

COMMITTEE QUESTIONS FOR THE RECORD

NOMINATIONS OF ROBERT S. LITT AND STEPHEN W. PRESTON

May 26, 2009

Congressional Notification

Mr. Litt and Mr. Preston, in addition to the responses you have already given concerning congressional notifications, please also respond to the following:

- **Would you both support, in those circumstances in which the legality of an intelligence activity has been evaluated in a legal opinion of the Department of Justice or of a General Counsel's Office in the Intelligence Community, providing that opinion to the congressional intelligence committees?**

Section 502 of the National Security Act requires that the intelligence committees be kept fully and currently informed of all significant intelligence activities, and as I have stated, I believe that the Intelligence Community will benefit from greater congressional oversight and input into important decisions. In many instances, legal opinions rendered by the Department of Justice may be important to that oversight. If confirmed, I will work to ensure that the committees have the information they need to conduct effective oversight, including relevant legal opinions. In some instances, where applicable privileges may be involved, I will work cooperatively with the committee to find alternative avenues of accommodating congressional oversight interests.

- **With respect to the content of limited briefings, what measures would you support to provide for complete records of any such briefings? For example, the establishment of a DNI registry of them? The submission by the DNI or the DCIA of a written statement to the Chairman and Vice Chairman? Non-objection to the creation of a congressional record, through the Committee's cleared reporter or a recording? Other means?**

As Director Blair has said, in the rare cases in which limited briefing is appropriate, such briefings will include a discussion with the Chairman and Vice Chairman of the committee regarding when and how briefing of the full committee membership is appropriate. I believe that this consultation should also include discussion of whether a record of the limited briefing should be prepared and, if so, what type of record would be most appropriate.

- **To determine whether there are matters of continuing interest that were briefed to prior committee leaders but not to the current Committee, would you undertake a review of all limited notifications of the past ten years and provide to the Committee a comprehensive list of them?**

All such limited notifications are under the purview of the President and I do not believe that the General Counsel of the Office of the Director of National Intelligence has the authority to provide such a list. Going forward, Director Blair has committed to briefing the full membership of the intelligence committees, except in rare exceptional cases, and if confirmed, I will work with the Committee to ensure that it has the information it needs to conduct effective oversight.

- **In the limited cases in which notification to a group smaller than the full committees is provided, what is the statutory basis, if any, for limiting the notification to the Gang of Four (the leaders of the two committees) rather than the full Gang of Eight (thereby including the Leaders)?**

Section 502 of the National Security Act provides that the intelligence committees must be kept fully and currently informed “[t]o the extent consistent with due regard for the protection from disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.” In rare circumstances, this might authorize briefing of a smaller group, although I believe this should only be done in consultation with the leadership of the intelligence committees.

There is an interest on the Committee, reflected in legislative proposals in our authorization bills, in changing the notification provisions in the National Security Act to ensure that the full Committee is informed.

- **Do you think the notification provisions need to be amended?**

- **Would you work with this Committee in crafting appropriate amendments?**

Like Director Blair, I believe that effective Congressional oversight of the intelligence community is extremely important and that the notifications to the committee of significant intelligence activities are essential to that oversight. While the Director may, in rare circumstances, brief a smaller group on particularly sensitive matters, the Director has committed that such briefings will include a discussion regarding how and when the full committee membership should be briefed on the matter. The notification requirements contained in the National Security Act represent a careful compromise between the Executive Branch and the Congress in an area where both have significant constitutional authorities, and I do not think it is prudent to alter this fundamental compact. If confirmed, I intend to have an ongoing dialogue with the committees to discuss how the Intelligence Community, and the Office of General Counsel in particular, can better help the intelligence committees conduct effective oversight, including ways to ensure that the committees are kept fully and currently informed.

The Clients of the National Security Lawyer

Mr. Preston, during the hearing you were asked about your response to the prehearing questions about the unclassified conclusions of the CIA Inspector General's report entitled "Procedures Used in Narcotics Airbridge Denial Program in Peru, 1995-2001" and when it might be appropriate to advise clients not to create discoverable documents during civil litigation or while facing the threat of civil litigation. Please provide written responses to these questions:

- **Does the DNI General Counsel have any responsibilities higher than ensuring that the ODNI and all its personnel act in accordance with the law and maintain full and accurate records of their actions?**

A primary responsibility of the General Counsel of the Office of the Director of National Intelligence is to assist the Director of National Intelligence in carrying out his statutory responsibility to ensure that all activities of the

Intelligence Community are conducted in compliance with the law, including any laws relating to the creation and maintenance of full and accurate records. As I have previously stated, I also believe that a General Counsel owes his or her client the benefit of “counsel” in addition to legal advice.

