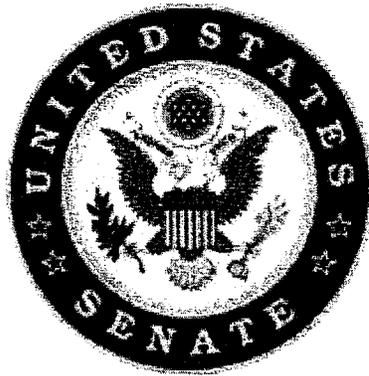


SELECT COMMITTEE ON
INTELLIGENCE
UNITED STATES SENATE



**Prehearing Questions
For
Stephen W. Preston
Upon his Selection to be
General Counsel
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?

Answer: Section 502 of the National Security Act obligates the Director of the Central Intelligence Agency – with only limited exceptions – to keep all members of the congressional intelligence committees informed of intelligence activities in a comprehensive and prompt fashion. In my view, meaningful compliance with this standard requires that the “going-in” presumption with respect to reporting and notification under that provision has to be in favor of full, timely provision of information to the entire memberships of the committees. Limitation of reporting or notification under section 502 should be consistent with any established, mutual understandings and implementations of the “due regard” clause.

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

Answer: In cases involving highly sensitive matters or circumstances, I can conceive that the DCIA might have no viable alternative except to limit notification to the Chairman and Vice Chairman (at least for some period). In considering whether it might be necessary to restrict a given section 502 report, notification or briefing in that manner, I am mindful that section 502—unlike section 503—does not contain an express provision and process for limiting the members to whom the information is provided, and that the congressional intelligence committees need and are entitled to meaningful access to information in order to carry out Congress’ constitutional role and responsibilities with respect to intelligence. Accordingly, and again in the majority of cases, section 502 obligates the DCIA (and other Executive branch officials) to keep the congressional intelligence committees fully and currently informed of CIA intelligence activities.

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.

Answer: The Director and I have discussed my views on the role of the General Counsel, which I believe are aligned with his expectations of me. The General Counsel is the chief legal officer of the Agency and serves as the senior legal adviser to the Director. He is a member of the Director's management team, providing not only legal advice, strictly speaking, but also the benefit of his judgment and experience generally. As head of the Office of General Counsel, he oversees the attorneys providing legal services throughout the Agency, and their professional development is one of his responsibilities.

In our discussions, the Director has underscored the role of the General Counsel in ensuring the Agency's compliance with applicable laws of the United States. I am sure he appreciates counsel who, rather than simply saying it cannot be done, helps to find a lawful and appropriate path from here to there, or advises as to the risks associated with alternative courses of action. At the same time, he has made very clear to me that he wants a General Counsel who has the maturity and the nerve to speak directly and candidly with the Director, without fear or favor. I am confident that I will live up to this expectation.

The Office of the General Counsel

QUESTION 3:

The Senate-confirmed position of General Counsel of the Central Intelligence Agency was created by Public Law 104-293 in 1996.

- a. What is your understanding of the history and purpose of the establishment by Congress of the Office of the General Counsel of the Central Intelligence Agency as a Senate-confirmed position?

Answer: It is my understanding that the legislative proposal to establish the General Counsel of the Central Intelligence Agency as a position subject to Senate confirmation was a measure favored by the Senate Select Committee on Intelligence and the Senate. The proposal was not enacted into law the first few times that the Senate adopted it. Section 813(a) of the Intelligence Authorization Act for Fiscal Year 1997 (Public Law 104-293) did

establish the General Counsel of the CIA as a position to be filled by a Presidential appointee with the advice and consent of the Senate.

The Committee, in reporting its FY 1997 Intelligence Authorization bill, stated as follows: “The Committee believes that the confirmation process enhances accountability and strengthens the oversight process. It is also important to note that currently, all elements of the Intelligence Community—except the CIA—are part of departments that have statutory general counsels who are Senate confirmed. Requiring that the CIA’s General Counsel be confirmed has been recommended several times over the years, including proposals by the Church Committee and the Iran-Contra Committee. The Senate’s version of both the FY 1994 and FY 1995 Intelligence Authorization Bill also contained a provision requiring Senate confirmation of the CIA General Counsel.” S. REP. NO. 258, 104th Cong., 2d Sess. 34 (1998).

b. The last Senate-confirmed General Counsel left the office in July 2004. How do you believe the vacancy of nearly five years may have affected the Agency and how would this affect the challenges facing a new Presidentially-appointed, Senate-confirmed General Counsel?

