RESPONSES OF STEPHEN W. PRESTON

COMMITTEE QUESTIONS FOR THE RECORD

NOMINATIONS OF ROBERT S. LITT AND STEPHEN W. PRESTON

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:

Q: 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?

A: *I would support providing a legal opinion to the intelligence committees where appropriate in order to keep the committees fully and currently informed of intelligence activities as required by section 502 of the National Security Act of 1947. I do not support an absolute rule – either precluding disclosure of any legal opinion of the Justice Department or of an OGC in the IC to the committees in any instance, or requiring disclosure of all legal opinions of the Justice Department or of an OGC in the IC to the committees in all instances. This is a judgment to be made on a case-by-case basis in light of the particular circumstances and considerations presented.*

Q: 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?

A: *I am not sufficiently familiar with the historical practices in conducting and memorializing limited briefings to offer a specific recommendation at this point. I understand that this is a matter of significant concern to the Committee and others, particularly of late, and, if confirmed, I will work*

with Director Panetta to address this concern. With respect to briefings by the CIA, I expect that there are means by which the Agency can record the fact and substance of a briefing in a manner that is reliable, accessible as needed, and protective against unauthorized disclosure of classified information.

Q: 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?

A: *Again, while I am not conversant with the history of limited notifications, my sense at present is that I would support undertaking an effort of this sort to the extent appropriate in order to keep the committees fully and currently informed of intelligence activities as required by section 502 of the National Security Act of 1947, subject to any direction Director Panetta may provide and coordination with others as appropriate. The focus, I expect, would be on any ongoing intelligence activities that were briefed to prior committee leadership but never disclosed to the full committee.*

Q: 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)?

A: *With respect to intelligence activities other than covert actions, under section 502 of the National Security Act of 1947, the Agency is required to keep the intelligence committees fully and currently informed "[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information" that is exceptionally sensitive. The "due regard" clause is a qualification on the obligation, requiring the Agency to inform the committees in a manner consistent with due regard for the protection from unauthorized disclosure of such classified information. I am not sufficiently familiar with the historical practices in providing notification to a group smaller than the full committee to say what circumstances and considerations have led to limiting the notification to the Gang of Four rather than the full Gang of Eight in the past, but any such limitation founded on section 502 must be based on a considered judgment*

that it is necessary under the "due regard" clause. Section 503 of the Act, of course, governs covert actions.

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.

Q: Do you think the notification provisions need to be amended?

A: *At this point, I do not think that the notification provisions need to be amended. Those provisions reflect a delicate balancing of constitutional interests between the Executive branch and the Congress that ought not be unnecessarily disturbed. At the same time, I am keenly aware of the Committee's concerns with limited briefings, records of same and related issues, and I am committed to working with Director Panetta in addressing these concerns, to the end of improving communication between the Agency and the Committee and, specifically, ensuring that the provisions of section 502 are properly followed. Rather than legislative changes, I favor leadership-level discussions between the Agency and the Committee aimed at developing a common understanding on the issues of concern and on practical procedures to ensure that the full Committee is informed as required by law.*

Q: Would you work with this Committee in crafting appropriate amendments?

A: *As noted above, I favor discussions between the Agency and the Committee because I think much can be done to improve notification within the current framework. Subject to any direction Director Panetta may provide and coordination with others as appropriate, I would be happy to work with the Committee on legislative proposals or otherwise to address legal issues that may arise during my tenure.*

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:

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

A: *At the most fundamental level, the General Counsel, like every lawyer in the Office of General Counsel, is sworn to uphold and protect the Constitution of the United States. That is an obligation that is not be taken lightly and underlies virtually everything the General Counsel does. Moreover, as I said in my responses to prehearing questions, "[p]erhaps 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." By "the Agency," I mean to include the people who comprise the Agency. And by "compliance with applicable U.S. law in all of its activities," I would include maintaining full and accurate records where the maintenance of records is required by law or otherwise undertaken.*

Q: Does the CIA General Counsel have any role in representing personnel in investigations by the Department of Justice or by the CIA Inspector General?

A: *No, the General Counsel represents the Agency, and ultimately the United States and the people of the United States. He takes his direction from the Director. Although the Agency is, in an important sense, the men and women who comprise the Agency, the General Counsel has no role in representing any individual in his or her personal capacity in investigations by the Justice Department or by the CIA IG.*

Q: What is the General Counsel's role in litigation to redress harm to individuals allegedly caused by CIA actions? In your view, is the CIA General Counsel another member of the defense team?

