergraduate student and after graduation. While living in China in October 2004, Shriver developed a relationship with three individuals whom he came to learn were PRC intelligence officers. At the request of these agents, Shriver agreed to return to the United States and apply for positions in U.S. intelligence agencies or law enforcement organizations that would afford him access to classified national defense information, which he would then transmit to the PRC officers in return for cash.
- Harold & Nathaniel Nicholson – On Jan. 18, 2011, Harold James Nicholson was sentenced to eight years in prison after pleading guilty on Nov. 8, 2010, in the District of Oregon to conspiracy to act as an agent of a foreign government and conspiracy to commit international money laundering. Nicholson, a former CIA employee, has been serving a 283-month sentence at the Federal Correctional Institution (FCI) in Sheridan, Oregon, for a 1997 conviction of conspiracy to commit espionage. The judge ordered him to serve the eight year prison sentence consecutive to the current sentence he is already serving. Harold Nicholson admitted that from 2006 to December 2008, with the assistance of his son, Nathaniel, he acted on behalf of the Russian Federation, passed information to the Russian Federation, and received cash proceeds for his past espionage activities while in prison. On Aug. 27, 2009, Nathaniel Nicholson pleaded guilty to conspiracy to act as an agent of the Russian government and conspiracy to commit money laundering.
- Leonardo & Marjorie Mascheroni – On Sept. 17, 2010, in the District of New Mexico, Dr. Pedro Leonardo Mascheroni and his wife, Marjorie Roxby Mascheroni, both former employees of Los Alamos National Laboratory, were arrested on charges of communicating classified nuclear weapons data to a person they believed to be a Venezuelan government official and conspiracy to participate in the development of an atomic weapon for Venezuela. The indictment charges the Mascheronis with conspiracy to communicate and communicating Restricted Data;

conspiracy to and attempting to participate in the development of an atomic weapon; conspiracy to convey and conveying records and things of value of the United States; as well as making false statements. The charges stem from Dr. Mascheroni's alleged discussions with an undercover FBI agent posing as a Venezuelan government official, during which Dr. Mascheroni allegedly presented his plan for helping Venezuela develop nuclear weapons. No classified information was sought by or passed to the government of Venezuela in the case, nor were any Venezuelan government officials charged with any crimes in the case. The prosecution remains pending.

- Walter and Gwendolyn Myers – On July 16, 2010, Walter Kendall Myers, a former State Department official, and his wife, Gwendolyn Steingraber Myers, were sentenced to life in prison and 81 months in prison, respectively, for their roles in a nearly 30-year conspiracy to provide highly-classified U.S. national defense information to the Republic of Cuba. On Nov. 20, 2009, Kendall Myers pleaded guilty to one count of conspiracy to commit espionage and two counts of wire fraud, while his wife pleaded guilty to one count of conspiracy to gather and transmit national defense information. In 1979, a Cuban intelligence officer recruited both of them to be Cuban agents, a role in which they served for the next 30 years. In April 2009, the FBI launched an undercover operation against the pair, during which the Myerses made a series of statements about their past activities on behalf of Cuban intelligence, which the FBI was able to corroborate through other evidence gathered in the investigation, resulting in their arrest in June 2009.
- Russian “Illegals” Case -- On June 28, 2010, eight Russian nationals were arrested for carrying out long-term, "deep-cover" assignments in the United States on behalf of the Russian Federation, and two additional defendants were also arrested for participating in the same Russian intelligence program in the United States. In total, eleven defendants, including the 10 arrested, were charged in the Southern District of New York with conspiring to act as unlawful agents of the Russian Federation within the United States. Nine of the defendants were also charged with conspiracy to commit money laundering. The arrests were the result of a multi-year investigation of a network of U.S.-based agents of the foreign intelligence organ of the Russian Federation (known as the "SVR"). The targets of the probe included covert SVR agents who assumed false

identities and lived in America on long-term, deep-cover assignments. These secret agents, commonly known as "illegals" in the intelligence community, worked to hide all connections between themselves and Russia, even as they acted at the direction of the SVR. The "illegals" network in America served one primary, long term goal: to become sufficiently "Americanized" such that they could gather information about the United States for Russia, and could successfully recruit sources who were in, or were able to infiltrate, U.S. policy-making circles. On July 8, 2010, all of the arrested defendants pleaded guilty to conspiring to serve as secret agents of the Russian Federation within the United States and agreed to be immediately removed from the United States. All of them were required to disclose their true identities in court and to forfeit certain assets attributable to the criminal offenses. The United States subsequently transferred these individuals to the custody of the Russian Federation. In exchange, the Russian Federation released to U.S. custody four individuals who had been incarcerated in Russia for alleged contact with Western intelligence agencies