Answer: While it is always preferable to have Presidentially appointed, Senate-confirmed positions filled with confirmed appointees, it is important to recognize the daily contributions of the dedicated and talented career public servants who provide continuity and leadership between Administrations. In the last few weeks, I have met several of the men and women who help lead the Office of General Counsel and believe them to be not only capable, but genuinely devoted to their jobs and the mission of the Agency. I am confident that with their assistance I can handle the challenges I will face if confirmed. One of those challenges will be more thoroughly understanding the structure, staffing and operation of the Office of General Counsel and how the office meets the evolving needs of the Agency. The world is highly dynamic, and organizations tend to be static. If in my judgment changes are needed, then changes will be made.

QUESTION 4:

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?

Answer: Perhaps the most important, overarching role of the General Counsel is in ensuring the Agency’s compliance with applicable U.S. law in all of its activities. The General Counsel performs his duties in this regard as the senior legal adviser to the Director and other Agency officials, and as head of the Office of General Counsel responsible for providing legal services

throughout the Agency. With respect to legal opinions, as the chief legal officer by statute, the General Counsel is the final authority for the Agency in matters of law and legal policy, and his legal opinions are controlling within the Agency. This includes the ability to make binding determinations on the Agency's own authorities. Thus, ordinarily, there is no need to seek the opinion of the Attorney General in order to ensure that the Agency's activities are undertaken in accordance with the law. However, in matters of exceptional significance or sensitivity, particularly with issues potentially affecting multiple agencies or where there may be conflicting views within the Executive branch, it is not uncommon for the Agency, through the General Counsel, to obtain from the Office of Legal Counsel legal opinions that are authoritative.

QUESTION 5:

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?

Answer: My expectations for the Office of General Counsel mirror the Director's expressed expectations of me. See Answer to Question 2. I wish to underscore the role of Agency counsel, from the General Counsel on down, in ensuring the Agency's compliance with applicable laws of the United States. I applaud counsel who, rather than simply saying it cannot be done, help to find a lawful and appropriate path from here to there, or advise as to the risks associated with alternative courses of action. At the same time, it is imperative that counsel have the independence and fortitude to speak directly and candidly with their clients, even when the message may be unwelcome. I believe that clients are entitled to receive not only the legal advice of counsel, strictly speaking, but also the benefit of their judgment and experience generally. It may be useful to delineate the two, distinguishing statutory interpretation and similar legal analysis from other relevant considerations, in presenting their views.

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

Answer: As I mentioned in response to Question 3, I have met with some, but not nearly all, of the attorneys in the Office of General Counsel and am beginning to appreciate the broad range of matters the office handles. OGC attorneys deal with issues involving personnel, appropriations, ethics, procurement, civil and criminal litigation, intelligence collection activities, and a host of operational scenarios with legal implications. Given the nature of these matters and the fact that I am currently outside the organization, however, I am not able to make an informed observation on the performance or effectiveness of the office.

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?

Answer: If confirmed, I intend to develop a more thorough understanding of the structure, staffing and operation of the Office of General Counsel and how the office meets the evolving needs of the Agency. My priority will be to ensure that the Director and all Agency elements receive sound legal advice. To be successful in that regard, I believe the office needs to be comprised of talented attorneys at various experience levels. One thing on which I intend to focus is the office's role in supporting the Agency's response to and participation in various inquiries and other matters relating to detainee treatment in the past, and associated staffing. At this preliminary stage, however, I have not made any judgments about this or how I might otherwise seek to make changes in the office.

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?

Answer: The General Counsel is the chief legal officer of the CIA and is responsible for the management and evaluation of all attorneys practicing law on behalf of the Agency. If confirmed, I intend to work with the senior staff in the Office of General Counsel to ensure that I have a window into the legal advice being provided by OGC attorneys throughout the Agency. I intend to hold regular meetings with the division chiefs so that I am kept informed and will expect all attorneys to bring issues to my attention as necessary.