- **Does the DNI General Counsel have any role in representing personnel in investigations by the Department of Justice or by the DNI Inspector General?**

No. The ODNI Office of General Counsel does not represent individuals. Individuals are represented by the Department of Justice, if appropriate, or by private counsel. The Office of General Counsel works with the Department of Justice in appropriate cases to assist the Department in its representation of government personnel.

- **What is the General Counsel’s role in litigation to redress harm to individuals allegedly caused by ODNI actions? In your view, is the DNI General Counsel another member of the defense team?**

The primary role in defending litigation rests with the Department of Justice. The role of the ODNI General Counsel in any such litigation is to represent the Office of the Director of National Intelligence and the Intelligence Community as a whole, in the interest of the American public, and to assist the Department of Justice, as requested.

Mr. Litt, please provide your written responses to the same questions above with respect to the General Counsel of the ODNI, including your answer to the question asked at the hearing concerning who is the “client” of the ODNI General Counsel.

I believe that, if confirmed, my primary client in most cases will be the Office of the Director of National Intelligence, and the Intelligence Community as a whole, in the interest of the American public.

Confirming General Counsels

Mr. Litt and Mr. Preston, Congress chose to require Senate confirmation for both the DNI and CIA General Counsel positions. Mr. Preston was specifically asked about his understanding of the purpose of the establishment of a confirmed General Counsel of the Central Intelligence Agency.

- **Mr. Preston, what is your understanding of the purpose of Congress's establishment of a confirmed General Counsel?**
- **Mr. Litt, what is your understanding of the requirement for Senate confirmation of your position?**

I believe that the purpose of ensuring Senate confirmation is twofold: first, so that the Senate is satisfied that the nominee is qualified to perform the duties of the General Counsel, and second, to ensure that the Senate is satisfied that the nominee will be responsive to and cooperative with congressional oversight.

Conflicts

Mr. Litt, you have informed the Committee that you have certain potential conflicts from your representations in private practice and you discussed this issue with Senator Feingold at the hearing.

- **What additional information can you place on the public record about the nature of those conflicts, how you will resolve them, and the extent to which they might affect your ability to provide the DNI with legal counsel?**

I represent several present and former employees of the Central Intelligence Agency in matters relating to the detention and interrogation of suspected terrorists. By statute, under the rules of ethics and by virtue of my ethics agreement that has been provided to the Committee, I will not participate

personally and substantially in any particular matter involving these clients. I have consulted with the ODNI Designated Agency Ethics Official about the scope of that bar, and while its precise contours will have to be determined on a case-by-case basis, I will not participate in any decisions relating to the possible prosecution or investigation of these individuals nor any decisions that would affect the outcome of such matters, including decisions about similarly situated individuals or offering an opinion with respect to the legal status of particular interrogation procedures that may have been employed in the past that relate to the subject of my representation.

A principal function of the Director of National Intelligence, and by extension the General Counsel of ODNI, is to set forward-looking policies and procedures to ensure compliance by the Intelligence Community with the Constitution and laws of the United States. I do not believe my prior representation will impose any limitations on my ability to participate fully in that process as it relates to detention and interrogation going forward.

These recusals would only affect my ability to provide the DNI with legal counsel in narrow areas related to my prior representation. There will remain a wide variety of issues falling within the responsibilities of the Office of General Counsel that I will be able to participate in fully.

Mr. Preston, in addition to informing the Committee about potential conflicts from your private practice, what information can you place on the public record about those conflicts and their resolution?

Conflicting legal opinions

Mr. Litt, in your responses to the Committee's prehearing questions, you noted that you would work with the CIA General Counsel to ensure that legal issues related to the work of the CIA are reviewed and evaluated. You also indicated that you would work with the general counsels of the various intelligence agencies and with attorneys from the Department of Justice with respect to conflicting legal opinions within the Intelligence Community. You also stated that the DNI General Counsel does not have decisional authority to resolve conflicting legal interpretations in the Intelligence Community.

