

SELECT COMMITTEE ON
INTELLIGENCE
UNITED STATES SENATE



**Prehearing Questions
for
David S. Kris
Upon his Selection to be
The Assistant Attorney General for National Security**

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 not only to the Director of National Intelligence but to the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities. 28 C.F.R. § 0.72(a) provides that the Assistant Attorney General for National Security (AAG/NS) shall conduct, handle, or supervise the briefing of Congress, as appropriate, on matters relating to the national security activities of the United States.

- a. What is your understanding of the obligation of the Attorney General and the Director of the Federal Bureau of Investigation to keep the congressional intelligence committees, including all their Members, fully and currently informed?

Answer: The basic obligation imposed by section 502 of the National Security Act of 1947 is to keep the two intelligence committees “fully and currently informed” of all U.S. intelligence activities (except covert actions that are covered in section 503), including “significant anticipated intelligence activities” and “significant intelligence failures.” This section clearly contemplates that the committees will be notified of all “significant” intelligence activities before they are undertaken. These obligations are conditioned by the opening phrase in this section that says “to the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive sources and methods or other exceptionally sensitive matters.” I interpret this phrase to provide the government with a degree of latitude in deciding how (not whether) it will bring extremely sensitive matters to the committees’ attention. In such cases, it may be prudent to begin by notifying the leaders and staff directors of the intelligence committees and attempt to reach an accommodation with them in terms of how and when the committee as a whole should be brought into the matter in question.

- b. To what activities of the Department of Justice, including the Federal Bureau of Investigation, does this obligation ordinarily apply?

Answer: This obligation applies to “intelligence activities,” cf. 50 U.S.C. § 413(f), which would ordinarily include, as appropriate, many of the activities of the FBI’s National Security Branch, as well as related activities of the NSD. The Foreign Intelligence Surveillance Act imposes similar obligations with respect to electronic surveillance, physical searches, and other investigative activity. See, e.g., 50 U.S.C. §§ 1808, 1826, 1846, 1862, 1871, 1881f, 1885c.

- c. Please describe (including a description of your knowledge at the time) and provide your evaluation of implementation of this obligation during your service as Associate Deputy Attorney General (2000-2003).

Answer: Within my areas of responsibility and knowledge, I believe this obligation was satisfied during my service as Associate Deputy Attorney General. In particular, I believe the Department kept the intelligence committees fully informed about the use of the Foreign Intelligence Surveillance Act (FISA) during my service as Associate Deputy Attorney General, and I recall several semi-annual reports on FISA.

- d. With establishment of the National Security Division, what is the responsibility of the Assistant Attorney General for National Security for implementation of this obligation?

Answer: This obligation applies to the Director of National Intelligence and to “heads of all departments” – in this case the Attorney General – but as pointed out in the question, 28 C.F.R. § 0.72(a) provides that the Assistant Attorney General for National Security shall “brief Congress, as appropriate, on matters relating to the national security activities of the United States.” This regulation also provides that the Assistant Attorney General for National Security shall “[p]erform other duties pertaining to ... national security matters as may be assigned by the Attorney General,” and “[a]dvice and assist the Attorney General in carrying out his responsibilities ... related to intelligence, counterintelligence, or national security matters.” See also 28 U.S.C. § 507A(b)(3) (Assistant Attorney General for National Security shall “perform such other duties as the Attorney General may prescribe”).

- e. The Committee utilizes detailed information on the overall national security threat environment to appropriately fulfill its intelligence authorization and oversight functions. However, the FBI at times has declined to fully brief the Committee on potential counterterrorism and counterintelligence threats to the United States, as well as FBI intelligence-related activities to thwart such threats, citing a January 27, 2000 letter from the Department of Justice to Congressman John Linder. Please describe your views on the applicability of the “Linder Letter” to Committee requests for information on intelligence-focused activities of the FBI, as well as your views on what intelligence-related activities of the FBI should not be shared with the Committee, if any.

Answer: I am not familiar with the “Linder Letter.” I appreciate the obligation, discussed above, to keep the Committees fully and currently informed. A summary of that standard appears on page 96 of the House Intelligence Committee’s 1978 report on

the Foreign Intelligence Surveillance Act, which (as noted above) adopts a similar standard:

the word “fully” means that the committee must be given enough information to understand the activities of, but does not mean that the Attorney General must set forth each and every detailed item of information relating to, all electronic surveillances. For example, the committee would not ordinarily wish to know the identities of particular individuals.

Liaison to the Director of National Intelligence

QUESTION 2:

Pursuant to 28 U.S.C. §507A(b)(2), the AAG/NS shall serve as primary liaison to the Director of National Intelligence for the Department of Justice (DOJ).

- a. Have you discussed with the Director of National Intelligence, and with personnel in the Office of the Director of National Intelligence, your respective understandings of that responsibility? If so, describe.