QUESTION 6:

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

Answer: The ODNI General Counsel has no direct statutory role in reviewing and providing legal advice on the work of the Central Intelligence Agency. By statute, he is the chief legal officer of ODNI and, of course, the CIA is not a component of ODNI. However, because the CIA is an element of the IC, for which the DNI has statutory and Executive Order oversight responsibilities, the ODNI General Counsel would provide legal guidance to the DNI concerning those responsibilities. In addition, the DNI has the statutory responsibility to ensure that CIA activities are consistent with the Constitution and laws of the U.S. (§ 102A(f)(4) of the National Security Act of 1947, as amended). The DNI would turn to the ODNI General Counsel for legal guidance concerning this responsibility, as well. Although there is no reporting relationship between them, it is incumbent upon the CIA General Counsel and the ODNI General Counsel to work together on matters of mutual interest or responsibility.

QUESTION 7:

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

Answer: On 22 January 2009, President Obama signed three Executive Orders, which directed that interagency task forces or reviews be set up to ensure lawful interrogations of individuals in the custody or control of the U.S. in armed conflicts, review the disposition of individuals detained at Guantanamo Bay Naval Base, and review detention policy options for individuals captured or apprehended in connection with counterterrorism operations. The CIA is a named member of, or participates through the ODNI in, all three of these interagency groups. In response to these Executive Orders, Director Panetta established the Director's Review Group on Rendition, Detention and Interrogation to represent the CIA during the course of these Executive Order reviews. It is my understanding that OGC attorneys provide legal guidance to the Director's Review Group – for example, to ensure that protection of intelligence sources and methods is adequately considered – and otherwise participate in the work of the Director's Review Group.

QUESTION 8:

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.

Answer: I firmly believe that a close and productive working relationship between the General Counsel of the CIA and the General Counsel of ODNI will be founded upon a shared willingness to collaborate, frequent communication and mutual transparency. Likewise between their respective offices and among the other legal components of the Intelligence Community. Accordingly, in legal matters of likely interest to the DNI or the DCIA (respectively), or of general interest to the IC, I would expect a free flow of information via legal channels both to and from the Agency, including the General Counsel forum where warranted.

QUESTION 9:

Section 8 of the Inspector General Reform Act of 2008 provides that for Inspectors General established under the Inspector General Act of 1978 (the CIA Inspector General was established by separate legislation) each Inspector General shall obtain legal advice from a counsel reporting directly to the Inspector General or another Inspector General. The CIA Inspector General has requested a similar amendment to the CIA Inspector General Act.

- a. What is your view of the independence that the CIA Inspector General should have vis-à-vis all officials of the CIA, including the General Counsel, by having separate counsel?

Answer: I understand that the current IG Counsel is an OGC attorney on rotational assignment to the OIG. He is responsible for advising the IG on all legal issues that pertain to or arise from the functions and authorities of the IG as enumerated in Section 17 of the CIA Act and internal regulation. The IG Counsel reports directly to the IG, not the General Counsel. In addition, the IG is permitted by the CIA Act of 1949, as amended, to “appoint and employ such officers and employees as are necessary to carry out his functions.” 50 U.S.C. § 403q(e)(7). I understand that the most recent IG cited this provision as authority to hire a second lawyer who is not on rotational assignment from OGC.

From my perspective, the IG has sufficient independence to carry out his responsibilities. At the same time, I am concerned that the current arrangements with respect to counsel for the IG may be sub-optimal. No question, the independence of the IG must be maintained and respected, and so the IG’s counsel should be independent in providing legal advice to the IG. It does not follow that the IG’s counsel should be entirely separate from the General Counsel and OGC. Nor is it necessarily desirable. Where an IG’s counsel is subject to the general professional oversight of the agency’s GC, while afforded complete latitude in advising the IG, there are means by which to ensure the quality of legal services provided the IG without compromising independence in the least.

That said, as I have no experience at the Agency with the current arrangements, I don’t have a fixed view in this regard. I look forward to developing a good working relationship with the IG, OIG staff and IG lawyers. And if the next IG wishes to, I would be happy to discuss the counsel arrangements further.

- b. What is the appropriate role and authority of the CIA Inspector General to conduct reviews of the activities of the Office of the General Counsel and to reach legal conclusions that may differ from that office?