- **Do you think the DNI General Counsel has an independent obligation to assess for the DNI the legality of covert actions and other intelligence programs?**

Yes.

- **If the Department of Justice were to issue an opinion with which you disagreed from a legal standpoint, how would you counsel the DNI?**

If I was unable to resolve the disagreement through discussions with the Department of Justice, I would advise the Director of National Intelligence to raise the issue through appropriate channels, to the President if the situation warrants it.

- **Do you think the DNI General Counsel should have decisional authority to resolve conflicting legal views within the Intelligence Community?**

The Attorney General is the chief legal officer of the United States Government, and generally speaking, the Department of Justice, and more particularly the Office of Legal Counsel, is charged with resolving disputed legal issues within the Executive Branch. If there is a conflict within the Intelligence Community on a legal issue and the ODNI Office of General Counsel is not able to resolve the conflict, if confirmed I would bring the matter to the attention of the Director and refer the issue to the Department of Justice for resolution if necessary.

Mr. Preston, will you undertake to ensure that the ODNI General Counsel has full awareness of significant legal interpretations of your office?

Attorney General Guidelines

Mr. Litt, in your responses to the Committee's prehearing questions, you noted that you expected Attorney General guidelines on information sharing promulgated pursuant to Executive Order 12333 to protect the privacy, civil liberties and statutory rights of US persons.

Please elaborate. In creating those guidelines, how would you recommend the DNI balance the need for information sharing with the privacy interests of US persons?

I believe that privacy and civil liberties interests should always be considered in tandem with proposals for information-sharing. Privacy and civil liberties are often best protected through legal processes, such as procedural and substantive requirements that must be met before information-sharing is permitted in a particular case. In general, the appropriate level of protection in this context should be determined by balancing the severity of the intrusion and the importance of the information to protecting national security. Greater intrusions upon civil liberties and privacy should generally require more stringent predicates and a higher level of approval; on the other hand, exigent circumstances or grave dangers to national security may warrant more flexible procedures. If confirmed, I would work closely with the Civil Liberties Protection Officer and his office in advising the Director with regard to the information-sharing guidelines promulgated pursuant to Executive Order 12333.

- **Are there particular types of records or information about US persons that should never be shared or should this depend on the need for those records?**

Some records should rarely be shared, but I am reluctant to say that there is any category of record that should never be shared regardless of the importance to national security. Even information protected by legally recognized privileges can generally be released under appropriate circumstances, such as pursuant to court order or to prevent a serious crime from occurring. However, as described above, the greater the intrusion on personal privacy, the stronger the procedural and substantive protections should be.

Declassification—IG Reports and OLC Opinions

Mr. Litt, the DNI will likely be involved in recommending whether information about both the Terrorist Surveillance Program and CIA's detention and interrogation program should be declassified, and will likely seek your counsel on those topics. In your responses to the Committee's prehearing questions, you noted that the public interest in the disclosure of certain information may outweigh the need to protect it.

- **In what circumstances do you think disclosure of information is in the public interest?**

In general, I believe that information that relates to matters of national interest should be made publicly available to the greatest extent possible and that there should be a presumption of openness, to enable robust and informed public discussion. However, in some instances countervailing interests, such as the privacy of Americans or national security, may overcome the presumption of openness.

- **Do you support the recent declassification of the four OLC opinions on CIA's detention and interrogation program?**

Yes.

- **Mr. Preston, what are your views on the declassification of the OLC opinions?**

Declassification—FISA Court Opinions

Mr. Litt, in your responses to the Committee's prehearing questions you noted that the Intelligence Community and the Department of Justice should identify FISA court opinions of legal significance whose disclosure would serve the public interest for potential declassification.

- **Do you support having a regular, mandated process for review of those opinions and discussion with the FISA court about possible declassification?**

I believe that any process for declassification of FISA Court opinions of legal significance should be undertaken in consultation with the Department of Justice and the FISA Court, and must protect national security information. If confirmed, I will work with the Department of Justice, to determine the best way to accomplish the goal of informing the public of significant legal interpretations of FISA.

