SELECT COMMITTEE ON
INTELLIGENCE

UNITED STATES SENATE

Additional Prehearing Questions
for
Mrs. Courtney Elwood
upon her selection to be
the General Counsel of the
Central Intelligence Agency

Keeping the Intelligence Committee Fully and Currently Informed

QUESTION 1:

Section 502 of the National Security Act of 1947 provides that the obligation to keep the congressional intelligence committees fully and currently informed of all intelligence activities applies to the Director of National Intelligence and to the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities.

a. **What is your understanding of the standard for meaningful compliance with this obligation of the Director of the Central Intelligence Agency to keep the congressional intelligence committees, including all their Members, fully and currently informed of intelligence activities?**

To allow the Congress to discharge its constitutional duties and provide valuable feedback to the intelligence community, the Director of the CIA has the affirmative duty, under Section 502, to "keep the congressional intelligence committees fully and currently informed" of the Agency's intelligence activities, including any significant anticipated intelligence activity and any significant intelligence failure; he must do so "consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters." 50 U.S.C. § 3092(a)(1). To the same extent, the Director must also "furnish the congressional intelligence committees with any information" concerning intelligence activities – "including the legal basis under which the activity is being or was conducted" – which is requested by either committee in order to carry out its responsibilities. 50 U.S.C. § 3092(a)(2).

I understand that standard to mean, in practice, that the congressional intelligence committees should receive accurate, timely, and complete information about the Agency's significant intelligence activities and failures, subject only to limitations necessary to protect specific operational details about sources, tradecraft, and other exceptionally sensitive information. Director Pompeo has committed that he will comply not only with the letter of the law, but also its spirit, which is to ensure that the Legislative Branch has the intelligence information it needs to perform its important constitutional function. I look forward to helping him meet that commitment, if confirmed.

b. **Under what circumstances is it appropriate to brief the Chairman and Vice Chairman and not the full Committee membership?**

Under Section 503 of the National Security Act, a presidential finding or notification about a covert action "may be reported to the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the

President," "[i]f the President determines that it is essential to limit access" to the finding or notification in order "to meet extraordinary circumstances affecting vital interests of the United States." 50 U.S.C. § 3093(c)(2), (d)(1).

More generally, and with respect to the application of Section 502's obligation to protect "sources and methods or other exceptionally sensitive matters," I would, if confirmed, look to Director Pompeo and Director of National Intelligence Coats, both former members of the congressional intelligence committees, for guidance and historical practice when considering the specific circumstances that might warrant limiting access . Director Coats recently told this committee, in response to questions, that limiting access for non-covert actions would be rare and often a matter of timing, and that, in his experience, the committee leadership has worked with the Executive Branch to determine when to expand access to the information in question.

Priorities of the Director of the Central Intelligence Agency

QUESTION 2:

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

Director Pompeo and I have discussed his expectations for me, if confirmed as General Counsel. He expects me to discharge ably the responsibilities as the CIA's chief legal officer and to provide effective leadership within the Office of General Counsel (OGC). He also expects me to represent the Agency in interagency discussions, as appropriate, and to serve as a member of his management team, providing him with the benefit of my judgment and experience as well as legal advice.

With respect to the Office as a whole, Director Pompeo has stressed the critical role of faithful adherence to the rule of law in achieving the CIA's mission. He has expressed his respect for and dedication to the hardworking professionals in OGC as members of the CIA workforce. As he told this committee, he will defend and advocate for all CIA employees, will train and support them, and will hold them accountable and demand excellence from them. I am certain that he expects his General Counsel to do the same.

The Office of the General Counsel

QUESTION 3:

Although the Attorney General, usually through the Office of Legal Counsel at the Department of Justice, is responsible for the issuance of legal opinions that are authoritative within the Executive Branch, what is your understanding of the responsibility of the General Counsel of the Central Intelligence Agency in ensuring that all activities of the Central Intelligence Agency are undertaken in accordance with the Constitution, treaties, and laws of the United States?