Answer: By law, pursuant to section 20 of the CIA Act of 1949, the General Counsel of the Central Intelligence Agency is the chief legal officer of the Agency. As such, the General Counsel is the final authority for the Agency in matters of law and legal policy, and his legal opinions are controlling within the Agency. In this regard, it is important to note that

section 6 of the Inspector General Reform Act of 2008 (even though not applicable to the CIA IG) expressly provides that amendments are not to be construed to alter the duties and responsibilities of each agency's legal counsel. The President, in signing the Reform Act, also stated the view that "[i]t is important. . .that agencies have structures through which to reach a single, final authoritative determination for the agency of what the law is." Here, OGC remains the structure to reach single, authoritative legal interpretations and advice within CIA.

As for the IG's authority to conduct reviews of the activities of OGC, of course, the office is no different from other elements of the Agency in being amenable to conventional scrutiny for fraud, waste and abuse (although special arrangements may be necessary, for example, to protect privileged communications). However, as the chief legal officer of the Agency, the General Counsel is responsible for the professional supervision of the lawyers serving as such throughout the Agency. It is the General Counsel's responsibility to review their professional performance and address any deficiencies as appropriate.

Guidelines under Executive Order 12333

QUESTION 10:

One of the fundamental documents governing the activities of the Intelligence Community is Executive Order 12333. Under Executive Order 12333, as amended in July 2008, there are requirements for Attorney-General approved guidelines. Explain your understanding of the role of the General Counsel of the Central Intelligence Agency in completing the guidelines and procedures required under the Executive Order. In answering this question, please identify particular guideline requirements that should be of interest to the Central Intelligence Agency.

Answer: As the Committee is aware, intelligence activities by the CIA and the other IC elements are subject to several "layers" of legal regulation and guidance. There are Constitutional requirements, statutory requirements and requirements under Executive Orders, most notably 12333. The previous version of Executive Order 12333 also called for the promulgation of more detailed and largely classified guidelines to address the conduct of specific types of intelligence activities and required that those guidelines to be approved by the Attorney General. A set of such guidelines for CIA were promulgated under EO 12333 in 1982. CIA OGC was deeply involved in working with the Department of Justice to prepare these guidelines. I understand that these guidelines are detailed and classified, and have been provided to the Committee and discussed with the Committee and staff on numerous occasions.

The revised version of EO 12333 retains the requirements for specific, Attorney General-approved guidelines for various types of intelligence activities. This includes guidelines that relate to issues of general "community-wide" interest, as well as guidelines relating to CIA-specific activities. I

expect that CIA, and OGC, will be integrally involved in supporting the DNI and Justice Department in efforts to draft community-wide guidelines, and will be in the lead in working with Justice to prepare the guidelines that relate directly to CIA activities. I have not yet formulated any conclusions as to what existing guidelines will need to be revised or replaced. If confirmed, one of my priorities will be to review the existing guidelines to determine what changes may be warranted.

Inspector General Review of the President's Surveillance Program

QUESTION 11:

Title III of the FISA Amendments Act of 2008 provides for a comprehensive report by certain inspectors general on the President's Surveillance Program during the period beginning on September 11, 2001 and ending January 17, 2007. The final report is to be submitted, within one year of the signing of the law in July 2008, in unclassified form but may include a classified annex. It will include a review of the Office of the Inspector General of the Central Intelligence Agency.

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

Answer: I believe the purpose of a public report is to provide information to the American public about the President's Surveillance Program in order for there to be at least some transparency about the program.

- b. Describe the responsibility that you anticipate that the General Counsel of the Central Intelligence Agency will have in recommending what should be declassified and the standards that should be applied to that determination.

Answer: Given that I have no information about whether and, if so, to what extent the CIA participated in this program, I am unable to describe my role if confirmed in making recommendations about declassification of the report.

December 2009 Sunset of Three FISA Provisions

QUESTION 12:

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

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

Answer: I have not undertaken a review of these provisions in detail, but I understand that in 2005, when these provisions came up for reauthorization, the Department of Justice made a compelling argument that their renewal was warranted in that these provisions continued to address significant but unintended and originally unforeseen gaps in the original FISA law, while at the same time providing reasonable safeguards for the rights of U.S. citizens.