Answer: Yes. As part of the consultation contemplated by 50 U.S.C. § 403-6(c)(2)(C) and Executive Order 12333 § 1.3(d)(2), prior to my formal nomination, the Attorney General, the Director of National Intelligence, and I spoke by telephone briefly about the role of the Assistant Attorney General for National Security as DOJ’s primary liaison to the Director of National Intelligence. I have also spoken to the General Counsel in the Office of the Director of National Intelligence about this topic (I understand that the General Counsel has since left government service). If confirmed, I expect to have further discussions on this topic.

- b. Describe the principal matters that should be addressed in performing this responsibility.

Answer: In general, the Assistant Attorney General for National Security should, in performing his liaison responsibilities, seek to work with the intelligence community to maximize the collection of intelligence on national security threats consistent with the laws and Constitution of the United States and protection of civil liberties. The matters to be addressed in the liaison relationship between the Assistant Attorney General for National Security and the Director of National Intelligence include certain aspects of FISA (see, e.g., 50 U.S.C. §§ 403-1(f)(6) and 1881a), and procedures issued under Executive Order 12333 (see, e.g., Sections 1.3(b)(5), 1.3(b)(20)(C), 2.3).

A report on the National Security Division, published by the Department of Justice in April 2008, explains the liaison relationship as follows:

In the USA PATRIOT Improvement and Reauthorization Act, Congress charged the Assistant Attorney General for National Security with serving as the Department's liaison to the Director of National Intelligence (DNI) and the Intelligence Community, and the NSD has made this responsibility a top priority. The AAG and the DAAGs in the NSD meet and consult with their Office of the Director of National Intelligence (ODNI) counterparts on virtually a daily basis, and the NSD has assigned a detailee to the ODNI to reinforce that collaboration. Since the stand-up of the NSD, the NSD and the ODNI have worked jointly on a number of efforts, including the Foreign Intelligence Surveillance Act (FISA) modernization legislation that is the subject of active Congressional debate and deliberation at this time. NSD attorneys also work on a daily basis with the Central Intelligence Agency (CIA), the National Security Agency (NSA), and other members of the Intelligence Community on a range of legal, policy, and operational issues and on specific investigations that require Justice Department review or participation.

NSD attorneys also coordinate efforts with a variety of other federal agencies that have roles in the national security effort, including:

- The Treasury Department—We assist the Treasury Department with its designation of terrorist organizations and in its ongoing work with the Financial Action Task Force to identify financing methods relating to illegal arms proliferation.
- The State Department—We coordinate with the State Department to provide anti-terrorism training and assistance to numerous nations around the globe.
- The Department of Defense (DOD)—We partner with DOD on the prosecution of high value detainees under the Military Commissions Act (see below), and we regularly provide support to their court-martial proceedings against active duty military members charged with espionage and related offenses.

Representation of Department of Justice on Interdepartmental Boards and Other Entities

QUESTION 3:

28 C.F.R. § 0.72(a)(3) provides that the AAG/NS shall represent the Department of Justice on interdepartmental boards, committees, and other groups dealing with national security, intelligence, or counterintelligence matters. 28 C.F.R. § 0.72(a)(20) provides that the AAG/NS shall represent the Department on the Committee on Foreign Investments in the United States.

- a. In addition to the Committee on Foreign Investments in the United States, what are the interdepartmental boards, committees, and other groups on which the AAG/NS has represented, or should be representing, the Department of Justice?

Answer: As a nominee for the office of Assistant Attorney General for the National Security Division who is not currently employed by the government, my knowledge of NSD's participation is necessarily limited to that set forth in statute, in regulations, and in other public documents. I have attempted to list those groups below. There may be other interdepartmental boards, committees, and groups on which the AAG/NS has represented, or should be representing, the Department of Justice. If confirmed, I expect to address this issue in more detail.

NSD personnel who work on the Committee on Foreign Investments in the United States are also charged with responsibilities relating to Federal Communications Commission (FCC) requests for Executive Branch determinations of the national security implications relating to applications for licenses under Sections 214 and 310 of the Communications Act of 1934. The FCC must decide whether granting each license application is in the "public interest." When the license will be acquired by a foreign entity, the FCC solicits and considers the views of the Executive Branch regarding the effects, if any, the transaction will have on public safety, national security, and law enforcement. To facilitate formation of those views, the Departments of Justice, Defense, and Homeland Security formed an interagency group called "Team Telecom." Team Telecom reviews such applications to determine if a proposed communication provider's foreign ownership, control or influence poses a risk to national security, infrastructure protection, law enforcement interests, or other public safety concerns sufficient to merit the imposition of mitigating measures or opposition to the transaction.

In addition, the National Security Division often represents the Department of Justice in various groups operating under the auspices of the National Security Council (e.g., Interagency Working Groups). The Assistant Attorney General for National Security or his designee typically represents the Department of Justice in the Counterterrorism Security Group (CSG) that evaluates terrorist threats. I expect that the Assistant Attorney General for National Security and/or the National Security Division will play a role in implementing the Executive Orders issued by the President relating to Guantanamo Bay, detainee policy, and/or interrogation policy.