A: *In connection with litigation to redress harm to individuals allegedly caused by CIA actions, the General Counsel represents the Agency. He has no role in representing any individual in his or her personal capacity. Depending on the forum and the defendant(s), defense of litigation may be the responsibility of the Department of Justice with support from CIA OGC – in which case the General Counsel functions as the senior representative of the Justice Department's "client" agency – or the responsibility of CIA OGC – specifically, OGC attorneys reporting to the General Counsel. The General Counsel may bring to a given case a perspective different from*

those most actively involved in the defense, but his focus remains on the interests of the Agency.

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.

Q: Mr. Preston, what is your understanding of the purpose of Congress's establishment of a confirmed General Counsel?

A: *I regard the requirement of the Senate's advice and consent as an indication of the importance of the position and of the incumbent's role in ensuring the Agency's compliance with applicable U.S. law. In addition, 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." S. REP. NO. 258, 104th Cong., 2d Sess. 34 (1998). See also my response to prehearing question 3(a).*

Conflicts

Q: 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?

A: *During my tenure as General Counsel, there may arise matters in which a former client of mine is a party or my former law firm represents a party. Pursuant to the terms of my ethics agreement and the Ethics Pledge (Executive Order No. 13490) to which I will be bound if confirmed, I will not participate personally and substantially in any particular matter involving specific parties in which my former law firm is a party or represents a party for a period of two years after my resignation, unless I am first authorized to participate pursuant to 5 C.F.R. 2635.502(d) and paragraph 3 of Executive Order 13490. I also will not participate personally and substantially in any particular matter involving specific parties in which a former client of mine is a party or represents a party for a period of two years after my*

resignation, unless I am first authorized to participate pursuant to 5 C.F.R. 2635.502(d) and paragraph 3 of Executive Order 13490.

Upon confirmation and assumption of duties as General Counsel, I will execute a formal recusal in which I will detail the screening arrangement to be used in any particular matter from which I am recused.

In the circumstance that the Director determines my participation is necessary in a matter involving my former firm or a former client from which I am otherwise recused, I will consult with the agency ethics official, who will in turn consult with the Office of Government Ethics, to determine whether an authorization to participate pursuant to 5 C.F.R. 2635.502(d) and a waiver of paragraph 3 of the Executive Order, is appropriate.

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.

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

A: *The working relationship between ODNI OGC and CIA OGC has been described to me as highly collaborative. In legal matters of Director-level interest or of general interest to the IC, I would expect a free flow of information from CIA OGC to ODNI OGC (and vice versa). In this fashion, the ODNI GC should become fully aware of significant legal interpretations by CIA OGC. Moreover, if I learn of a legal interpretation of which the ODNI GC is not aware that I believe he should be, I will see to it that he is made fully aware of it.*

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.

Q: Mr. Preston, what are your views on the declassification of the OLC opinions?

A: *I support the President's decision to declassify the four OLC opinions.*

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.

Q: 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?

A: *Executive Order 13491 prohibits the use of interrogation techniques not authorized by and listed in the Army Field Manual. The Executive Order also establishes a Special Task Force, chaired by the Attorney General, to determine what if any additional or different techniques necessary to protect national security may be warranted. If alternative approaches to interrogation are proposed, I expect that they would be evaluated under currently applicable U.S. law.*

When the U.S. Senate ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984, it did so with the following reservation: "That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel,

inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." This reservation was carried over to the Detainee Treatment Act of 2005. The Detainee Treatment Act prohibits cruel, inhuman and degrading treatment or punishment of detainees, defined as the cruel, unusual and inhumane conduct prohibited by the 5th, 8th and 14th Amendments. In Hamdan v. Rumsfeld (2006), the Supreme Court held that Common Article 3 of the Geneva Conventions applies to terrorist detainees. The Military Commissions Act of 2006 criminalizes cruel or inhuman treatment, listing it with torture and seven other specific activities as among the "grave breaches" of Common Article 3 that constitute a war crime under the War Crimes Act.

The federal torture statute remains applicable, but cruel, inhuman and degrading is generally considered to be a lower threshold/stricter requirement than torture. I would anticipate that any new interrogation techniques to be recommended would have to be evaluated not only under the torture statute and any other federal statutes that applied, but also under the standards of the 5th, 8th, and 14th Amendments per the Detainee Treatment Act, as well as under Common Article 3 of the Geneva Conventions.

Q: 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?