I think it is fair and useful to reexamine these provisions in that same light and see whether they do in fact meet a continuing intelligence need. Obviously, such an evaluation must be based, in large part, on classified information, which I have not yet had the opportunity to review. If confirmed, I will work with other offices in CIA to evaluate the intelligence benefits of these provisions to date, inform the Director of the conclusions of that review, and be happy to discuss the matter with the Committee.

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

Answer: The authorities given in Title VII of the FISA Amendments Act, which provide procedures for targeting persons outside the United States, are very different in nature from the lone wolf, roving wiretap and business records provisions so the benefit to aligning those sunset provisions with the Title VII sunset provision is not direct. However, doing so would ensure that these provisions would continue for the next three years, which, based on my limited understanding, has previously been deemed important to fill a gap in FISA. There may also be some administrative benefit in reviewing all of the provisions that will sunset at one time rather than three years apart.

Pending Legislation

QUESTION 13:

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

Answer: My inclination in such matters involving Constitutional questions is to recommend that both the Congress and the Executive branch proceed with caution. Generally speaking, comprehensive factual inquiries should be conducted to the extent necessary to understand the issues involved in application of current Administration practices in these three areas and to identify the problems, if any, that give rise to the question of possible legislative solutions. The totality of Administration practices should be considered, not just the few cases that have received public attention. Equally important, the unintended consequences of legislation should be identified and weighed. From my limited vantage point, I am uncertain that such legislation is necessary, but if confirmed I am eager to become more knowledgeable and to offer informed contributions to the debate on these questions.

With respect to the three subject matters in question, I have the following preliminary observations.

State Secrets Privilege legislation. I believe the following factors should be considered:

- The breadth and scope of the privilege as defined and interpreted by U.S. courts, including the Supreme Court;
- The existing procedural and substantive requirements that limit the invocation of the privilege, and the effectiveness of these requirements;
- Whether Executive branch and, ultimately, Presidential action is sufficient to cure any identified concerns over the invocation of the privilege;
- Whether Congress has the authority under the Constitution to alter the state secrets privilege;
- Whether proposed legislation would impose upon the district courts a responsibility to make national security judgments and, if so, whether that result is Constitutionally permissible, practical and efficient;

- Whether proposed legislation would provide an appropriate level of protection for national security information;
- The impact on cases currently being litigated.

“Media Shield” legislation. The following factors should be considered:

- How to appropriately tailor the definition of the type of journalists to be covered by the legislation, so that only bona fide journalists are included, and terrorists and other criminals are not unintentionally given safe harbor;
- How to effectively define the type of information that is subject to the privilege governed by the legislation;
- How to define the role of the courts in assessing whether and how the privilege should be overridden in light of a demonstrated governmental interest, and with deference for the President’s constitutional obligation to protect classified national security information;

Whistleblower legislation. The following factors should be considered:

- Whether the status quo adequately preserves the interests of CIA employees who seek to provide Congress with information about CIA activities;
- Whether classified national security information is adequately protected from unauthorized disclosure;
- Whether the President’s ability to grant and deny security clearances as an expression of Constitutional authority is respected.

Cyber Security

QUESTION 14:

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

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

Answer: Although I am not well-versed in this initiative, I imagine that a major legal issue is the establishment of clear “lanes in the road” or areas of responsibility for cyber and cyber security issues, consistent with constitutional and statutory requirements. For example, CIA is an element of the intelligence community, and receives direction from the President, the National Security Council, or the Director of National Intelligence. CIA, or an element of CIA, could not be incorporated into the military chain of command. Additionally, CIA has a statutory prohibition against exercising an internal security function or law enforcement authorities. As a result, any cyber or cyber security effort moving forward would have to incorporate CIA in a manner consistent with the above requirements.

Another significant legal issue is ensuring that the Director of CIA is able to effectively protect CIA information systems from cyber attack while still accomplishing our unique core mission of collecting intelligence. Federal law recognizes the special authority of the Director of CIA to protect CIA information systems, by developing and implementing information security policies, standards and guidelines, in recognition of the unique nature of CIA information systems and the information contained therein. Any cyber security effort should preserve the statutory authority of the Director of CIA to provide for the protection of CIA information systems without having to adhere to a government-wide standard that may not account for CIA’s unique sensitivities and needs.