Pending legislation

Mr. Litt, in response to prehearing questions on legislation relating to federally compelled disclosure of information by persons connected to the news media, the state secrets privilege and whistleblower protections, you noted that the various legislative proposals should be evaluated collectively. You also stated that it was important to consider, among other things whether the legislation "provides appropriate deference to Executive Branch determinations that the disclosure of classified information has or will cause damage to national security."

- **How would you envision these legislative proposals be considered collectively? Would you recommend one piece of legislation to deal with all of these issues in the national security context?**

I do not think that it is necessary to have a single piece of legislation. However, I do believe that the Congress, in evaluating each proposal, should consider its

interaction with the other proposals and the possible cumulative effect on national security and the public's right to be informed.

- **With regard to state secrets, would you support providing to the congressional intelligence committees regular reports on the assertion of a state secrets privilege, including the classified declarations by the intelligence or other officials in support of those assertions of privilege?**

President Obama recently said that the Administration will voluntarily report to Congress regarding when and why the state secrets privilege is invoked, to allow for proper congressional oversight, and if confirmed I would support that effort.

Many of these legislative proposals reflect concern that the Executive Branch does not adequately weigh the public interest when classifying information or when evaluating the interest of the coordinate branches, the courts and Congress, or the public's need for information.

- **If you feel that deference should be accorded to Executive Branch determinations relating to the damage to national security from disclosure, how would you recommend addressing the congressional concern about Executive Branch overclassification?**

President Obama recently announced a review of Executive Order 12958, specifically including “[e]ffective measures to address the problem of over classification.” The Director of National Intelligence is given considerable responsibilities in the area of classification and declassification by the National Security Act and Executive Order 12333 and I would therefore expect that he would play a significant role in this review, as well as the parallel review of procedures relating to Controlled Unclassified Information. If confirmed, I look forward to discussing these issues with the committee.

Cyber security

Mr. Litt, the Obama Administration has undertaken a 60 day review of the Comprehensive National Cybersecurity Initiative. Although you noted in your responses to the Committee's prehearing questions that our efforts must strictly comply with the Constitution and the law, you did not identify what privacy concerns you thought might be implicated by the government's involvement in this area.

- **What would you identify as the main privacy concerns and civil liberties related to the cybersecurity initiative?**

The privacy and civil liberties concerns related to the cybersecurity initiative arise from the vast amount of personal and private data that is stored on electronic networks or transmitted over electronic communications systems. This information is vulnerable to attack by malevolent individuals, but also may be compromised by government action if adequate safeguards are not provided. The challenge will be to provide robust protection for government and private networks and systems that are essential to our national security and our economy, while at the same time protecting individual privacy from unnecessary intrusion.

- **Do you see a need for legislative changes to support the cybersecurity initiative?**

The review of cybersecurity issues that the President ordered has just been released and I have not yet had an opportunity to review it in detail. If confirmed, however, I expect to be involved in the resolution of any legal issues and will work with the committee on any legislative changes that may be necessary.

Declassified OLC opinions

Mr. Litt, on April 16, 2009, the Department of Justice released four opinions that were issued by the Office of Legal Counsel in the last Administration for the CIA. These opinions have been withdrawn by the Department of Justice.

- **Do you believe that you are limited in any way in commenting on any of these opinions on account of your representation of a client in private practice?**

As I have stated, I do not believe that I can offer an opinion about the legal status of interrogation techniques that may have been employed in the past. While I believe I can comment on some aspects of these opinions there are some areas that I cannot comment upon consistent with my ethical responsibilities.

- **To the extent you are able to comment, and focusing for now on the interpretation of the Fifth and Eighth Amendment in the May 30, 2005 opinion, what is your assessment of its legal reasoning and conclusions?**

The relevant question under the Fifth and Eighth Amendments is whether, considered in the light of traditional government behavior and contemporary practice, the conduct can be said to "shock the conscience." This can be a complicated analysis requiring examination of the totality of the circumstances, including the nature of and the justification for the conduct. Based upon my review of the May 30, 2005, opinions and on commentary I have read, I believe that the opinions gave insufficient consideration to precedents from the courts and the Executive Branch relating to some of the interrogation techniques analyzed in them.