As set forth in the Central Intelligence Agency Act of 1949, as amended, the General Counsel is the chief legal officer of the CIA. As such, she provides authoritative legal advice and guidance within the Agency. Assisted by other OGC lawyers, the General Counsel has the responsibility to ensure that all activities of the CIA are undertaken in accordance with the Constitution and U.S. law, including any applicable treaty obligations or principles of customary international law that have been implemented in a domestic statute. For non-self-executing treaties, I believe that, the General Counsel should inform the Director in the event that she concludes that CIA activities would be lawful as a matter of U.S. domestic law, but would violate a treaty to which the United States is a party and would likely be considered unlawful by the international community.

QUESTION 4:

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

My expectation is that the Office must and will continue to do high-caliber legal work in support of the critical mission of the Agency and in service to the men and women of the workforce. Above all else, the Office must ensure that all CIA activities are conducted in accordance with the Constitution and U.S. law and ensure that the Agency's workforce receives the legal support and the legal services it needs. In addition, I expect OGC lawyers to be not merely reactive but to anticipate issues, and to counsel on the benefits and risks associated with different courses of action. OGC lawyers should also provide their judgment, in addition to their legal analysis, but take care to distinguish between legal opinions and non-legal advice.

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

   As noted in my response to Question 3, I believe that OGC's core responsibility is to ensure that all activities of the CIA are undertaken in accordance with the Constitution and U.S. law. I have met only a small number of OGC lawyers to date, and I have been impressed by their dedication to the Agency and the pride they take in their work. If confirmed, I plan to make it a top priority to assess – and to work consistently to improve

– the performance and effectiveness of the Office in discharging all of its responsibilities and in serving the Agency, its workforce, and ultimately the American people.

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

At this time, I have not formed an opinion on the need to make changes in the number or qualifications of the attorneys in the Office, or in its operations. If confirmed, I would want to observe the operations of the Office for a period of time before reaching any conclusions about the need for staffing, organizational, or management changes. I would want to hear from OGC lawyers and from other CIA personnel. I also would need to evaluate the Office's work product, procedures, resources, and recordkeeping, all to assess what is working well and where improvements can be made. My evaluation would be guided by the Director's priorities and goals and would need to take into account the CIA's recent re-organization.

c. What do you understand your responsibility to be to manage and oversee the legal work of the attorneys from the Office of the General Counsel who are assigned to the various components of the CIA and how would you carry out this responsibility if confirmed?

The General Counsel is the chief legal officer of the CIA. As such, she is responsible for managing and overseeing the legal work of all OGC lawyers in the Agency, including those attorneys who are assigned to the other components. To carry out this responsibility, I would, if confirmed, ensure that I and OGC's leadership team continually and effectively supervise the legal advice being provided by all OGC lawyers. I would review existing means for evaluating and managing the attorneys' work, and I would work to ensure that all attorneys are receiving the necessary training, support, guidance, and supervision.

QUESTION 5:

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

Generally speaking, the Director of National Intelligence (DNI) provides coordination and guidance on a range of activities that affect multiple intelligence community elements, including the CIA. The DNI has both an oversight and collaborative role with the Agency and its work, intended to ensure that the CIA's activities are integrated and responsive to the broader national security strategy.

What this means in practice depends upon the particular work in question and the priorities and approach of each DNI. The recent responses provided by Director Coats and Director Pompeo in

response to questions from this committee provide further information about what they envision for their respective roles in connection with several subjects including the collection of foreign intelligence through human sources; the coordination of relationships between elements of the intelligence community and the intelligence and security services of foreign governments; the correlation, evaluation, and dissemination of intelligence related to national security; and covert action. (See, e.g., Director Coats's response to APQ 43 and Director Pompeo's responses to APQs 30-32.)

It is my understanding that previous General Counsels of the CIA and Office of the Director of National Intelligence (ODNI) have had – and have benefitted from – a close and synergetic working relationship. If confirmed, I would hope to continue that practice and anticipate frequent interaction with the General Counsel of ODNI. In particular, I would bring to his or her attention significant matters of legal policy and interpretation concerning CIA activities, as well as legal issues that have broader implications for the intelligence community.

QUESTION 6:

Explain your understanding of the responsibility of the General Counsel of the Central Intelligence Agency to bring issues of legal significance to the attention of the Office of the General Counsel of the Director of National Intelligence and to the General Counsel Forum established by the Office.