Of course, we must ensure that any effort to address cybersecurity also respects privacy and civil liberties. In particular, the involvement of the Intelligence Community underscores the need for adherence to guidelines on collecting and handling US person information in an appropriate manner.

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

Answer: My understanding is that there exists already sufficient guidance on the collection, retention and dissemination of US Person information. CIA is guided by constitutional protections, statutory requirements, executive orders, and Attorney General-approved guidelines in the conduct of intelligence activities, including any activities related to the CNCI or similar efforts. If confirmed, I will work to ensure that CIA adheres to existing guidelines.

As discussed above, the Intelligence Community needs to have clear guidance on the specific roles and authorities of each entity. This should emphasize that existing guidelines

on, for example, US Person information or other legal, privacy or civil liberties issues are equally applicable to activities implementing the CNCI or similar efforts.

Executive Branch Oversight of Intelligence Activities

QUESTION 15:

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

Answer: As part of a continuing effort to enhance the capabilities and effectiveness of CIA, as well as the Intelligence Community writ large, we have to continue to look for ways to improve Executive branch oversight of intelligence activities, in part to make sure those activities are fully responsive to policymaker interests and requirements. At the same time, we must make sure that the oversight process is efficient and not overly burdensome, and that the activities and analysis of the CIA and Intelligence Community are not politicized.

Relationship with the Other Officials of the Intelligence Community

QUESTION 16:

What should be the relationship between the General Counsel of the Central Intelligence Agency and the following officers of the Intelligence Community:

- a. General Counsel, Office of the Director of National Intelligence

Answer: A close and productive working relationship between the General Counsel of the CIA and the General Counsel of ODNI is critical and, I firmly believe, will be founded upon a shared willingness to collaborate, frequent communication and mutual transparency. The dealings of their respective offices in the short time since the latter was established have been described to me as highly collaborative. I previously served in government with the nominee for the ODNI position and am confident that we will work well together, if we are confirmed.

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

Answer: A good working relationship between the General Counsel of the CIA and the Assistant Attorney General for the National Security Division is also important. Again, a

collaborative approach and effective communication will be essential in maintaining such a relationship, particularly in matters involving FISA, crimes reporting, and CT and CI investigations and prosecutions. I am previously acquainted with the incumbent Assistant Attorney General and am confident that we will work well together, if I am confirmed

c. Inspector General, Central Intelligence Agency

Answer: A good working relationship between the General Counsel of the CIA and the Inspector General of the CIA is no less desirable and, in my experience, achievable. To be sure, the relationship is somewhat different from others, as the Inspector General must maintain an appropriate measure of independence, and other Agency officials should respect his or her independence (likewise with respect to the General Counsel's statutory role as chief legal officer). But independence is no bar to the collaborative approach and effective communication that are the hallmarks of a functional relationship. While some distance may be needed, there is nothing inherent in the structure that precludes the Inspector General from serving as a valuable member of the Director's management team or that prevents OIG and OGC from collaborating on matters of mutual interest and responsibility.

Professional Experience

QUESTION 17:

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

a. Partner and Co-Chair, Defense, National Security and Government Contracts Practice Group, WilmerHale LLP

Perhaps the single most important contribution of my work at WilmerHale to my preparation for the CIA position is that it has enabled me to remain active in national security-related matters after leaving government service and returning to the private sector. Second, in terms of substantive areas, my work has focused heavily on issues on "the business side" of national security, including industrial security requirements, foreign ownership restrictions, the CFIUS process, government contracts, conflicts of interest, procurement integrity, competitor information, foreign military assistance, U.S. export controls, foreign corrupt payments, contract disputes, suspension and debarment, civil fraud liability and criminal enforcement. Third, WilmerHale has provided a platform from which I have participated in a series of projects and enterprises relating to national security, including service on the Board of Directors of the Center for Strategic and Budgetary Assessments (an independent,

non-partisan, not-for-profit policy research institute), on the Independent Panel to Review Legal Services in the Department of Defense (appointed by the Secretary of Defense pursuant to the FY2005 Defense Authorization Act), on the ABA's Standing Committee on Law and National Security Advisory Committee, and as legal adviser to the CSIS Commission on Transatlantic Security and Industrial Cooperation in the Twenty-First Century.