- David Nozette – On Oct. 19, 2009, David Nozette, a Maryland scientist who once worked in varying capacities for the Department of Energy, Department of Defense and the National Aeronautics and Space Administration, was charged with attempted espionage for attempting to deliver classified national defense information to an individual Nozette believed to be an Israeli intelligence officer, but who was, in fact, an undercover employee of the FBI. On March 17, 2010, a superseding indictment was returned containing an additional count, charging Nozette with attempting to deliver to a foreign government (Israel) documents and information relating to the national defense of the United States, specifically classified information on a U.S. Navy system that involved satellite information. The indictment does not allege that the government of Israel or anyone acting on its behalf committed any offense under U.S. laws in this case. This prosecution remains pending.
- James Fondren – On Sept. 25, 2009, James Wilbur Fondren Jr., a Pentagon official who served as the Deputy Director of the Washington Liaison Office, U.S. Pacific Command, was convicted in the Eastern District of Virginia on one charge of unlawfully communicating classified information to an agent of the People's Republic of China (PRC) and two counts of making false statements to the FBI. From November 2004 to

February 2008, Fondren provided certain classified Defense Department documents and other information to Tai Shen Kuo, an agent of the PRC, who he was aware maintained a close relationship with an official of the PRC. Fondren provided classified information via “opinion papers” that he sold to Kuo. Fondren also provided Kuo with sensitive, but unclassified Defense Department publications. On Jan. 22, 2010, Fondren was sentenced to 36 months in prison, followed by two years of supervised release.

OLC Opinions on Matters within Responsibility of the National Security Division

QUESTION 17: With respect to opinions of the Office of Legal Counsel (OLC) on matters within or related to the responsibilities of the NSD, or if preceding the establishment of the Division were related to such matters as electronic surveillance, physical searches, or other methods of national security investigations that would now be of interest to the Division, will you, if confirmed, undertake to do the following:

- a. Provide to the Committee a comprehensive list and description of OLC opinions on these subjects for opinions that remain OLC precedent or are of significant historical value in understanding the development of the Government’s legal theories in support of the matters addressed in the opinions.
- b. Provide to the Committee copies of those opinions, for handling in accordance with their classification, which are identified by or on behalf of the Committee as useful to it in the performance of its legislative and oversight responsibilities.
- c. Promptly update the list and description as new opinions are issued with respect to the legal basis for intelligence activities or covert actions and provide such new opinions to the Committee on request.
- d. If your answer to any part of Question 17 is no, or is qualified, please describe the basis, if any, for the Department to decline to provide information or material requested by the Committee under sections 502 or 503 of the National Security Act of 1947 for the purpose of being fully and currently informed about the legal basis for intelligence activities or covert actions, including the level of authorization in the Executive Branch required for any such refusal.

Answer: I appreciate the importance of the Committee’s oversight role and its interest in the legal basis for intelligence activities or covert actions. However, as a nominee, I am not in a position to offer commitments as to how the Department may respond to particular document requests. I understand, however, that in order for the Committee to

perform its oversight function it is important for it to receive information on the legal basis for intelligence activities or covert action. I further understand that the intelligence agencies provide that information to the Committees. The Attorney General has the responsibility, like all department heads, for ensuring that the Intelligence Community elements within his department fulfill this obligation. If confirmed, I would work to cooperate with the committee and to accommodate its legitimate oversight needs.

State Secrets

QUESTION 18: The Attorney General's September 23, 2009 memorandum on state secrets states: "The Department will provide periodic reports to appropriate oversight committees of Congress with respect to all cases in which the Department invokes the privilege on behalf of departments or agencies in litigation, explaining the basis for invoking the privilege."