The General Counsel of the CIA and the General Counsel of the Office of the Director of National Intelligence both benefit from a close and collaborative professional relationship. If confirmed, I expect to bring to his or her attention significant matters of legal policy and interpretation concerning CIA activities, as well as legal issues that have broader implications for the intelligence community. I would follow the guidance of the General Counsel of the ODNI on the use of the General Counsel Forum.

QUESTION 7:

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

Covert action, like all government activities, must comply with the Constitution and U.S. law, including any applicable treaty obligations or principles of customary international law that have been implemented in a domestic statute. Section 503(a)(5) of the National Security Act of 1947, as amended, provides that a covert action finding "may not authorize any action that would violate the Constitution or any statute of the United States." 50 U.S.C. § 3093(a)(5). By this language, Congress did not prohibit the President from authorizing a covert action that would violate a non-self-executing treaty or customary international law. However, I understand that, as a general matter, the United States complies with international law to the extent possible in the execution of covert action activities.

QUESTION 8:

The National Security Act places limits on the activities that may be conducted as "covert actions." In particular, covert actions do not include "traditional ... military activities or routine support to such activities." 50 U.S.C. Sec. 3093(e). What is your understanding of the definition of traditional military activities? What is your understanding of the definition of routine support to traditional military activities? What factors would you use in testing whether a proposed covert action involves traditional military activities or routine to support to such activities? Please provide one or two illustrative examples.

I have not previously had the opportunity to consider the definition of "traditional . . . military activities" as used in Section 503(e) of the National Security Act. To determine whether a particular activity falls within its scope, I would look to the common meaning of the phrase and to past practice, and I would consult with the experts on the subject including, as appropriate, lawyers from the Department of Defense and other relevant agencies. The legislative history of Section 503(e) suggests at least four relevant considerations: whether the activity has customarily been considered a military activity; whether the activity is under the direction and control of a military commander; whether the activity is connected to hostilities involving U.S. military forces; and whether the U.S. government's role in the overall operation will be apparent or acknowledged publicly. *See* S. Rep. No.102-85, at 44, 46-47 (1991); H.R. Conf. Rep. No. 102-166, at 29-30 (1991).

Detainee Treatment Policy

QUESTION 9:

Do you support the standards for detainee treatment specified in the revised Army Field Manual on Interrogations, FM 2-22.3, issued in September 2006, and required by Section 1045 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92)?

Director Pompeo gave the committee his full commitment that, during his tenure, the CIA will fully comply with laws governing interrogation, including the legal bar on the use of any interrogation method not listed in the Army Field Manual 2-22.3. I support that commitment and Section 1045, which has provided a clear and accessible rule to government officers who are asked to participate in interrogations.

Past Personal Involvement in Relevant Matters

QUESTION 10:

Please describe your involvement, if any with regard to:

a. **The September 18, 2001, Authorization of the Use of Military Force;**

In September 2001, I was an Associate Counsel to the President in the Office of the Counsel to the President. I recall that our office was involved in drafting the 2001 Authorization of the Use of Military Force (AUMF), but I do not recall working on it.

b. **The October 16, 2003, Authorization of the Use of Military Force;**

In October 2003, I was Deputy Counsel to the Vice President. I do not recall doing any work on the 2003 AUMF.

c. **Any legal analyses related to lethal operations or programs;**

I do not recall doing any work on legal analyses related to lethal operations or programs in any of the government positions that I held from 2001 to 2007.

d. **The September 17, 2001, Memorandum of Notification or any other covert action Findings or Memoranda of Notification; and**

I did not work on the September 17, 2001, Memorandum of Notification or on any other covert action Findings or Memoranda of Notification.

e. **Any other matters relevant to the authorities of the CIA.**

Immediately after September 11, 2001, I was among the small number of White House staff members who worked with members of the intelligence and law-enforcement communities, alongside Members of Congress and their staffs, to draft legislation to ensure that law enforcement and the intelligence community had the tools needed in the fight against terrorism. That legislation became the USA PATRIOT Act.