- b. What are the principal responsibilities of each of these boards, committees, or groups, and what is or should be the nature and objectives of the National Security Division's participation on them?

Answer: See answer above.

Implementation of the FISA Amendments Act of 2008

QUESTION 4:

Under section 702 of the Foreign Intelligence Surveillance Act, as added by the FISA Amendments Act of 2008 (FISA Amendments Act), the Attorney General and the DNI may authorize jointly, for a period up to one year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information. The FISA Amendments Act was signed into law in July 2008. Thus, the process for one or more new annual authorizations may occur at some time proximate to the first anniversary of the FISA Amendments Act and annually thereafter. The FISA Amendments Act also provide for semiannual or annual assessments and reviews, as described in section 702(1) of FISA. Pursuant to 28 C.F.R. § 0.72(b)(2), the AAG/NS shall supervise the preparation of FISA applications.

- a. Describe your understanding of the matters that the Attorney General and DNI, with the assistance of the AAG/NS, should evaluate in order to determine, on the basis of the first year's experience under the FISA Amendments Act (and annually thereafter), whether there should be revisions in the substance or implementation of (1) targeting procedures, (2) minimization procedures, and (3) guidelines required by the FISA Amendments Act, in order to ensure both their effectiveness and their compliance with any applicable constitutional or statutory requirements.

Answer: As I explained in my opening statement before the Senate Judiciary Committee on February 25, "the FISA Amendments Act ... is a new statute, and I do not yet know exactly how it functions." Accordingly, any views I may hold now are tentative and based primarily on my reading of the statutory language (and other public documents). If I am confirmed, I may revise my view in light of full range of information to which I will then have access.

Subject to the above, I expect that the matters that should be evaluated would include relevant Inspector General reviews, orders or opinions from the FISA Court, and/or some or all of the following, in keeping with 50 U.S.C. §§ 1881a(l) and 1881f:

- the number of disseminated intelligence reports containing a reference to a United States-person identity and the number of United States-person identities subsequently disseminated by the element concerned in response to requests for identities that were not referred to by name or title in the original reporting;
- with respect to acquisitions authorized under 50 U.S.C. § 1881a(a), the number of targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed;
- any procedures developed by the head of a relevant element of the intelligence community and approved by the Director of National Intelligence to assess, in a manner consistent with national security, operational requirements and the privacy interests of United States persons, the extent to which the acquisitions authorized under 50 U.S.C. § 1881a(a) acquire the communications of United States persons, and the results of any such assessment;
- any certifications submitted in accordance with 50 U.S.C. § 1881a(g);
- with respect to each determination under 50 U.S.C. § 1881a(c)(2), the reasons for exercising the authority under such section;
- any directives issued under 50 U.S.C. § 1881a(h);
- the results of judicial review of such certifications and targeting and minimization procedures adopted in accordance with subsections (d) and (e) of 50 U.S.C. § 1881a and utilized with respect to an acquisition, including significant legal interpretation of the provisions of 50 U.S.C. § 1881a;
- any actions taken to challenge or enforce a directive under paragraph (4) or (5) of 50 U.S.C. § 1881a(h);
- any compliance reviews conducted by the Attorney General or the Director of National Intelligence of acquisitions authorized under 50 U.S.C. § 1881a(a);
- any incidents of noncompliance with a directive issued by the Attorney General and the Director of National Intelligence under 50 U.S.C. § 1881a(h), including incidents of noncompliance by a specified person to whom the Attorney General and Director of National Intelligence issued a directive under 50 U.S.C. § 1881a(h) of this title;

- any incidents of noncompliance by an element of the intelligence community with procedures and guidelines adopted in accordance with subsections (d), (e), and (f) of 50 U.S.C. § 1881a;
- the total number of applications made for orders under 50 U.S.C. §§ 1881b(b) and 1881c(b), including the total number of such orders granted, modified, and denied; and
- the total number of emergency acquisitions authorized by the Attorney General under 50 U.S.C. §§ 1881b(d) and 1881c(d) and the total number of subsequent orders approving or denying such acquisitions.

All of these items should be viewed in the context of a more general review of the operational effectiveness of the Act. Such a review would necessarily involve extensive discussions with the FBI, NSA, and other Intelligence Community components.

- b. Describe how the semiannual or annual assessments and reviews required by the FISA Amendments Act should be integrated, both in substance and timing, into the process by which the Attorney General and DNI consider whether there should be revisions for the next annual authorization or authorizations under the FISA Amendments Act, including in applicable targeting and minimization procedures and guidelines.

Answer: Subject to the limitations noted in my response to Question 4(a), I expect that annual and semi-annual assessments and reviews, as well as day-to-day experience with the Act and any successes, challenges, or problems with its implementation, would inform annual authorizations and any revisions to applicable targeting and minimization reviews. See 50 U.S.C. § 1881a(l)(3)(B). I envision this as a collaborative process that would involve extensive interaction with operational components of the Intelligence Community to ensure the effective implementation of the Act and briefing of the intelligence committees to understand legislators' concerns and to receive their input. As to the precise timing of these discussions, I believe that I will be in a better position to comment once I have had access to the details of how the Act has actually been implemented by the Department.