Declassified OLC opinions

Mr. Preston, in response to prehearing questions about the now declassified OLC opinions, you both stated that as the interrogation practices in question had been stopped pursuant to Executive Order 13491, and the law has changed by virtue of the *Hamdan* decision, you did not expect to confront the same issues addressed in the August 2002 and May 2005 opinions. While specific practices have been barred, the federal torture statute addressed in those opinions is unchanged, and, of course, the Fifth and Eighth Amendments are unchanged.

- **If alternative approaches to interrogation are proposed, would you be required to evaluate them in light of the requirements of the Fifth and Eighth Amendments, and federal statutes?**
- **If so, from your prior experience in national security law, do you have any views on the general legal analysis in the now declassified opinions about the U.S. Constitution and the federal torture statute?**

Guidelines under Executive Order 12333

Mr. Preston, in your response to prehearing questions , you state that, if confirmed, one of your priorities will be to review existing guidelines under Executive Order 12333 and determine what changes may be warranted.

- **If confirmed, would you undertake to report to the Committee within three months of the results of your review?**

Views on Pending Legislation

Mr. Preston, in your response to a prehearing question on pending legislation involving the state secrets privilege and other matters, you state that the totality of Administration practices should be considered, not just the few cases that have received public attention.

- **With regard to state secrets, would you support providing to the congressional intelligence committees regular reports on the assertion of a state secrets privilege, including the classified declarations by the intelligence or other officials in support of those assertions of privilege?**

Executive Branch Oversight

Mr. Preston, in your responses to prehearing questions about Executive Branch oversight and the relationship between the CIA General Counsel and other officials of the intelligence community, you emphasize your personal acquaintance with the nominee for the ODNI General Counsel and the new Assistant Attorney General for National Security.

- **Please be more specific about your understanding of the offices and procedures involved in Executive Branch oversight, and what you would do to improve Executive Branch oversight.**

Questions for the Record from Vice Chairman Bond

Mr. Litt:

USA PATRIOT Act

The next national security legislation on the agenda will address the USA PATRIOT Act sunset provisions of the “lone wolf,” roving wiretap, and Section 215 FISA business records court orders. Amazingly, we are still waiting for the Administration’s position on these relatively simple provisions.

- How would you advise the President on whether these provisions should be made permanent, extended, or allowed to expire?

To form a judgment on the renewal of these provisions I would need to understand how they have been used and the circumstances in which they might be needed in the future. As much of this information is classified I have not had an opportunity to review it. If confirmed I will do so and look forward to discussing these issues with the committee.

FISA Amendments Act

- The FISA Amendments Act will sunset in 2012. What are your views on the FISA Amendments Act?

As with the three sunset provisions of the USA PATRIOT Act, I would need to understand how the FISA Amendments Act has been used and the circumstances that led to its enactment, information that is classified. Oversight of the use of the FISA Amendments Act is one of the responsibilities of the Office of General Counsel and if confirmed I intend to be involved in that process.

Management

- Lawyers managing lawyers is probably one of the most challenging tasks facing a general counsel. Could you please explain your vision for how you intend to manage the ODNI's Office of General Counsel?

I believe that management of a law office requires first of all selection of capable, intelligent lawyers with initiative. While I have not yet had the opportunity to work closely with the lawyers in the Office of General Counsel my impressions so far are favorable. Second, it is important to delegate clearly both authority and responsibility, and to ensure that your expectations are clearly understood by the lawyers with whom you are working. Third, regular communication with the lawyers, and feedback on how well they are meeting your expectations, is essential to keep track of what they are doing; it is my understanding that there are already regular staff meetings which I intend, if confirmed, to continue.

State Secrets

The "State Secrets Protection Act" is currently pending before the Senate Judiciary Committee. In my opinion, the bill in its current form significantly erodes the protections of the judicially-recognized State Secrets privilege.

- What are your thoughts on the utility of preserving the common law approach to the State Secrets privilege?

The President has emphasized that the principle behind the State Secrets privilege is "absolutely necessary to protect national security." Like the President, however, I am concerned that the privilege has been overused. The President has proposed several reforms in the use of the privilege, and if confirmed, I will examine whether those reforms would best be accomplished through Executive Branch action or legislation

Extraordinary Renditions

- When you served in the Criminal Division and the DAG's Office during the Clinton Administration, did you support the use of extraordinary renditions in terrorism cases?

