April 21, 2017

The Honorable Ron Wyden
The Honorable Martin Heinrich
Select Committee on Intelligence
United States Senate
211 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Wyden and Heinrich:

Thank you for your letter dated April 7, 2017. Please find enclosed my responses to your questions.

I look forward to appearing before your committee on April 26, 2017.

Sincerely,

Courtney Elwood

Enclosure

Prehearing Questions for Ms. Courtney Elwood upon her nomination to be General Counsel of the Central Intelligence Agency

Senators Wyden and Heinrich

Detention, Interrogation, Rendition and Human Rights

1. **Were you ever read into CIA's Rendition, Detention and Interrogation (RDI) Program? If yes, please provide the date.**

   I did not work on, nor have knowledge of, classified aspects of the CIA's RDI program.

2. **Please describe any involvement you had with the RDI program as part of the White House Counsel's office, the Office of the Vice President, or at the Department of Justice.**

   I did not work on, nor have knowledge of, the CIA's highly classified RDI program when I served as an Associate Counsel to the President and as Deputy Counsel to the Vice President. I also did not work on, nor have knowledge of, classified aspects of that program when I served in the Justice Department. Although I was therefore not privy to any connection between the classified program and proposed legislation, I did follow developments on the legislation that became the Detainee Treatment Act of 2005, and the Military Commissions Act of 2006, through periodic updates from the individuals at the Department who were involved day-to-day on that legislation.

3. **In response to Committee questions, you stated that, at the Department of Justice, you worked on "cases involving the constitutionality of national security programs and detention of enemy combatants and military commissions." Please detail those cases and any other involvement you may have had with regard to detention matters, as part of the White House Counsel's office, the Office of the Vice President, or at the Department of Justice.**

   Following September 11, 2001, the Justice Department was often litigating well over a hundred terrorism-related civil cases at any one time. Those court cases were assigned to different components within the Department, depending on the particular claims at issue and the stage of the litigation. Well before I arrived at the Department, the Attorney General had established a task force within the Department composed of representatives from different components to ensure that these cases were properly handled and coordinated. That task force was chaired by a lawyer from the Attorney General's Office and, in late 2005, I assumed that responsibility. Generally, my role was to convene weekly meetings of the task force where participants discussed significant developments in the court cases and to ensure that the Attorney General was kept informed of any matters that required his personal attention. As I recall, some of the cases involved federal court habeas challenges to the detention of enemy combatants held at Guantanamo. With regard to my work, if any, on other detention matters, please see my

response to Question 2, which I incorporate by reference. In addition, I consulted with the Solicitor General and his Deputies on matters that required the Attorney General's involvement or were noteworthy for some other reason, including on significant national security cases that the Department was litigating in the U.S. Supreme Court or in the U.S. Courts of Appeal.

4. **Do you believe that any of the CIA's former enhanced interrogation techniques are consistent with the Detainee Treatment Act?**

I was not involved in, nor have I reviewed, the Justice Department's legal analysis of that question, and I have not done the legal and factual research that would be required to properly answer it. I would note that the law governing interrogation has changed significantly in the past decade. Among other things, Section 1045 of the National Defense Authorization Act for Fiscal Year 2016 provides that no individual in U.S. custody may be subjected to any interrogation technique or approach that is not authorized by and listed in the Army Field Manual. I fully support Director Pompeo's commitment to ensure that, during his tenure, the CIA fully complies with the law governing interrogation, including the legal bar on the use of any interrogation method not listed in the Army Field Manual.

5. **Do you believe that any of the CIA's former enhanced interrogation techniques are consistent with U.S. statutory prohibition on torture?**

Please see my response to Question 4.

6. **Do you believe that any of the CIA's former enhanced interrogation techniques are consistent with the War Crimes Act?**

Please see my response to Question 4.

7. **Do you believe that any of the CIA's former enhanced interrogation techniques are consistent with U.S. obligations under the Convention Against Torture, Common Article 3 of the Geneva Convention and other U.S. treaty obligations?**

Please see my response to Question 4.

8. **Have you read the declassified Executive Summary of the Committee's Study of the CIA's Detention and Interrogation Program?**

Yes.