- c. In addition to the matters described in the FISA Amendments for semiannual or annual assessment or review, are there additional matters that should be evaluated periodically by the Attorney General or the DNI to improve and ensure the lawful and effective administration of the FISA Amendments Act?

Answer: I would anticipate that actual experience with the reviews provided for in the statute will suggest other matters that should be evaluated periodically. If confirmed, I

will keep the Committee informed of any such matters that emerge from my experience overseeing these reviews.

- d. At your Senate Judiciary Committee nomination hearing, in response to a question from Senator Feingold whether you agreed there are serious problems that need to be corrected in the implementation of the FISA Amendments Act, you responded, “I do.” To the extent that you can give an unclassified answer, please explain what serious problems you see in the implementation of the FISA Amendments Act and what solutions you would offer.

Answer: The response described in the question took place during the following colloquy:

Q. We had an opportunity earlier today to discuss in a classified setting specific concerns I have about how the FISA Amendment[s] Act has been implemented. Without discussing those specifics in an open hearing, do you agree that there are serious problems that need to be corrected?

A. Senator, ah, I do, I appreciate very much the meeting we had this morning. You raised a number of concerns that I as an outsider had not appreciated, and you certainly got my attention. I have been thinking about it since we met, and if it’s even possible, you increased my desire to – if I were to be confirmed – to get to the bottom of the FISA Amendments Act. And I hope, if I am confirmed, that I can take advantage of your learning and that of others on the [Judiciary] Committee and the Intelligence Committee to see how best to make any necessary improvements.

Q. Well, and I hope that you’ll work with me to develop modifications to the statute that would potentially address these problems. I realize that you need to get all the detail first.

A. Senator, I will look forward to working with you very much.

My response to Senator Feingold’s question about “serious problems” was referring specifically to the classified matters he had raised with me prior to the hearing. The nature of these matters is such that I cannot meaningfully describe them in an unclassified environment. Moreover, as I explained in my opening statement before the Senate Judiciary Committee on February 25, “the FISA Amendments Act ... is a new statute, and I do not yet know exactly how it functions.”

In the past, I have raised general questions about the Act's complexity, its continued reliance on location (e.g., of the acquisition target) as a trigger for legal requirements, and its minimization rules (particularly concerning retention and dissemination of information). However, these comments were based only on my reading of the statute and other public documents. If confirmed, I look forward to learning about how the Act functions, making informed judgments about its implementation, and working with Senator Feingold and others on the Committee in this and other areas.

QUESTION 5:

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, 2001. 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.

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

Answer: As I understand it, the purpose of this public report is to inform the public about the President's Surveillance Program, without disclosing classified information that could harm the national security. For instance, as I understand it the report would not disclose the name or identity of any individual or entity of the private sector that participated in the Program or with whom there was communication about the Program, to the extent that information is classified.

- b. Describe the responsibility that you anticipate that the AAG/NS will have in recommending what should be declassified and the standards that should be applied to that determination.

Answer: I anticipate that the AAG/NS will participate in the classification review of the report as directed by the Attorney General.

Administration of Parts of FISA Other than Titles Added in 2008

QUESTION 6:

An objective of the FISA Amendments Act of 2008, as expressed by the Department of Justice, was to enable the U.S. Government to devote more of the time of attorneys and others to

implementation of portions of FISA that continue to require individual orders based on probable cause.

- a. Do you share the view that the FISA Amendments Act permits a reallocation of the work of personnel of the National Security Division?

Answer: If confirmed, I expect to review the allocation of personnel and resources within the Division to ensure that personnel and resources are optimally allocated to accomplish the Division's mission. As I explained in my opening statement before the Senate Judiciary Committee on February 25, "the FISA Amendments Act ... is a new statute, and I do not yet know exactly how it functions." Accordingly, any views I may hold in this area are necessarily tentative, and subject to revision if I am confirmed and later learn how the Act functions. Subject to those limits, I do believe that the Act may permit a reallocation of the work of personnel in the National Security Division, at least to some degree.

- b. What should the objectives of any such reallocation be?

Answer: The general objective of a reallocation should be to ensure that intelligence collection is effective and is conducted in accordance with the rule of law and appropriate regard for civil liberties. Subject to the limits set forth in response to sub-part a., any such reallocation could result in personnel of in the National Security Division devoting more time to implementation of portions of FISA that continue to require individual orders based on probable cause (particularly with respect to U.S. person targets), and perhaps also oversight.

December 2009 Sunset of Three FISA Provisions

QUESTION 7:

Pursuant to 28 C.F.R. § 0.72(a)(13), the Assistant Attorney General for National Security shall formulate legislative initiatives. 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: Among other things, I would want to consider any actual and possible use (and/or misuse) of the provisions in question since they were enacted; the relationship between the provisions and any recent amendments to FISA (e.g., in the FISA Amendments Act); the operational environment in which the provisions function and the continuing need or lack of need for them; and perhaps other factors. More generally, I would want to consult with career professionals in the government and consider the possible benefits of any legislative changes improving the statute against the possible costs in the form of disruption or uncertainty resulting from such changes.