To the best of my recollection I did not deal with this issue while I was in the Department of Justice.

- Do you believe that extraordinary rendition should remain in the Intelligence Community's tool box?

The term "extraordinary rendition" has been used in several contexts. I believe that there may be cases where it is appropriate to seize someone abroad and return him to the United States without going through formal extradition processes, and that there may also be cases where it is appropriate to seize someone abroad and send him to a third country. Each of these has been called "extraordinary rendition." In no circumstances, however, do I believe it is appropriate to send someone to a country where it is known that he will face torture, and I believe that any rendition to a third country should only be undertaken when there are satisfactory assurances that the individual will be treated properly.

Media Shield

- One of the biggest problems in the Intelligence Community is the seemingly endless leaks of classified information that reveal our sources and methods. Do you believe that those who leak classified information should be prosecuted to the fullest extent of the law?

Leaks of classified information are very serious and in my view if persons who leak classified information can be identified they should be prosecuted.

- Do you think it would be a good idea to create a statutory privilege for journalists (or people who can quickly qualify as journalists by posting a few blogs on the internet) to protect criminals who leak classified information?

The President has expressed his support for responsible media shield legislation, in view of the critical role that the media play in a free and democratic society. I believe that such legislation can and should be crafted to ensure that leaks of classified information can be effectively investigated and prosecuted, and if confirmed I look forward to working with the Congress to ensure that any legislation that is passed does so.

- Wouldn't such a privilege actually encourage even more unauthorized disclosure of classified information?

Again, I believe that legislation creating a statutory privilege for journalists can and should be crafted in a manner to protect intelligence sources and methods and other classified information and that would not encourage unauthorized disclosure of such information.

Questions for the Record from Senator Whitehouse

Mr. Litt:

Please provide your responses to the questions I asked Mr. Preston at the hearing concerning:

- **how do you intend to balance the President's desire to look forward with your responsibilities as general counsel to assist in the resolution of very significant unresolved issues of the past pertaining to the treatment of detainees; and**

As President Obama has said, it is of critical importance that the Intelligence Community and the nation move forward to address the urgent national security challenges and opportunities facing us, including important decisions as to the appropriate disposition of persons now in our custody or those whom we may detain in the future. I agree, however, that it is important both to be informed about and mindful of past practices in order to ensure that we make the right decisions going forward, and to provide a process that ensures that appropriate actions are taken in regard to these past practices.

- **how will you ensure that your principal, the Director of National Intelligence, has access to channels of information and advice on these issues from career officials who were not themselves associated with decisions that led to the torture of detainees?**

If confirmed, I will ensure that Director Blair receives expert legal advice and counsel from senior lawyers with no prior involvement in those decisions, and with full access to whatever information is necessary for complete and accurate factual determinations to support that advice and counsel.

Questions for the Record from Senator Levin

Mr. Litt:

1. On April 16, 2009, the Department of Justice released four opinions issued by the Office of Legal Counsel (OLC) (dated August 1, 2002, May 30, 2005, and two issued on May 10, 2005). Have you read those OLC opinions?

Yes.

2. Do you believe that the release of the four OLC opinions has jeopardized national security?

No.

3. Do you believe that waterboarding is torture?

The President and the Attorney General have stated that waterboarding is torture and I have no reason to disagree with that conclusion. Moreover, the President has stated that he has banned waterboarding “once and for all” and Director Blair has stated that it will not occur on his watch. I therefore do not expect to be presented with that legal question, but if confirmed, I can promise that waterboarding will not happen on my watch.

4. Do you believe that there are differences between the interrogation techniques as applied by the Central Intelligence Agency (CIA) and as applied in Survival Evasion Resistance Escape (SERE) training?

While I am not fully familiar either with the manner in which the interrogation techniques were applied by the CIA or with SERE training, materials that I have read indicate that there are differences, for example the fact that SERE training is voluntary and an individual can indicate that he or she wants the technique to stop.

5. General David Petraeus said in a May 10, 2007 letter that “Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. They would be wrong. Beyond the basic fact that such actions are illegal, history shows that they also are frequently neither useful nor necessary. Certainly, extreme physical action can make someone ‘talk;’ however, what the individual says may be of questionable value.” Do you agree with General Petraeus?