b. General Counsel, Department of the Navy; Acting General Counsel and Principal Deputy General Counsel, Department of Defense

I address my positions at the Pentagon together because they afforded me exposure to many of the same issues and challenges, one from the perspective of a Military Department and its constituent Armed Services, and the other from the perspective of the Office of the Secretary of Defense. First, and perhaps most obvious, I consider both good preparation for the CIA position because they constitute prior experience as the chief legal officer of major components of the national security establishment. From 1993 to 1995, as Principal Deputy General Counsel of DoD and, for an extended period, Acting General Counsel, I served as the chief legal officer of DoD, or deputy, and senior legal adviser to SECDEF and DEPSECDEF. From 1998 to 2000, as General Counsel of the Navy, I served as the chief legal officer of the Navy Department and senior legal adviser to SECNAV. Second, in these positions, I gained valuable experience in a wide range of relevant areas, including terrorist attack and force protection, intelligence, counterintelligence and law enforcement, and technology security. While at DoD, I was the direct reporting senior of the chief counsels of the defense intelligence agencies and ultimately responsible for the legal functions at those agencies. While at the Navy Department, I had legal and oversight responsibilities for special programs and the Naval Criminal Investigative Service. In both positions, I dealt frequently with other national security agencies, including the CIA. Third, in these positions, I became familiar with the interagency generally and the legal offices principally concerned with national security in particular.

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

As the Deputy Assistant Attorney General responsible for civil litigation on behalf of the United States in the courts of appeals from 1995 to 1998, I handled a variety of intelligence and other national security matters in litigation, including issues involving classified information and the protection of sources and methods. Because one role of the General Counsel is to interface with DOJ's litigating divisions, as well as the Solicitor General's Office, this prior experience should be particularly valuable. Moreover, my three years at "Main Justice" yielded an in-depth understanding of the organization, its culture, leadership roles and decision-making processes on which I could usefully draw as the General Counsel of a "client" agency.

QUESTION 18:

What, if any, conflicts might arise from your private practice if you are confirmed as General Counsel and how would you address these conflicts?

Answer: Under applicable statutes and regulations and the ethics pledge, I will be precluded from personally and substantially participating in any particular matter with specific parties in which I have a financial interest, in which a former client of mine is a party, or in which my former law firm represents a party, for specified periods where applicable and absent waiver where available. In the process of preparing my SF278 and Ethics Agreement, an agency ethics officer, in consultation with the Office of Government Ethics, has determined that certain of my investments might give rise to conflicts of interest. I intend to divest the potentially problematic investments, if confirmed, per my Ethics Agreement. With respect to particular matters in which my former clients are a party or my former firm represents a party, I will be disqualified from such matters for specified periods, unless waived where appropriate.

Opinions of the Office of Legal Counsel

QUESTION 19:

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

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

Answer: From the four opinions, and based on the limited information of which I am aware, my understanding is that the Office of General Counsel facilitated the Agency's efforts to obtain definitive legal guidance from the Department of Justice concerning interrogation techniques and conditions of confinement. Specifically, OGC, through the Acting General Counsel, requested that OLC provide the legal opinions in question, and OGC was evidently the principal channel through which factual information utilized by OLC in its analysis was obtained from the Agency.

I do not know the details of how the CIA interrogation program and "enhanced interrogation techniques" came about, the manner in which the OLC opinions were commissioned, generated and issued, or the specific actions taken by OGC attorneys in this regard. The

question invites forward-looking suggestions based not on findings of fault, but on the nature of the OLC opinion process employed here. On that basis, I can think of three lessons for the future:

First, in matters of exceptional significance or sensitivity, particularly with issues potentially affecting multiple agencies or where there may be conflicting views within the Executive branch, it is entirely appropriate for the Agency though OGC to seek definitive legal guidance from the Department of Justice.

Second, where OLC's analysis will depend heavily on factual circumstances as represented by the Agency, it is important that OGC ensure that the information provided is as complete, accurate and current as possible. I am not aware of any material deficiencies in this regard, but wish to underscore the importance.