- 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: There may be a benefit to alignment in that it could reduce the number of instances in which the statute needs to be changed. Much would depend on the particulars of the situation.

Declassification of FISA Opinions

QUESTION 8:

At the end of last year, the FISA Court of Review released to the public a redacted version of its most recent opinion. What are your views regarding the issues to be considered in creating a regular process under which important rulings of law and key decisions of the FISA Court and the FISA Court of Review could be publicly released in an unclassified form?

Answer: As the co-author of a book on national security law and a law school teacher in that area, I appreciate the value of public information about FISA and other statutes, in keeping with the need to protect classified and otherwise non-public information. Our laws in this area, as in others, are strongest if they rest on the informed consent of the governed, and I regard as healthy an appropriate amount of public discourse regarding the legal bases for FISA court rulings. If I am confirmed, I will confer with the Court and with other members of the intelligence community to explore whether, consistent with the need to protect sensitive and classified information, it is appropriate to develop a process, or modify the existing process, for publication of certain significant decisions of the FISA Court of Review, and perhaps also the FISA Court, with appropriate redactions where necessary. I recognize that Members of the Committee have significant experience and expertise regarding this issue, and would solicit Members' views and counsel as well.

The Committee is familiar with the statutory obligation to report certain FISA matters to relevant congressional committees. Under 50 U.S.C. § 1871(a), the Attorney General is directed

to submit to certain committees of Congress, “in a manner consistent with the protection of the national security,” a report that includes the following: “a summary of significant legal interpretations of [FISA] involving matters before the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review, including interpretations presented in applications or pleadings filed with the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review by the Department of Justice; and copies of all decisions, orders, or opinions of the Foreign Intelligence Surveillance Court or Foreign Intelligence Surveillance Court of Review that include significant construction or interpretation of the provisions of this Act.” It may be worth considering whether it is appropriate for the government to establish a system under which it discloses publicly the portions of the report required by Section 1871(a) that would be disclosed in response to a properly submitted request for that report under the Freedom of Information Act.

National Security Letters

QUESTION 9:

In the USA PATRIOT Improvement and Reauthorization Act of 2005, Congress directed the undertaking of a DOJ Inspector General audit on the use of national security letters.

- a. What is your understanding of the principal benefits from or problems with national security letters?

Answer: National security letters are enormously valuable investigative tools. The principal benefits of NSLs are described in the Inspector General’s March 2007 report (page xxii): “FBI Headquarters and field personnel told us that they found national security letters to be effective in both counterterrorism and counterintelligence investigations. Many FBI personnel used terms to describe NSLs such as ‘indispensable’ or ‘our bread and butter.’” Approximately 50,000 NSLs are issued each year, *id.* at xix; NSLs were issued in approximately one-third of all FBI investigations in 2006 (March 2008 report at 109). Without any doubt, NSLs are important to the Department of Justice and other federal agencies.

The principal problems with national security letters are described in the Inspector General’s March 2007 report. These include use of one type of NSL when another should have been used (page xxix), “FBI agents’ unfamiliarity with the constraints on NSL authorities” (page xxx), lack of guidance to agents (pages xli-xlii), difficulty tracking the use of NSLs (page xviii), underreporting of errors to the Intelligence Oversight Board (page xxxiii), and flawed NSL approval memos (page xli). A

forthcoming report may reveal additional problems with the use of so-called “exigent” NSLs (pages xxxiv, xxxvii; see March 2008 Report at 6).

In his March 2008 report on NSLs (at page 6), the Inspector General noted that “since issuance of our March 2007 report, the FBI and the Department have made significant progress in implementing the recommendations from that report and in adopting other corrective actions to address serious problems we identified in the use of national security letters. The FBI has also devoted significant energy, time, and resources toward ensuring that its field managers and agents understand the seriousness of the FBI’s shortcomings in its use of NSLs and their responsibility for correcting these deficiencies.”

In my current position, I am relying on the publicly-released versions of the Inspector General reports. Should I be confirmed, I will have access to far more detailed information on the current practices regarding NSLs, and may become aware of additional issues relevant to the analysis here.

- b. What is your understanding of the main conclusions of the Department of Justice Inspector General audit of national security letters?

Answer: See answer above.

- c. What is your understanding of the administrative reforms implemented by the FBI in response to that audit?

Answer: See answer above. Those reforms are described in detail in the Inspector General’s March 2008 report.

- d. What is your view on what issues should be addressed, and what evidence should be gathered, in regard to whether to place into law any administrative improvements, any other changes to improve the effectiveness or lawfulness of national security letters, or to enact further improvements in response to any judicial decisions about national security letters?