Yes.

6. What would you do if the Director of National Intelligence (DNI) made a significant public statement that was erroneous or misleading? What would you do if the DNI refused to correct such a statement?

I am confident from my discussions with him that Director Blair is committed to transparency, accuracy and disclosure to the greatest extent possible, consistent with national security. If the Director of National Intelligence made a significant public statement that I believed was erroneous or misleading I would discuss the matter with him to ascertain whether my understanding was correct and, if so, the reason for the Director’s action. If I was not satisfied with the Director’s explanations, and could not convince the Director to correct the statement, I would consider resigning my position if the matter was of sufficient importance.

Questions for the Record from Senator Levin

Mr. Preston:

1. On April 16, 2009, the Department of Justice released four opinions issued by the Office of Legal Counsel (OLC) (dated August 1, 2002, May 30, 2005, and two issued on May 10, 2005). Do you believe that the release of those opinions has jeopardized national security?
2. General David Petraeus said in a May 10, 2007 letter that “Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. They would be wrong. Beyond the basic fact that such actions are illegal, history shows that they also are frequently neither useful nor necessary. Certainly, extreme physical action can make someone ‘talk;’ however, what the individual says may be of questionable value.” Do you agree with General Petraeus?

Questions for the Record from Senator Feingold

Mr. Litt:

Congressional notification

In your responses to Committee questions, you indicated that, under Section 502 of the National Security Act, the DNI could limit briefings to the Chairman and Vice Chairman, using the “Gang of Eight” provision from Section 503 “by analogy.” This is wrong as a matter of statutory interpretation. Please clarify.

Section 502 of the National Security Act provides that the intelligence committees must be kept fully and currently informed “[t]o the extent consistent with due regard for the protection from disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.” My reference to Section 503 was meant only to indicate by analogy the sorts of circumstances under which I thought that a limited briefing might be appropriate under Section 502.

The warrantless wiretapping program (or Terrorist Surveillance Program) was a collection activity covered under Section 502 of the National Security Act. Was the failure to notify the full Committee a violation of that Act?

Because the program you refer to is classified, I am not familiar with it nor with the reasons why the full Committee was not briefed.

What is your understanding of the legal obligation to notify the congressional intelligence committees of covert action and other intelligence activities prior to their implementation?

Section 503 of the National Security Act requires the President to report “before the initiation of [a] covert action” and provides that if the President does not do so he shall fully inform the intelligence committees in a timely fashion and explain why prior notice was not given. Section 502 requires that the intelligence

committees be kept “fully and currently informed” of intelligence activities, including any “significant anticipated intelligence activity,” and that any report relating to a significant anticipated intelligence activity should be in writing and contain a concise statement of the facts. As you know, Director Blair has repeatedly emphasized the importance of timely notification to the committees and keeping the committees fully and currently informed. If confirmed, I will fully support the Director’s policies.

Warrantless wiretapping

Based on the Bush Administration’s 2006 “white paper” and other public sources, do you believe that the warrantless wiretapping program (Terrorist Surveillance Program) was legal under Justice Jackson’s steel seizure case test?

Because the program you refer to is classified, I am not sufficiently familiar with it or with the reasons why it was believed to be necessary to offer a view as to whether it was a valid exercise of the President’s authorities.

State secrets

The president has committed to “voluntarily report[ing] to Congress when we have invoked the [state secrets] privilege and why.” Will you commit to providing such briefings to Committee members and staff?

Yes.

OLC review

During his confirmation hearing, DNI Blair agreed to send all intelligence programs that pose significant legal questions to the Justice Department’s Office of Legal Counsel (OLC), right at the outset. Will you commit to doing this? Will you include the Comprehensive Cybersecurity Initiative?

To the extent that any intelligence issues pose significant legal questions that require the views of the Department of Justice I commit that, if confirmed, I will ensure that they are submitted to the Office of Legal Counsel at the outset. To the

extent that the cybersecurity initiative raises such legal issues, if confirmed I will ensure that they are submitted.