A: *I have no prior experience with the federal torture statute and am not an expert in the relevant constitutional jurisprudence. However, as noted in my responses to the prehearing questions and in my testimony at the hearing, I believe that the now declassified OLC opinions are flawed. The Department of Justice itself, in the prior Administration, publicly repudiated the reasoning of the unclassified August 1, 2002 opinion and formally withdrew it, later superseding the now declassified August 1, 2002 opinion. The Justice Department has since determined the four opinions to be flawed, having now withdrawn all four. If alternative approaches to interrogation are proposed, I expect that their lawfulness would be assessed by the Department of Justice. In that event, as previously noted, I would become sufficiently familiar with the facts and guiding legal principles to be able to*

fully engage with the Justice Department. I would not be bound in any respect by the legal analysis in the now declassified OLC opinions.

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.

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

A: *I believe this is a fair request, and I will do my best to accommodate the Committee. Because I am not familiar with the existing guidelines or progress towards implementing the current version of Executive Order 12333, I cannot commit to the formal reporting of my views by a certain date or independent of the Agency. That said, I would hope to be in a position to engage with the Committee within a three-month timeframe, subject to any direction Director Panetta may provide and coordination with others as appropriate.*

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.

Q: 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?

A: *In remarks delivered at the National Archives on May 21, 2009, the President said, with reference to the State Secrets privilege: "We plan to embrace several principles for reform. We will apply a stricter legal test to material that can be protected under the State Secrets privilege. We will not assert the privilege in court without first following a formal process, including review by a Justice Department committee and the personal approval of the Attorney General. Finally, each year we will voluntarily report to Congress when we have invoked the privilege and why, because*

there must be proper oversight of our actions." I support the President's decision to change the practices associated with assertion of the State Secrets privilege in these respects, including instituting regular reports to the appropriate oversight committees. Whether to include classified declarations in such reports is, I believe, a judgment to be made on a case-by-case basis in light of the specific circumstances and considerations presented.

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.

Q: 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.

A: *The DNI has statutory and Executive Order oversight responsibilities for the CIA and the IC generally. Under section 104A(b) of the National Security Act of 1947, the DCIA reports to the DNI "regarding the activities of the [CIA]." In addition, under section 102A(f)(4) of the Act, the DNI has the statutory responsibility to ensure that CIA activities are consistent with the Constitution and laws of the United States. The ODNI GC in turn serves as the senior legal adviser to the DNI. The Assistant Attorney General for National Security (AAG-NSD) has certain responsibilities for oversight and execution with respect to FISA applications, and CT and CI investigations and prosecutions, among other things. Because I am not yet familiar with the procedures and interactions between CIA OGC and ODNI OGC and between CIA OGC and OAAG-NSD – the latter offices having been created since the time of my prior government service -- I am unable to describe them with particularity or to make specific recommendations concerning Executive Branch oversight. As previously noted, I believe that highly functional relationships with the ODNI GC and the AAG-NSD are very important. While my prior acquaintance with the ODNI GC nominee and the current AAG-NSD will no doubt help, I am confident that I will have well-functioning relationships with each, no matter who the incumbent is, because I view it as imperative in order for us to get the job done.*

QUESTIONS FOR THE RECORD FROM VICE CHAIRMAN BOND

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.

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

A: *I have not yet been briefed on the details of how the Intelligence Community has used these authorities, so it would be premature for me to advise the President or anyone else on the reauthorization of these provisions at this time. However, among the factors I believe should be considered in determining whether these provisions should be continued are the extent to which the use of these authorities has resulted in intelligence gains for the U.S. and whether the use of these authorities has significantly affected the civil liberty interests of U.S. persons.*

FISA Amendments Act

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

A: *I think the FISA Amendments Act, providing procedures for targeting persons outside the United States, was important in supplying a statutory basis and judicial process for certain surveillance previously challenged as unlawful. At this time, I do not have a view on renewal in 2012.*

Management

Q: 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 CIA's Office of General Counsel?

A: *I have considerable prior experience running the law offices of large federal agencies – the Department of Defense Office of General Counsel and Defense Legal Services Agency, and the Department of the Navy Office of the General Counsel – and managing government attorneys many of whom are collocated with their "client" components within the agency. In my*

experience, in addition to basic leadership skills, the following are useful and effective:

Exercising ultimate responsibility for the professional supervision and evaluation of all attorneys providing legal services within the agency;

Maintaining a good supervisory structure and relying on senior staff who are experienced managers;

Providing multiple opportunities for direct communication with rank and file lawyers and support staff; and

Offering rotation and other forms of career enrichment.

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.

Q: You have served as the Deputy Assistant Attorney General in the Department of Justice's Civil Division. What are your thoughts on the utility of preserving the common law approach to the State Secrets privilege?