Answer: I believe that NSLs, like other investigative tools, should exist in a form that renders these tools both effective for investigation, protective of civil liberties, and subject to appropriate oversight. If confirmed, I look forward to understanding fully the FBI’s operational experience with NSLs and any oversight issues relating to NSLs. With this information, I will be in a better position to suggest changes and will both keep the

Committee informed of, and if a legislative approach appears appropriate seek the Committee's assistance in enacting, improvements to accomplish those ends.

- e. To the extent not addressed in response to (d), describe the main outline of the proposal for national security subpoenas that you presented to the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties in April 2008.

Answer: In my testimony, I summarized the proposal as follows:

I believe Congress should enact a single statute, providing for national security subpoenas, to replace all of the current NSL provisions. This subpoena statute should contain or satisfy the following 10 elements. It should:

- (1) streamline and simplify current law, which is unnecessarily and harmfully complex;
- (2) provide for subpoenas to be issued by attorneys designated by the Attorney General;
- (3) make subpoenas available to all Intelligence Community agencies, as long as the subpoena is issued by a designated attorney for the government as described in (2) above, and limited to obtaining the types of information described in (5) below, and also subject, as desired, to additional limits for particular agencies (*e.g.*, CIA);
- (4) allow production of any tangible thing that is subject to compelled production via grand jury subpoena;
- (5) be limited to acquiring certain specified foreign intelligence information and Secret Service protective information, subject to additional limits by analogy to 50 U.S.C. § 1861(b)(2)(A) if desired;
- (6) impose a nondisclosure obligation on recipients, with the usual exceptions, that expires 60 days after a written objection is received by the government, unless the government obtains an extension order from the Foreign Intelligence Surveillance Court (FISC) – an approach that should satisfy *Doe v. Gonzales*, 500 F. Supp. 2d 379 (SDNY 2007) [note: this decision was affirmed in part and reversed in part on appeal, *Doe v. Mukasey*, 549 F.3d 861 (2nd Cir. 2008), with results similar to those in my proposal];
- (7) permit motions to quash, and to enforce, subpoenas in the FISC, using the “burdensome or oppressive” standard applicable to grand jury subpoenas

under Fed. R. Crim. P. 17(c) and *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991);

- (8) provide the usual sort of prospective immunity for good-faith compliance;
- (9) require minimization procedures governing acquisition, retention and dissemination of information, and limits on the use of that information, along the lines of current 50 U.S.C. § 1861(g); and
- (10) adhere to the traditional oversight standard in requiring (and enabling) the Attorney General to keep the Congressional Intelligence and Judiciary Committees, as well as certain other Committees, “fully informed” on a semi-annual basis, and provide for three successive annual audits by the Justice Department’s Inspector General.

Although I advanced a detailed proposal in an effort to be helpful to Congress, I was careful to “stress the tentative nature of my testimony, which is in part the product of a relatively brief period of thought unaided by inside knowledge of the current operational and threat environment (I was first contacted about the possibility of testifying one week ago).” I went on to state that “[m]y primary purpose here is to raise issues and provide technical support, not to take a strong position on any particular question.”

- f. If confirmed, would you advocate that this proposal be made by the Administration and, if so, why?

Answer: I made the proposal as a private citizen, and as one without access to the current operational environment. If I were to be confirmed, I would not necessarily advocate that this proposal be made by the Administration (although I likewise would not rule it out). Any recommendation I would make would be advanced only after I had full access to operational information about the use or misuse of NSLs and extensive consultations with career personnel in DOJ and the FBI. In addition, if confirmed, my personal views (which were reflected in my testimony last year as a private citizen) would not necessarily determine the positions I would take, or recommend, in my capacity as Assistant Attorney General for National Security, at a time when I am representing the United States.

Priorities of the Attorney General

QUESTION 10:

Have you discussed with the Attorney General his specific expectations of you, if confirmed as Assistant Attorney General, and his expectations of the National Security Division as a whole? If so, please describe those expectations.

Answer: I have discussed with the Attorney General his specific expectations of me, and the National Security Division, and if confirmed I expect to have further discussions. Among the Attorney General's expectations are that the Division and I (if confirmed) will assist the Department in its highest priority, which is protecting national security and protecting the American people from terrorism. In particular, the Attorney General expects that the Division and I (if confirmed) will fulfill our functions as described in relevant statutes, regulations, and the U.S. Attorneys' Manual. For example, the Attorney General expects that I will, if confirmed, perform the following functions as described in 28 C.F.R. § 0.72:

- [E]nsure that all of the Department's national security activities are coordinated;
- Develop, enforce, and supervise the application of all federal criminal laws related to the national counterterrorism and counterespionage enforcement programs, except those specifically assigned to other Divisions;
- Administer the Foreign Intelligence Surveillance Act;
- Oversee the development, coordination, and implementation of Department policy, in conjunction with other components of the Department as appropriate, with regard to intelligence, counterintelligence, or national security matters;
- Provide legal assistance and advice, in coordination with the Office of Legal Counsel as appropriate, to Government agencies on matters of national security law and policy;
- Provide oversight of intelligence, counterintelligence, or national security matters by executive branch agencies to ensure conformity with applicable law, executive branch regulations, and Departmental objectives;
- Serve as the primary liaison to the Director of National Intelligence for the Department of Justice.