Conflicts of interest

With regard to potential conflicts of interest, you have indicated that you have relied on and will continue to rely on the counsel of the ODNI Designated Agency Ethics Official. That person, however, is an employee of the ODNI Office of the General Counsel (OGC) and thus would be your direct subordinate, should you be confirmed. This raises further questions about objectivity and impartiality. Have you discussed potential conflicts of interest with anyone outside the OGC? Have you had any discussions with the DNI regarding the possibility, should you be confirmed, of designating an ethics official outside the OGC who could provide you counsel and, if so, what was the outcome of those discussions?

The issue you raise is not unique to this particular situation but exists throughout the government. In the Office of the Director of National Intelligence, as in all other federal agencies, the Designated Agency Ethics Officer is subordinate to one or more individuals in the agency to whom he or she gives ethics advice. Thus, for example, the ODNI DAEO is also responsible for giving ethics advice to the Director. The DAEO may call upon experts at the Office of Government Ethics in determining the appropriateness of any potential recusals. I have full confidence in the DAEO's ability to provide objective and impartial ethics advice and to consult with the office of Government Ethics when she deems it advisable.

You have indicated that the “precise contours” of the scope of your potential conflicts of interest have yet to be determined. This raises the question of when you will voluntarily recuse yourself or seek counsel. You have identified questions of prosecution or investigation, as well as reviews of interrogation techniques that are the “subject of [your] representation” of your clients as posing potential conflicts of interest. While the “subject of [your] representation” of your clients may have been narrow, however, you may be familiar with the broader range of activities conducted by your

clients, and your decisions with regard to these activities going forward could affect not only possible prosecution or investigation, but administrative actions or career advancement. What decisions related to detention, interrogation or rendition might prompt you to recuse yourself or seek counsel? Are there other decisions that might affect the interests of your clients still in the Intelligence Community, such as those related to the relative authorities of the CIA and DNI, the role of contractors, or employee benefits? If so, how will you identify them and what course of action would you take?

As I have told the committee, I will not participate in any decisions relating to the possible prosecution or investigation of my former clients nor any decisions that would affect the outcome of such matters, including decisions about similarly situated individuals or offering an opinion with respect to the legal status of particular interrogation procedures that may have been employed in the past that relate to the subject of my representation. With respect to the types of other decisions you identify, they do not appear to present a conflict, but I will provide the Designated Agency Ethics Official with the names of these former clients to ensure that I do not participate in any matters from which I should be recused.

Questions for the Record from Senator Feingold

Mr. Preston:

Interrogations

Both the Attorney General and the President have indicated that waterboarding is torture. Is this your professional opinion as well?

You indicated during your confirmation hearing that you believe that the four Office of Legal Counsel (OLC) memos recently declassified and withdrawn are “flawed.” Please describe the flaws you have identified in those memos.

Renditions

Director Panetta has left the door open for renditions to other countries of individuals in short-term CIA custody. First, what kinds of assurances and follow-up are necessary to satisfy the United States’ obligations under the Convention Against Torture? Second, even if those obligations are met, are there legal requirements that the individual be subject to an open legal process, rather than indefinite extrajudicial detention? And, third, is there an obligation to notify the ICRC of such renditions?

OLC review

During his confirmation hearing, DNI Blair agreed to send all intelligence programs that posed significant legal questions to the Office of the Legal Counsel (OLC), right at the outset. Will you commit to doing this? Will you include any resumption of renditions or short-term CIA detentions, or considerations of interrogation policies that diverge from the Army Field Manual?

State secrets

In your response to Committee questions about state secrets legislation, you indicated that Congress should consider the impact on cases currently being litigated. Since then, the President has committed to “voluntarily report to Congress when we have invoked the privilege and why.” Will you commit to providing Committee members and staff briefings on cases involving the CIA in which the privilege has been invoked?

Congressional notification

Do you agree that Section 502 of the National Security Act provides no authority to limit briefings to the Chairman and Vice Chairman and that programs other than covert action must always be notified to the full congressional intelligence committees? Was the failure to notify the full committees of the warrantless wiretapping program (the Terrorist Surveillance Program) a violation of that Act?

What is your understanding of the legal obligation to notify the congressional intelligence committees of covert action and other intelligence activities prior to their implementation?

Inspector General

Do you agree that the CIA Inspector General should have full independence to conduct investigations of CIA activities, regardless of whether the General Counsel has concluded that those activities are legal?