A: *State Secrets is an important and time-honored, judicially recognized privilege. I would be concerned about any legislative proposal that might impinge upon the President's constitutional responsibility to protect national security information, put in the hands of the courts matters they may not be constitutionally or institutionally competent to decide, and under-protect national security information from disclosure. In remarks delivered at the National Archives on May 21, 2009, the President said, with reference to the State Secrets privilege: "We plan to embrace several principles for reform. We will apply a stricter legal test to material that can be protected under the State Secrets privilege. We will not assert the privilege in court without first following a formal process, including review by a Justice Department committee and the personal approval of the Attorney General. Finally, each year we will voluntarily report to Congress when we have invoked the privilege and why, because there must be proper oversight of our actions." I support the President's decision to change the practices associated with assertion of the State Secrets privilege in these*

respects. In my view, these reforms address the issue of "over-use" of the privilege without eroding the protections of or eliminating the common law approach to the privilege.

Extraordinary Renditions

Q: Do you support the use of extraordinary renditions in terrorism cases? Should the technique remain in the Intelligence Community's tool box?

A: *I am not aware of any legal determination that rendition per se is unlawful. Indeed, "extraordinary renditions" are specifically authorized in the U.S. Attorneys Manual as a means to bring individuals overseas into the Untied States to stand trial. While renditions per se are not unlawful, they must not be used for an unlawful purpose. I am also not aware of any policy decision to prohibit renditions. To the contrary, the practice is one of the things being studied by the Special Task Force chaired by the Attorney General under Executive Order 13491. I look forward to the recommendations of the Special Task Force and, assuming it remains in the "tool box," am prepared to support lawful rendition in appropriate cases.*

Media Shield

Q: 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?

A: *Yes. At the same time, I understand that there may be considerable difficulty in identifying the source of a leak and that the judgment whether to prosecute the source of a leak may be influenced by the nature and extent of additional disclosure that prosecution would likely entail.*

Q: 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?

A: *See my response to prehearing question no. 13 for a more detailed discussion. In short, I understand the general concern underlying the question and note three specific concerns:*

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;

How to effectively define the type of information that is subject to the privilege governed by the legislation; and

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.

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

A: *I do not know. In my view any such legislation should be framed so as not to encourage leaks, to the extent possible.*

QUESTIONS FOR THE RECORD FROM SENATOR LEVIN

Q: 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?

A: *I support the President's decision to release the four OLC opinions. The potential impact on national security, positive or negative, was among the considerations informing the President's decision, and the President explained his thinking in this regard in his statement on April 16, 2009.*

Q: 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?

A: *Yes, I agree with General Petraeus that sanctioning torture would be wrong. I also agree that torture is illegal. As the effectiveness of interrogation techniques is an area in which I have no training or experience, I am not in a position to assess the utility of extreme physical*

action as a means of obtaining valuable information or its necessity as opposed to alternative techniques. But I have no basis for disagreeing with General Petraeus in this regard. Finally, I should reiterate that, by order of the President, the Agency does not and will not engage in torture. If I am confirmed, it certainly will not during my tenure as General Counsel.

QUESTIONS FOR THE RECORD FROM SENATOR FEINGOLD

Interrogations

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

A: *As I testified at the hearing, I support the President's and the Attorney General's conclusion that waterboarding is torture, and the President's decision that the United States will not engage in the practice going forward. I have not made an independent legal judgment with respect to past conduct under the federal torture statute, but I have no reason to disagree with the conclusion reached by the President and the Attorney General.*

Q: 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.

A: *Some flaws apparent to me after reviewing the four OLC opinions (without examining applicable precedents or otherwise conducting any legal research) are as follows:*

One problem with all of the memos is the assumption that the Geneva Conventions, including Common Article 3 and its proscriptions against inhumane treatment, violence to life or person (including cruel treatment) and outrages upon personal dignity (including humiliating and degrading treatment), were inapplicable. The error of this assumption was conclusively established by the Supreme Court in Hamdan v. Rumsfeld.

In the unclassified August 1, 2002 memo (portions of which the previously classified August 1, 2002 memo referred to):

The discussion of the President's Commander-in-Chief power and the defenses of necessity and self-defense in the unclassified August 1, 2002

memo overreaches and betrays a result-orientation not typical in OLC jurisprudence.

The proposition that physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death was erroneous and later recognized as such.

The proposition that there is no concept of physical suffering amounting to torture apart from physical pain was erroneous and later recognized as such.

The proposition, in the May 10, 2005 Techniques memo (and unclassified December 30, 2004 memo), that physical suffering amounting to torture must be extreme in intensity and significantly protracted in duration or persistent over time – as opposed to extreme in intensity and difficult to endure, as for physical pain – was dubious and insufficiently supported.