At the Justice Department, I worked on a program that I have since learned is affiliated with the CIA. Because that affiliation remains classified, I cannot describe my involvement with that program here.

Chief of Mission Authority

QUESTION 11:

22 U.S.C. 3927 states that: "Under the direction of the President, the chief of mission to a foreign country... shall have full responsibility for the direction, coordination, and supervision of all Government executive branch employees in that country...." Absent direction from the President, is the CIA obligated to cease intelligence activities that do not have the approval of the chief of mission?

It is important for the CIA and the State Department to work together as partners. If confirmed, I will work with the Legal Adviser to anticipate and resolve any disagreement with the State Department over intelligence activities. Director Pompeo has also said that, if such a disagreement were to arise, he would seek to resolve the issue with the Secretary of State. In the extremely unlikely event that they were unable to resolve the issue, the Director would promptly seek further guidance from the President.

Surveillance

QUESTION 12:

Were you ever read into any of the components of the President's Surveillance Program (PSP), as defined in the Report on the President's Surveillance Program by the Offices of the Inspectors General of the Departments of Defense and Justice, the CIA and the NSA, July 10, 2009? If yes, please provide a date.

I do not recall being read into the Terrorist Surveillance Program or any other aspect of the President's Surveillance Program (PSP). Please see my responses to Questions 13-16 for a description of my best recollection of my involvement in classified intelligence activities related to the PSP.

QUESTION 13:

Please describe any involvement you may have had with the PSP or its transition to FISA authorities.

My work on the PSP began after the President publicly acknowledged one aspect of the program, commonly known as the Terrorist Surveillance Program (TSP). At that time in December 2005, I was working at the Justice Department as Deputy Chief of Staff to the Attorney General.

Starting that month and continuing into 2006, Executive Branch officials made a series of public statements on the NSA activities described by the President. The Justice Department reviewed and in many instances drafted those statements. I recall being involved in reviewing at least some of those statements and discussing them with individuals inside and outside the

Department. As Deputy Chief of Staff, I was involved, in particular, whenever the Attorney General made public statements about the TSP. The Department's Office of Legal Counsel (OLC) had responsibility for describing the legal authorities that supported the TSP. I discussed with OLC the analysis contained in the statements, but I did not do my own independent legal analysis.

As described in more detail below in response to Question 16, I supported the effort during that time period to transition the presidentially authorized TSP activities to the authority of the Foreign Intelligence Surveillance Act (FISA). Officials who were working closely on that transition would provide the Attorney General with periodic updates on their progress, and I recall participating in at least some of those discussions. In addition, I had separate discussions with Department officials about the transition in an effort to keep the Attorney General fully informed. I also likely reviewed related materials such as orders or draft orders of the Foreign Intelligence Surveillance Court, although I do not have a specific recollection of those materials today.

During that time period, Department officials were also working on obtaining orders from the FISA court to authorize collection of telephone call detail records pursuant to Section 215 of the PATRIOT Act. I was generally aware of this effort. I do not have a firm recollection of my involvement, but I believe it entailed a few discussions with individual(s) who were working closely on the matter.

QUESTION 14:

Did you have any involvement in the development of the Department of Justice's public defense of the PSP after its partial acknowledgment in December 2005? If yes, please detail that involvement.

Please see my response to Question 13.

QUESTION 15:

On January 19, 2006, the Department of Justice issued a White Paper entitled "Legal Authorities Supporting the Activities of the National Security Agency Described by the President." That White Paper stated that: "[t]he NSA activities are supported by the President's well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States." Do you believe that the program had a sufficient legal basis in the President's Article II authorities? If so, please elaborate.

Please see my response to Question 16.

QUESITON 16:

The White Paper also stated that the September 18, 2001, Authorization for Use of Military Force "confirmed and supplemented the President's recognized authority under Article II of the Constitution to conduct such warrantless surveillance to prevent further catastrophic attacks on the homeland." Do you believe that the AUMF authorized the program? If so, please elaborate.