Evaluation of National Security Division

QUESTION 11:

On the basis of your participation on the Department of Justice Agency Review Team, as part of the President-elect Transition Team, as well as any other applicable observations, do you have preliminary observations on strengths or weaknesses of the National Security Division (NSD), including matters which you would like to study further, relating to organization, allocation of personnel, skills and training, or any other factors that you believe are relevant to a successful mission for the NSD? If so, please describe.

Answer: The Agency Review Team was divided into groups, and I led the group reviewing the National Security Division, the FBI, and another component. In that capacity, I interviewed personnel from the National Security Division and the FBI, reviewed unclassified documents, and had access to some limited classified information in certain areas. This experience was part of what led me to my opening statement at my confirmation hearing before the Senate Judiciary Committee, which identifies three procedural issues and three substantive issues on which I would expect to focus in the short run if confirmed. I understand that the Committee is already in possession of that statement; I am happy to provide additional copies upon request.

Guidelines under Executive Order 12333

QUESTION 12:

28 C.F.R. § 0.72(b)(1) provides that the Assistant Attorney General for National Security shall advise and assist the Attorney General in carrying out responsibilities under Executive Order 12333. For the following requirements of Executive Order 12333, as amended in July 2008, describe the principal matters to be addressed by each of the required Attorney General-approved guidelines or procedures, the main issues you believe need to be resolved in addressing them, and your understanding of the schedule and priorities for completing them (or indicate whether the existing named guidelines or procedures are deemed sufficient).

Answer: I appreciate the relevance and importance of this question, and of the information it seeks. In my current position as a nominee and an outsider, however, I do not believe I can meaningfully answer the question or provide the information sought. I look forward to addressing the implementation of Executive Order 12333 if confirmed.

- a. Guidelines under section 1.3(a)(2) for how information or intelligence is provided to, or accessed by, and used or shared by the Intelligence Community, except for information excluded by law, by the President, or by the Attorney General acting under presidential order in accordance with section 1.5(a).

Answer: Please see answer above.

- b. Procedures under section 1.3(b)(18) for implementing and monitoring responsiveness to the advisory tasking authority of the Director of National Intelligence for collection and analysis directed to departments and other U.S. entities that are not elements of the Intelligence Community.

Answer: Please see answer above.

- c. Procedures under section 1.6(g) governing production and dissemination of information or intelligence resulting from criminal drug intelligence activities abroad if the elements of the IC involved have intelligence responsibilities for foreign or domestic criminal drug production and trafficking.

Answer: Please see answer above.

- d. Regulations under section 1.7(g)(1) for collection, analysis, production and intelligence by intelligence elements of the FBI of foreign intelligence and counterintelligence to support national and departmental missions.

Answer: Please see answer above. FBI Guidelines are discussed in the answer to Question 13.

- e. Procedures under section 2.3 on the collection, retention, and dissemination of United States person information and on the dissemination of information derived from signals intelligence to enable an Intelligence Community element to determine where the information is relevant to its responsibilities.

Answer: Please see answer above.

- f. Procedures under section 2.4 on the use of intelligence collection techniques to ensure that the Intelligence Community uses the least intrusive techniques feasible within the U.S. or directed at U.S. persons abroad.

Answer: Please see answer above.

- g. Procedures under section 2.9 on undisclosed participation in any organization in the United States by anyone acting on behalf of an IC element.

Answer: Please see answer above.

Attorney General Guidelines for Domestic FBI Operations

QUESTION 13:

In September 2008, Attorney General Mukasey issued guidelines on the domestic operations of the Federal Bureau of Investigation. To implement the guidelines, the FBI developed and put into effect a Domestic Investigations and Operations Guide, referred to as the DIOG. In December, the FBI advised the Committee that it plans an extensive reevaluation of the DIOG one year from its issuance, including whether its protective provisions and limitations are adequate

- a. What is your understanding of the main decisions made by the Attorney General in the September 2008 guidelines for domestic FBI operations?

Answer: I believe the main decisions made by then-Attorney General Mukasey in the new FBI Guidelines can usefully be divided into three broad categories: structural, philosophical, and operational.

Structurally, the new Guidelines effect two notable changes. *First*, they combine formerly separate guidelines into a single document, and establish more uniform standards for FBI law enforcement and intelligence activities. Until the new Guidelines, national security investigations were governed by the National Security Investigations (NSI) Guidelines, and most criminal investigations were regulated by the General Crimes Guidelines, although agents could use either set of guidelines where they overlapped (e.g., in terrorism investigations). *Second*, the new Guidelines are entirely unclassified, although they refer to classified materials in some areas. By contrast, the 2003 NSI Guidelines were largely classified, and were released to the public only in redacted form.