The May 10, 2005 Combined Techniques memo is flawed at least to the extent that the analysis of individual techniques is flawed. In addition, in its effort to show that the whole is nothing more than the sum of its parts, the memo loses sight of the possibility that the repeated application of certain techniques in the course of an interrogation could supply the "protracted" or "persistent" physical suffering (or "prolonged" or "extended" mental harm) found absent in any single application.

The May 30, 2005 memo rejects U.S. military doctrine as reflected in the Army Field Manual as a possible measure of what would "shock the conscience" on the basis that a policy premised on the applicability of the Geneva Conventions does not constitute controlling evidence of executive tradition and contemporary practice with respect to untraditional armed conflict where those treaties do not apply. The Court in Hamdan, of course, overturned this erroneous premise.

Renditions

Q: 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?

A: *Article 3 of the Convention Against Torture forbids transferring a person to another country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." When the Senate ratified the Convention Against Torture, it did so with an understanding that the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture" means "if it is more likely than not that he would be tortured." Therefore, the United States may not render a person to another country where it is more likely than not that the person would be tortured. In determining whether it is more likely than not a person would be torture, the United States is charged by Article 3 of the Convention to "take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."*

I am not aware of a legal requirement that a country must agree to submit a person to an open legal process as a condition of rendering a person there. The United States could make a policy choice to seek such a commitment and, if it did so, I would ensure that policy choice was respected.

Finally, Executive Order 13491 would require the CIA to notify the ICRC of CIA detainees "consistent with Department of Defense regulations and policies."

OLC Review

Q: 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?

A: *In matters of exceptional significance or sensitivity, particularly with issues potentially affecting multiple agencies, where there may be conflicting views within the Executive branch, or with issues outside the Agency's expertise, I believe that it is entirely appropriate and wise to seek learned and authoritative legal guidance from the Department of Justice. Although I*

do not think it is necessary to submit all intelligence programs or all significant legal questions to OLC for review/analysis, I have every intention to make liberal use of OLC when confronted with legal issues arising from intelligence programs. Moreover, with respect to the particular activities cited – resumption of renditions and divergence from the Army Field Manual – it is difficult to imagine either occurring without substantial consultation with OLC. I certainly would want the benefit of OLC's legal analysis.

State Secrets

Q: 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?

A: *In remarks delivered at the National Archives on May 21, 2009, the President said, with reference to the State Secrets privilege: "We plan to embrace several principles for reform. We will apply a stricter legal test to material that can be protected under the State Secrets privilege. We will not assert the privilege in court without first following a formal process, including review by a Justice Department committee and the personal approval of the Attorney General. Finally, each year we will voluntarily report to Congress when we have invoked the privilege and why, because there must be proper oversight of our actions." I support the President's decision to change the practices associated with assertion of the State Secrets privilege in these respects, including instituting regular reports to the intelligence committees. While I am not sure what form such reporting will take, I would favor reporting to the entire membership of the Committee as the norm (with staff as appropriate).*

Congressional Notification

Q: 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?

A: *With respect to intelligence activities other than covert actions, under section 502 of the National Security Act of 1947, the Agency is required to keep the intelligence committees fully and currently informed "[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information" that is exceptionally sensitive. The "due regard" clause is a qualification on the obligation, requiring the Agency to inform the committees in a manner consistent with due regard for the protection from unauthorized disclosure of such classified information. Thus the law requires the complete and timely provision of information to the intelligence committees and admits of exception only in extraordinary circumstances. In my view, the norm should be to provide information to the entire membership of the committees.*

Q: What is your understanding of the legal obligation to notify the congressional intelligence committees of covert action and other intelligence activities <u>prior</u> to their implementation?

A: *With respect to covert actions, section 503 of the National Security Act of 1947 requires that a finding be reported to the intelligence committees "before the initiation of the covert activity," but also provides for notice "in a timely fashion" where prior notice is not given. With respect to intelligence activities other than covert actions, section 502 of the Act does not include the same "before the initiation" language, but does include "significant anticipated intelligence activities" among the intelligence activities to be reported, subject to the "due regard" clause. In my view, the norm should be to provide information prior to implementation.*

<u>Inspector General</u>

Q: 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?

A: *I believe that the Inspector General should have full independence to conduct investigations of CIA activities within the scope of the Inspector General's statutory authority. 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. Rather than the General Counsel unilaterally declaring lawful activities already under investigation or the Inspector General initiating an investigation of activities previously determined to have been lawful, this strikes me as a prime example of where the two ought to work together to ensure that the considered opinions of the former and the full independence of the latter are both respected.