The White Paper of January 19, 2006, was prepared by the Justice Department's Office of Legal Counsel. I reviewed the paper and discussed it with its authors and others, but I did not do my own independent legal analysis. I recall thinking at the time that its analysis was thorough and carefully reasoned and that certain points were compelling. I also thought that the analysis of the FISA provisions presented a difficult question and that reasonable minds could reach different conclusions about it. I therefore supported the effort to transition the collection activities to be undertaken pursuant to FISA authority and orders of the FISA court. Later, after I left the Department, Congress modified relevant provisions of FISA, including certain provisions interpreted in the White Paper, when it passed the FISA Amendments Act of 2008.

The White Paper concluded that the described NSA activities rested both on the President's inherent Article II authorities and on the authority granted by the Congress in the 2001 AUMF. I have not analyzed the hypothetical question of whether, in the absence of the AUMF, the President's Article II powers alone would have provided a sufficient legal basis for the described NSA activities, consistent with the then-existing statutory framework in FISA. I therefore am not prepared to offer an opinion on that question.

QUESTION 17:

The White Paper stated that "[f]oreign intelligence collection, especially in the midst of an armed conflict in which the adversary has already launched catastrophic attacks within the United States, fits squarely within the area of 'special needs, beyond the normal need for law enforcement' where the Fourth Amendment's touchstone of reasonableness can be satisfied without resort to a warrant."

a. **Do you believe that the NSA program violated the Fourth Amendment's warrant requirement?**

   Although, as noted above, I did not conduct my own independent legal analysis of the issues analyzed in the White Paper, I thought its analysis of the Fourth Amendment's warrant requirement was solidly grounded in judicial precedent. As the Amendment's text makes clear and as the Supreme Court has repeatedly said, the "ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (internal citation and quotation marks omitted). When the TSP was initiated and the White Paper was written, a number of courts had recognized a foreign intelligence exception to the warrant requirement under appropriate circumstances. *See, e.g., United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States v.*

Brown, 484 F.2d 418 (5th Cir. 1973). Those decisions, and the Supreme Court precedent on which they were based, supported the White Paper's conclusion that, under the specific circumstances presented, the NSA activities were not subject to the Fourth Amendment's warrant requirement.

b. Under what circumstances, if any, does national security allow for warrantless collection under the "special needs" doctrine when the collection would otherwise require a warrant?

I have not done the legal research and analysis required to properly answer that question. That analysis would start with the fact that searches governed by the Fourth Amendment must always be reasonable – whether analyzed under a "special needs" exception or not. Reasonableness, in turn, involves balancing " 'the degree to which [a search] intrudes upon an individual's privacy' " and " 'the degree to which it is needed for the promotion of legitimate governmental interests.' " *Samson v. California*, 547 U.S. 843, 848 (2006) (quoting *United States v. Knights*, 534 U.S. 112, 118-19 (2001)). Courts conducting this type of balancing in national security cases have carefully considered both the privacy interests and the national security imperatives that are at stake. *See, e.g., In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 172-76 (2d Cir. 2008). As a result, any Fourth Amendment analysis is highly contextual, and a firm and complete understanding of the facts is needed before one can reach a proper conclusion on the application of the Fourth Amendment.

QUESTION 18:

The CIA's minimization procedures with regard to Section 702 of FISA state: "CIA personnel may query CIA electronic and data storage systems containing unminimized communications acquired in accordance with section 702 of the Act. [REDACTED] Such queries must be reasonably designed to find and extract foreign intelligence information. CIA will maintain records of all such queries, including but not limited to United States person names and identities, and NSD and ODNI will review CIA's queries for content." What is the role of the Office of the General Counsel in ensuring that queries are "reasonably designed to find and extract foreign intelligence information" and identifying and reporting compliance incidents?

I understand that the Office plays an important role in supporting the Agency's FISA compliance program. I am told that CIA attorneys conduct in-person training on the minimization procedures and are embedded with the operators to answer any question that may arise. OGC lawyers know to report any identified incident of noncompliance to the Department of Justice and the Office of the Director of National Intelligence. OGC lawyers also participate in those agencies' frequent reviews of all of the CIA's U.S. person queries of Section 702-acquired content to ensure that each query satisfies the legal standard referenced in the question. By law, any compliance incident is also reported to the Congress and to the Foreign Intelligence Surveillance Court. If confirmed, I will ensure that the Office continues this important work.