- a. Have you worked directly on the formulation or implementation of the policies set forth in the Attorney General's memorandum? If so, please describe.

Answer: As Associate Deputy Attorney General I participated in the review of the then pending litigation in which the Department had asserted the State Secrets privilege on behalf of client agencies and in the formulation of Attorney General's policy announced in September 2009. I have provided advice and recommendations to the Deputy Attorney General on the implementation of that policy.

- b. Has the Department implemented the commitment of the Attorney General to provide the reports promised in the Attorney General's memorandum? If so, or if not, please describe.

Answer: Yes. I understand that by letter of April 29, 2011, the Department provided to Chairman Feinstein and Vice Chairman Chambliss the Department's first periodic report regarding the Department's application of new procedures and standards governing the assertion of the state secrets privilege in litigation.

- c. Has the Department declined, or failed to respond to, requests by the Committee for classified declarations filed by the heads of elements of the Intelligence Community in support of the assertion of the state secrets privilege in matters relating to intelligence activities or covert actions? If so, please describe the legal basis, if any, for not providing to the Committee those declarations, including the level of authorization in the Executive Branch required for any such refusal.

Answer: In an April 29, 2011, letter to Chairman Feinstein and Vice Chairman Chambliss, the Department indicated that it does not object to the relevant agencies providing the declaration in the Al-Aulaqi matter, in which the judgment is final. The letter also notes that intelligence officials have made the Committee aware of the classified facts underlying the assertion of the privilege in the Shubert matter and that the Office of the Director of National Intelligence and the National Security Agency are prepared to brief the Committee regarding the substance of the classified submissions in that matter.

Requests for Certain Documents

QUESTION 19: In responding to the following, please review the August 3, September 29, October 5, November 19, and December 9, 2010, correspondence with the Department of Justice regarding requests for certain documents relating to the work of the Guantanamo Bay Detainee Review Task Force, including any September 2009 Attorney General memorandum or other guidance or recommendations related to the Task Force process, the unredacted recommendations contained in the Task Force assessments of each Guantanamo detainee, and a list of the 92 detainees approved for transfer as of August 28, 2009.

- a. Did the Attorney General provide in or about September 2009 any guidance or recommendations in any form to Executive Branch officials or employees, whether in or outside of the Department of Justice, on any presumption that should be applied in favor of transferring or releasing a certain category of detainees? If so, will the Department now provide those documents to the Committee?

Answer: I appreciate the importance of the Committee's oversight role and its interest in the legal basis for intelligence activities or covert actions. However, as a nominee, I am not in a position to speak for the Department in regard to these matters. I understand, however that they are under active consideration within the Department.

- b. Will the Department now provide the unredacted recommendations contained in the Task Force assessments of each Guantanamo detainee and the list of the 92 detainees approved for transfer as of August 28, 2009 that were requested in the referenced correspondence?

Answer: As a nominee, I am not in a position to speak for the Department in regard to these matters. However, I am aware that they are under active consideration within the Department and that there is an ongoing effort to accommodate the Committee's legitimate oversight interests. If I am confirmed, I would look forward to working with the Committee to help ensure that such requests receive prompt and respectful consideration.

- c. If the Department is declining to provide these requested documents to the Committee, please describe the specific factual and legal basis for not doing so. Also, please state whether you concur in that decision and your rationale.

Answer: I appreciate the Committee's interest in the requested materials and understand the Department is engaged in a process with the Committee to try to accommodate the Committee's requests. I understand the Committee's interest in this issue and its legitimate oversight concerns with how the Executive Branch exercises its national security authorities. If I am confirmed, I will work with others in the Department and the Committee to accommodate its legitimate oversight needs.

- d. Do you believe that the "deliberative process" privilege allows the Department to withhold the documents and information requested by the referenced correspondence? If so, please describe the specific factual and legal basis for this assertion.