Third, the General Counsel has the duty to exercise his own independent judgment in matters of law relating to the Agency. When it is appropriate or necessary for the Agency to seek guidance from the Department of Justice, as General Counsel, I would try to develop a view on the relevant legal question, to the extent that time and expertise permit, so that I could fully engage with OLC on the question. OLC opinions are properly treated as authoritative as to the law within the Executive branch. If I had a serious disagreement with an opinion, however, I would make my disagreement known to the Director, Justice Department leadership and others, as appropriate.

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

Answer: The Department of Justice itself, in the prior Administration, publicly repudiated the reasoning of the unclassified August 1, 2001 opinion, which provided the legal analysis on which the previously classified August 1, 2001 opinion was based, taking the extraordinary step of formally withdrawing the former and later superseding the latter. While I have of course reviewed the four opinions recently released, I have not made a close study of the legal reasoning and conclusions. Clearly they have flaws that the Department itself has recognized, having now withdrawn all four. Since these opinions issued, the practices in question have been stopped pursuant to Executive Order 13491, and the law has changed by virtue of the Supreme Court's decision in *Hamdan v. Rumsfeld* and the passage of the Detainee Treatment Act of 2005, so I do not expect to confront the same issues addressed in the opinions. Should a similarly important issue be the subject of OLC review in the future, I would, as noted above, become sufficiently familiar with the facts and guiding legal principles to be able to fully engage with the Department of Justice.

CIA Inspector General Report on Narcotics Airbridge Denial Program in Peru, 1995-2001

QUESTION 20:

In November 2008, Representative Hoekstra released five unclassified conclusions from the CIA Inspector General's report entitled "Procedures Used in Narcotics Airbridge Denial Program in Peru, 1995-2001." Referring to the Office of General Counsel, one of those conclusions stated: "Seeking to avoid both criminal charges against Agency officers and civil liability, OGC advised Agency managers to avoid written products lest they be subject to legal scrutiny."

- a. What is your view of the role of the General Counsel and attorneys in the Office of the General Counsel in advising Agency managers concerning the possibility of legal scrutiny, including whether a CIA General Counsel or OGC attorney should advise them to avoid written products?

Answer: I have not yet had access to the Inspector General's report of investigation concerning the Airbridge Denial Program in Peru and, therefore, I am not able to specifically address this conclusion, the context in which it was reached, or the accuracy of the report.

As a general proposition, I believe that OGC attorneys have a legitimate role to play in advising CIA personnel on mitigating potential civil liability. In a given case, it may be entirely appropriate for OGC attorneys to advise their clients not to create discoverable documents during civil litigation or while facing the threat of civil litigation.

- b. What is your view of the other portions of the IG report that Representative Hoekstra released and how would you, as General Counsel, address the matters discussed there?

Answer: I am unable to provide views on the Peru incident and the Inspector General's report without first reviewing that report and other documentation regarding the case. I understand that the Agency has impaneled an Accountability Board that is currently reviewing the Peru incident and the Inspector General's report, and preparing recommendations to the Director. If confirmed, I expect I will advise the Director about the conclusions and recommendations contained in the Inspector General's report, as well as those presented by the Accountability Board.

Intelligence Relationships and Charges of Terrorism or Human Rights Violations

QUESTION 21:

The Central Intelligence Agency conducts reviews prior to approving contacts with individuals about whom there are allegations of terrorism or human rights violations involving a potential foreign intelligence contact.

- a. What is your understanding of the legal issues that must be considered with respect to such contacts?

Answer: First, in cases involving possible violations of U.S. law, the Office of General Counsel would have to determine if a crimes report to DOJ is required or other appropriate steps must be taken regarding the allegation. Second, the Agency would have to balance the risks and benefits of a relationship with such a contact when deciding to pursue or continue a relationship with a contact that may have violated US law. Third, I believe DOJ would have to be involved in order to help delineate the parameters of any ongoing association.

- b. If confirmed, what factors should be considered with respect to whether or not the review process should be revised?

Answer: Without knowing the details of the process currently in place, I believe any review should encourage timely and informed decision-making that is based on a comprehensive assessment of the value of the relationship to the United States balanced against the scope, severity, and credibility of the possible human rights violations or other allegations.