QUESTION 19:

What limitations and reporting requirements apply to U.S. person queries of Section 702-derived metadata?

As the Privacy and Civil Liberties Oversight Board explained in its July 2014 report, the CIA's current procedures prohibit CIA personnel from querying Section 702-derived metadata for an unauthorized purpose. *See Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (July 2, 2014), at 58. The Board recommended that CIA revise its minimization procedures to require that a U.S.-person-metadata query be based on a statement of facts showing that it is reasonably likely to return foreign intelligence information. *Id.* at 12, 139-40. I understand that the CIA plans to implement that recommendation.

QUESTION 20:

Section 702 of FISA prohibits "reverse targeting" of U.S. persons. Given that the CIA can both nominate foreign targets and conduct U.S. person queries intended to return communications of or about U.S. persons, how should the Office of General Counsel guard against any instances of reverse targeting?

As the question notes, Section 702 prohibits "reverse targeting" of U.S. persons. I understand that OGC lawyers, in coordination with the CIA's FISA Program Office, provide in-person training on this prohibition. OCG lawyers also review and approve every CIA nomination and facilitate the Department of Justice's regular compliance reviews, which specifically look for indications of "reverse targeting."

These and other measures appear to be effective. After a thorough review, the Privacy and Civil Liberties Oversight Board saw "no trace" of any "illegitimate activity associated with the [702] program, or any attempt to intentionally circumvent legal limits." *See Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (July 2, 2014) at 11. Still, Director Coats has committed to review how Section 702 is being implemented to determine whether any changes should be made to further strengthen compliance and oversight, including with respect to the reverse targeting prohibition.

QUESTION 21:

Do you believe the CIA should be authorized to monitor U.S. persons' social media activities? If so, under what circumstances and subject to what limitations?

With its focus on foreign intelligence, the role of the CIA, with respect to U.S. persons, is and should be limited. The CIA may collect information that is publicly available concerning U.S. persons only if it is done in the course of the CIA's duly authorized intelligence activities and in

fulfillment of the CIA's national security responsibilities, and only if the collection complies fully with the Constitution, federal statutes, and presidential directives. In particular, the CIA's collection, retention, and dissemination of information concerning U.S. persons must comply with its recently revised and publicly available Attorney General-approved guidelines, *CIA Intelligence Activities: Procedures Approved by the Attorney General Pursuant to Executive Order 12333* (Attorney General Guidelines).

Like Director Pompeo, I think publicly available information, including public posts on social media, can provide important clues in identifying those who seek to harm Americans here and abroad. I also agree with Director Pompeo that the FBI and other appropriate government agencies have a duty to use publicly available social-media activities as part of their lawfully conducted investigations or intelligence gathering, subject to applicable privacy and other legal restrictions and regulations.

a. What specific legal authorities would provide the basis for such monitoring?

The National Security Act of 1947 and the CIA Act of 1949 authorize and direct the CIA Director to conduct intelligence activities by appropriate means, not to include police, subpoena, or law enforcement power or internal security functions. The President, through Executive Order 12333 and other Presidential directives, has given the CIA Director intelligence-related duties and responsibilities and has also placed important limitations on the CIA's intelligence activities. The Attorney General Guidelines, described above, place further limitations on the collection, retention, and dissemination of information concerning U.S. persons. For example, the CIA may not collect information concerning U.S. persons solely for the purpose of monitoring activities protected by the First Amendment. *See* Attorney General Guidelines § 3.3. Collectively, these and other rules are designed to keep the CIA's focus on its foreign intelligence mission while also protecting privacy.

QUESTION 22:

What limitations apply to the CIA's collection, use and dissemination of information collected in bulk known to include U.S. person information?

Pursuant to applicable law and the Attorney General Guidelines, the CIA is permitted in some instances to engage in "bulk" collection activities in furtherance of its duly authorized intelligence activities and in fulfillment of the CIA's national security responsibilities. "Bulk" collection activities are activities that, due to technical or operational considerations, acquire data without the use of specific identifiers or terms (*e.g.*, names, phone numbers, or email addresses). The recently revised and publicly available Attorney General Guidelines impose stringent and detailed restrictions on information collected in bulk, as well as unevaluated information, which is generally presumed to contain incidentally acquired information concerning U.S. persons.