9. **During his confirmation process, Director Pompeo committed to reviewing parts of the classified Committee Study relevant to the position of the Director of the CIA and the Committee. Will you likewise commit to reviewing parts of the classified Study relevant to the Office of the General Counsel?**

Yes, if confirmed.

10. In response to the Committee Study, then-Director Brennan directed the General Counsel, working with the Executive Director, to "develop a formal mechanism for triggering systematic reviews of OLC opinions regarding ongoing covert action programs with the goal of ensuring that OLC's legal analysis is confirmed or updated as warranted by material changes in facts and circumstances." Will you commit to implementing this reform?

I understand that the Office of the General Counsel implemented that reform in 2013. If confirmed, I commit to evaluating for myself that reform and its implementation.

11. In responses to questions asked during her confirmation process, former CIA General Counsel Caroline Krass wrote: "In my view, CIA officers should not continue to participate in the interrogation of detainees in liaison custody when harsh or extreme interrogation techniques are used. For example, CIA officers should not participate in any interrogations when they witness, know or otherwise suspect a detainee has been tortured or mistreated, as their participation could, depending upon the circumstances, result in violations of law or administrative restrictions." Do you agree?

Yes.

12. The statutory prohibition on interrogations not consistent with the Army Field Manual apply to any individual "in the custody or under the effective control of an officer, employee, or other agent of the United States Government; or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict."

a. Please describe the factors that would indicate whether a detainee was in the "effective control" of an officer, employee, or other agent of the United States Government.

I have not previously had the opportunity to consider this issue. To determine whether a detainee is in the "effective control" of an officer, employee, or other agent of the United States Government, I would begin by looking to the common meaning of the phrase and to past practice, and I would consult with the experts on the subject. I would also consider other statutes containing, and judicial decisions construing, the same or similar language.

b. Please describe how you would define whether a detainee is "detained within a facility owned, operated, or controlled by a department or agency of the United States."

I have not previously had the opportunity to consider this issue. To determine whether a detainee is "detained within a facility owned, operated, or controlled by a department or

agency of the United States," I would begin by looking to the common meaning of the terms and to past practice, and I would consult with the experts on the subject. I would also consider any other statutes containing, and judicial decisions construing, the same or similar language.

13. To the extent that the CIA participates in any updates of the Army Field Manual, do you agree to oppose any techniques that involve use or threat of force, as stipulated in the National Defense Authorization Act for Fiscal Year 2016 (P.L. 114-92)?

Yes.

14. The United States recognizes its obligation, under the Convention Against Torture, not to "expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."

a. To what extent does U.S. compliance with this obligation depend on "diplomatic assurances" provided by countries to which detainees may be extradited or rendered?

I understand that diplomatic assurances have been a valuable tool for ensuring that detainees are treated humanely. I also understand that the decision to rely on a diplomatic assurance is assessed on a case-by-case basis in light of all the relevant factors, including the practices of the country providing the assurances as well as that country's record of complying with similar assurances provided to the United States and other countries.

b. Should those assurances be conveyed in writing, so that a record of their provision and receipt is established?

As noted in response to subpart (a), the decision to rely on an assurance is assessed on a case-by-case basis, and I assume would entail considering the need for the assurance to be conveyed in writing. That consideration might depend on, among other things, the identity of the government providing the assurances and the nature of the situation to which the assurances relate.

c. Should such assurances be accepted from countries with established records of committing torture?

Under section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998, it is the stated policy of the United States "not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." 8 U.S.C. § 1231 note. The decision to rely an assurance would be assessed on a case-by-case basis in light of all the relevant factors.

d. What is the role of the Office of General Counsel in ensuring that "diplomatic assurances" that detainees will not be subject to torture are credible?

I am not familiar with the specific role that the Office of the General Counsel has played in connection with the decision to rely on diplomatic assurances. If confirmed, I will work to ensure that the Office is providing the advice and support necessary to ensure that CIA officers fully and faithfully comply with applicable law.

15. In an August 6, 2015, letter to Senators Wyden, Heinrich and Hirono, then-Director of the CIA John Brennan said that, "While we neither condone nor participate in activities that violate human rights standards, we do maintain cooperative liaison relationships with a variety of intelligence and security services around the world, some of whose constituent entities have engaged in human rights abuses."

a. If a liaison service were to use CIA-provided resources to engage in human rights abuses, would the CIA bear any legal responsibility?