Answer: I have not undertaken a legal analysis of the documents requested in the referenced correspondence to determine the application of any privileges. As a general matter, I understand that concerns are sometimes raised about the exposure of internal deliberations outside the Executive Branch for fear that it will chill the exchange of candid advice and recommendations. Based on my years of work in the Department, I understand that Congress, and in particular the Intelligence Committees, play an important role in promoting accountability with regard to the Executive's intelligence activities. If I am confirmed, I will work with the Committee to facilitate cooperation with the oversight process.

Professional Experience

QUESTION 20: For each of the following, describe specifically how your experiences will enable you to serve effectively as the Assistant Attorney General for National Security. Include within each response a description of issues relating to the NSD that you can identify based on those experiences.

- a. Principal Associate Deputy Attorney General and Associate Deputy Attorney General, Department of Justice;

Answer: In the Deputy Attorney General's Office, I have helped to supervise the national security functions of the Department, including the National Security Division (NSD), United States Attorneys Offices, the FBI and components of the Drug Enforcement Administration. I have assisted the Deputy Attorney General in the oversight and management of counterterrorism and espionage prosecutions, the litigation

before the Foreign Intelligence Surveillance Court and approval of certain functions and exemptions under Attorney General Guidelines.

I have worked with partners in the Intelligence Community and in the interagency process and have developed an understanding of the national security architecture of the federal government. In my career working with agents, analysts and lawyers across the government I have developed an appreciation of the challenges confronting national security professionals and prosecutors as they pursue their mission of developing intelligence, sharing information, and working together to disrupt national security threats and protect the nation. As a result of all these experiences, I have gained a broader understanding of the range and complexity of national security issues confronting the Department's components and United States Attorneys Offices as well as the importance of striking the appropriate balance of Intelligence Community equities, legal requirements and prosecutorial interests.

Through my experience in the Deputy Attorney General's Office, I have developed a clear understanding of the overall mission of the National Security Division, why it was created and how it operates as to further its mission to provide one place within the Department in which national security functions are coordinated. I understand the importance of using all tools in order to combat the national security threats we face and of doing so consistent with statute, executive order, relevant regulations, and the Constitution. Drawing on my experience as a prosecutor as well as the perspective I have gained at the FBI and with the Department of Justice working on the operational aspects of national security investigations, I will exercise independent judgment in managing the Department's national security functions while ensuring that the Division's activities are properly coordinated with the nation's other national security activities when appropriate. I will do the same in providing advice to and advancing partnerships with the Division's partners within the Intelligence Community and in working cooperatively with congressional oversight committees.

b. Chief of Staff to the Director, Federal Bureau of Investigation;

Answer: At the FBI, I provided advice and guidance to Director Mueller on a range of national security matters and worked with the FBI's leadership team to develop the FBI's National Security Branch and to further the integration of intelligence across all facets of that organization. I helped manage the Bureau's national security assets and worked to advance the FBI's transformation from a law enforcement agency to a national security organization focused on preventing terrorist attacks. Among other things, I gained an understanding of and appreciation for the FBI's national security program and operations, the Bureau's role as an element of the Intelligence Community, and the importance of FISA as an intelligence collection tool from which the whole Intelligence Community

benefits. I gained an understanding of the FISA process from the FBI's perspective and the assistance the FBI provides to other members of the Intelligence Community. My experience at the FBI provided me an understanding of the need to be accurate and expeditious in the preparation and presentation of applications to the FISC. Finally, during my tenure at the FBI, I gained firsthand experience working within the Intelligence Community to understand the role that effective and coordinated intelligence operations play in safeguarding our nation's security.

- c. Enron Task Force, Department of Justice;

Answer: As an Assistant United States Attorney (AUSA) on detail to the Department of Justice Criminal Division and the Enron Task Force, I put my experience as a criminal prosecutor to work on large and complex investigations. This experience will serve me well at NSD in overseeing complex national security prosecutions and investigations.

- d. Assistant U.S. Attorney, Office of the U.S. Attorney for the District of Columbia.

Answer: As an Assistant United States Attorney (AUSA), I learned the value of rigorous analysis and legal argument and how to build and prosecute an effective criminal case. This experience will be valuable in ensuring that as prosecutors and investigators we are both aggressive and careful in exercising the power to bring criminal charges.