QUESTION 23:

In his responses to questions, Director Pompeo wrote, in the context of CIA collection of U.S. person information from foreign entities, that "In very limited circumstances, however, the manner in which a foreign partner collected the information could be so improper that it would not be appropriate for the CIA to receive, use, or further disseminate the information." What circumstances would prevent the CIA from receiving, using or disseminating that information?

In response to further questions on this subject, Director Pompeo explained that, in the quoted sentence, he was "indicating that [he] could not rule out a circumstance in which the conduct of a foreign partner is so egregious that CIA would not receive the information." He went on to explain that "this would be a highly fact-specific determination" which would consider, among other things, the source of the information, the intent of the foreign partner, the nature of the information, and the scope of the information. Because the decision would be based on a consideration of all facts and circumstances and because I have not had personal experience with such a decision, I am unable to offer an opinion beyond what Director Pompeo has already said.

QUESTION 24:

Would the CIA's receipt of intelligence from a foreign entity, or its subsequent use or dissemination of that intelligence be restricted if it is known to include the communications of U.S. persons engaged in First Amendment-protected political activity, as opposed to those of suspected terrorists or foreign agents?

Information about U.S. persons must be handled with great care, in full compliance with applicable law and procedures. As noted above, the recently revised Attorney General Guidelines place stringent and detailed restrictions on the CIA's retention, use, and dissemination of information concerning a U.S. person. I understand those restrictions apply no matter how the CIA received the information and no matter what the U.S. person may be saying in or doing with the collected communication. The Guidelines also prohibit the CIA from "collect[ing] or maintain[ing] information concerning U.S. persons solely for the purpose of monitoring (1) activities protected by the First Amendment or (2) the lawful exercise of other rights secured by the Constitution or laws of the United States." Attorney General Guidelines § 3.3. The Guidelines also prohibit the CIA from requesting that a foreign entity undertake any activity that the Guidelines prohibit. *Id.*

QUESTION 25:

Section IV ("Processing Raw SIGINT"), paragraph (C)(2) of the Procedures for the Availability or Dissemination of Raw Signals Intelligence Information by the National Security Agency Under Section 2.3 of Executive Order 12333 states that, when raw signals intelligence is shared with IC elements, queries for communications reasonably likely to be to, from, or about a U.S. person or a person located in the United States may be conducted for purposes of targeting that person if the Attorney General determines that the person is an agent of a foreign power or an officer or employee of a foreign power and the purpose of the selection is to acquire significant foreign intelligence or counterintelligence information.

a. **What rules apply for a query of a U.S. person that is <u>not</u> for purposes of targeting that person? Is Attorney General approval required?**

I have not had experience with the CIA's implementation of the Procedures for the Availability or Dissemination of Raw Signals Intelligence Information by the National Security Agency Under Section 2.3 of Executive Order 12333, or the application of rules that apply to a query of shared raw SIGINT or of signals intelligence collected by the CIA designed to retrieve information concerning a U.S. person.

I would note that the Attorney General Guidelines contain procedures that address querying under certain situations, and I understand that additional protections or enhanced safeguards may also be applied. If confirmed, I will consult with the appropriate experts at the Agency on these issues, and I will seek to ensure each query is conducted carefully, for authorized purposes, and in full compliance with applicable legal requirements.

b. **Do the same rules related to queries of U.S. persons apply for signals intelligence collected by the CIA (as opposed to shared raw SIGINT) and is Attorney General approval required? If not, please describe those rules.**

Please see response to subpart (a).