I have not previously had the opportunity to consider that question. I imagine that the CIA's legal culpability, if any, would turn on the specific facts and applicable law.

b. Would the CIA have a legal responsibility to end or modify its relationship with a liaison service in such a scenario?

I understand that the CIA has developed policies and procedures, coordinated with the Office of the Director of National Intelligence, on handling relationships with foreign liaison services who are alleged to have participated in human rights violations. Director Brennan generally described that procedure in his letter of August 6, 2015. Director Pompeo has further explained that, under his direction, each decision regarding the costs and benefits of working with a liaison service alleged to have engaged in human rights abuses will continue to be weighed on an individual, case-by-case basis, would consider the unique utility or specific access of the relationship and the risk of future potential human rights abuse.

Chief of Mission Authority

16. 22 U.S.C. 3927 requires that chiefs of mission "shall be kept fully and currently informed with respect to all activities and operations of the Government within that country," including the activities and operations of the CIA. As described in the Executive Summary of the Committee Study of the CIA's Detention and Interrogation Program, in two countries, U.S. ambassadors were informed of plans to establish CIA detention sites in the countries where they were serving only after the CIA had already entered into agreements with the countries to host the

detention sites. Did the failure to inform chiefs of mission prior to entering into agreements with the host countries violate 22 U.S.C. 3927?

It is important for the CIA and the State Department to work together as partners, both in Washington and in the field. Although I do not have all the facts needed to answer the specific question, I agree with Director Coats who stated in response to questions that it is critical for the Chief of Mission to be informed of intelligence operations that may affect diplomatic relationships.

17. **In two other countries where negotiations on hosting new CIA detention facilities were taking place, the CIA told local government officials not to inform the U.S. ambassadors. Did the CIA's direction to local government officials not to inform the U.S. chiefs of mission violate 22 U.S.C. 3927?**

Please see my response to Question 16.

Surveillance

18. **What differences, if any, exist with regard to CIA access to, queries of, and use, dissemination and retention of U.S. person communications collected pursuant to Executive Order 12333 as compared to communications collected pursuant to Section 702?**

Information about U.S. persons must always be handled with great care, in full compliance with U.S. law and presidential directives. In both cases – whether the communication was collected pursuant to Executive Order 12333 or pursuant to Section 702 – specific restrictions govern the CIA's retention, use, and dissemination. The requirements implementing E.O. 12333 are contained in the 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). The Attorney General Guidelines also incorporate Congress's specific instructions in Section 309 of the Intelligence Authorization Act for Fiscal Year 2015, regarding the protection of U.S. person communications. In addition, for U.S. person communications collected under Section 702, further court-approved minimization procedures apply.

19. **Please describe the rules under which the CIA would approve requests for the unmasking of U.S. person identities in disseminated CIA products.**

The CIA's 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 that, when the CIA disseminates information concerning a U.S. person outside the Intelligence Community, the Attorney General Guidelines generally require the CIA, to the extent practicable, to remove any identifying information unless (1) the

information is necessary, or it is reasonably believed that the information may become necessary, to understand, assess, or act on the information being disseminated and (2) the information fits within one of the specific categories listed in sections 7 and 8.2.1 of the Attorney General Guidelines. I understand that the same criteria would govern a follow-up request for additional information regarding the identity of a U.S. person. Additional protections or prohibitions may apply in some circumstances. For example, information collected under the Foreign Intelligence Surveillance Act may be disseminated only pursuant to court-approved minimization procedures. If confirmed, I look forward to learning about the application of these requirements in practice.

Lethal Authorities

20. On December 2, 2015, now-President Donald Trump stated the following: "The other thing with the terrorists is you have to take out their families, when you get these terrorists, you have to take out their families. They care about their lives, don't kid yourself. When they say they don't care about their lives, you have to take out their families." Do you agree that this would be a violation of U.S. and international law?

The intentional targeting of persons not presenting a threat to the United States or its allies, or persons who are not otherwise lawful targets under existing law, would implicate a variety of laws. If confirmed, I will work to ensure that all activities of the CIA fully and faithfully comply with the Constitution and U.S. law.