Relations with Congress

QUESTION 26:

The "Gang of Eight" provision in the National Security Act (Section 503(c)(2)) applies to covert action.

a. **Are there circumstances in which the "Gang of Eight" briefings can apply to other than time-sensitive tactical matters? If so, please elaborate.**

Section 503 of the National Security Act provides that a presidential finding or notification about a covert action may be reported to only the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President, "if the President determines that it is essential to limit access" to the finding or notification in order "to meet extraordinary circumstances affecting vital interests of the United States." 50 U.S.C. § 3093(c)(2). Thus the statutory language does not confine limiting access in this manner only to circumstances involving "time-sensitive tactical matters." However, as noted above, Director Coats has said that, based on his experience, limited notifications are often a matter of timing.

b. **Are there circumstances in which it can be used to conceal from the full Committee ongoing programs or significant legal analyses related to intelligence activities? If so, please elaborate.**

To invoke the so-called "Gang of Eight" provision, the President must determine that "it is *essential* to limit access" in order "*to meet extraordinary circumstances affecting vital interests of the United States*." 50 U.S.C. § 3093(c)(2) (emphasis added). That determination would be highly fact specific. It would not be proper to use the provision to withhold from the full committee information or legal analysis related to intelligence activities in the absence of such a determination.

In addition, as noted in the response to subpart (c), the "due regard" language of Section 502 of the National Security Act recognizes that, in other rare cases, it may be necessary to initially brief only the "Gang of Eight" or the leadership of the congressional intelligence committees. It would not be proper to use that provision to withhold from the full committee information unless the limited access was done for the "protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods and other exceptionally sensitive matters." 50 U.S.C. § 3092(a).

c. Are there circumstances in which the "Gang of Eight" provision would apply to non-covert action. If so, what would be the statutory basis for such limited notifications?

Section 503, by its terms, applies only to covert action. I understand that, in rare cases involving particularly sensitive non-covert action matters, it may be necessary to initially brief only the "Gang of Eight" or the leadership of the congressional intelligence committees. The statutory basis for such limited notifications is found in the language of National Security Act's reporting provisions which specify that notifications be made "consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods and other exceptionally sensitive matters." 50 U.S.C. § 3092(a). In practice, if confirmed, I would look to Director Pompeo and Director Coats, both former members of the congressional intelligence committees, for guidance and historical practice. Director Coats recently told this committee that he expected limited initial notifications for non-covert actions would be rare.

Lethal Authorities

QUESTION 27:

In his responses to questions, Director Pompeo stated that "when the United States knows in advance that the specific object of its [lethal] attack is an individual U.S. citizen, it proceeds on the assumption that constitutional rights – in particular, the Fifth Amendment's Due Process Clause and the Fourth Amendment's prohibition on unreasonable searches and seizures – attach to the U.S. citizen even while the individual is abroad. Those rights are considered in assessing whether it is lawful to target the individual."

a. Please describe how the constitutional rights of U.S. citizens would be applied in this context.

The United States government must consider the constitutional rights of a U.S. citizen before targeting him or her for lethal action. Because I have not had previous experience applying constitutional law in this context – where the United States is considering the use of lethal force against a U.S. citizen abroad – I cannot speak to the specific application of constitutional principles in that context. As this committee knows, the Justice Department has set forth in a white paper its detailed and authoritative framework for that constitutional analysis. I can assure you, if I am confirmed and presented with this issue, I would give the matter and the required legal analysis my utmost care and attention, including consultation with the Department of Justice.

b. Do these rights apply to non-citizen U.S. persons overseas?

Because I have not had previous experience with that issue, I have not done the necessary legal research and analysis required to answer that question properly. If I am confirmed and presented with this issue, I would again give the question my utmost care and attention and would seek the guidance of the Department of Justice.

Transparency and Congressional Notification

QUESTION 28:

What is the role of the Office of the General Counsel in ensuring that the CIA classification decisions are consistent with Executive Order 13526?

I understand that the Office of the General Counsel provides legal advice to CIA officers on the proper interpretation and application of Executive Order 13526, to ensure that CIA classification decisions are consistent with that Executive Order. The Office is also called upon to explain and defend the Agency's classification decisions in litigation.

QUESTION 29:

50 U.S.C. § 3349 requires notification of Congress in the event of an authorized disclosure to the press or the public of classified information that has not otherwise been declassified. Based on the law, do you see any exceptions to this notification requirement?

I have not had previous experience with 50 U.S.C. § 3349, and have not studied how it has been interpreted and applied. But subsection (d) appears to list four exceptions to the notification requirement. In addition, other exceptions may arise from other federal statutes or principles of law.