Philosophically, the new Guidelines articulate three significant ideas. *First*, they explain that the FBI's overriding mission is to protect against terrorism, and that criminal prosecution is only one of several ways to achieve that protection. They emphasize that, as an intelligence agency, the FBI is "not limited to 'investigation' in a narrow sense, such as solving particular cases," but may also collect information to support "broader analytic and intelligence purposes." This is part of the FBI's continuing transformation into a security service. *Second*, the Guidelines note the FBI's authority and status as the lead federal agency in the fields of federal law enforcement, counterintelligence, and (within the United States) affirmative foreign intelligence. *Third* and finally, the Guidelines emphasize oversight from DOJ in a way not previously seen, specifically referring to National Security Reviews of FBI Headquarters and field offices conducted by the National Security Division. This may be part of an evolution of the working relationship between the National Security Division and the FBI, to include discrete legal services (e.g., preparing FISA applications or indictments), after-the-fact oversight (though National Security Reviews), and a real-time operational partnership.

Operationally, the new Guidelines continue to divide investigative activity into four main categories: assessments (formerly known as threat assessments); preliminary investigations; full investigations; and enterprise investigations (which existed solely under the General Crimes Guidelines, not the NSI Guidelines, but which could be used in terrorism investigations). The most significant changes concern assessments. Although the public portions of the NSI Guidelines did not specify all of the investigative measures permitted, they described threat assessments as involving “relatively non-intrusive techniques,” such as “obtaining publicly available information and checking government records.” Under the new Guidelines, assessments “require an authorized purpose but not any particular factual predication,” and may involve any of the following: review of publicly available information (including commercially available online resources); review of pre-existing records at DOJ or another federal, state, local, or foreign governmental agency; use of human sources; interviews (including pretextual interviews); physical observation and consensual monitoring; and the use of grand jury subpoenas (although NSLs remain unavailable). At least three of these techniques – tasking informants, conducting pretextual interviews, and physical surveillance – were not permitted in threat assessments under the 2003 NSI Guidelines.

- b. What is your understanding of the principal concerns raised by civil liberties groups and others about these Attorney General guidelines, such as concerns about pretext interviews and physical surveillance?

Answer: As I understand it, concerns have been focused on the use of assessments, particularly those that involve collection of information necessary to the evaluation of threats and vulnerabilities and to facilitate intelligence analysis and planning (referred to by the FBI as Type 3 and Type 4 assessments, respectively). In a letter sent to Chairman Rockefeller and Ranking Member Bond of this Committee on December 15, 2008, the FBI’s General Counsel acknowledged these concerns and identified ways in which they were and will be addressed. Concerns have also been raised about racial profiling. In her December 15 letter, the FBI’s General Counsel explained that “[w]e share the concern and have devoted considerable time and effort to educating our employees regarding how race and ethnicity can - and cannot - be used during Assessments. This is an issue that we expect to monitor closely to ensure compliance.”

- c. In what ways, and how well or not, do you believe that the Attorney General guidelines and the implementing FBI DIOG address those concerns?

Answer: I have not yet reviewed the DIOG in detail, but would expect to do so if confirmed, as explained in my opening statement to the Senate Judiciary Committee. See also the answer to part e of this question, which would inform my judgment about whether and how the Guidelines and the DIOG address concerns.

- d. What will be the role of the National Security Division in the planned FBI re-evaluation, as well as any evaluation by the Attorney General, of the September 2008 guidelines?

Answer: I expect the National Security Division, including its Office of Law and Policy, to participate significantly in the planned re-evaluation of the new Guidelines, subject to direction from the Attorney General.

- e. What standards should be applied in the re- evaluation and what empirical evidence should be gathered and analyzed as part of that review?

Answer: Among other things, I would want to learn how the Guidelines are understood, and function, at ground level. I would also want to hear the perspective of field agents about areas of difficulty or ambiguity, and any significant uses or misuses of the new Guidelines. I would want to know the results of the FBI's web-based and in-person training, the monitoring initiative devised by the FBI's Office of Integrity and Compliance, the results of any National Security Reviews undertaken by the National Security Division (through the Oversight Section of the Division's Office of Intelligence), reports made to the FBI's Corporate Policy Office, and additional input from Congress and the public.

- f. Please explain in more detail your statement at your Judiciary Committee nomination hearing concerning the guidelines that "in at least two ways, I think these new guidelines reflect positive developments; in other ways, however, they raise some questions that I would like to explore further."

Answer: In discussing positive developments, I was referring to some of the structural, philosophical, and operational changes described above, including the increase in simplicity and transparency of the new Guidelines, and the way they reflect and encourage the FBI's continuing transformation into a security service and what may be the continuing evolution of its working relationship with NSD personnel, particularly in operational matters. In noting questions, I was referring to the civil liberties concerns described above.

Oversight of Intelligence Activities

QUESTION 14:

28 C.F.R. § 0.72(17) provides that the Assistant Attorney General for National Security shall provide oversight of intelligence, counterintelligence, and national security matters by executive branch agencies to ensure conformity with applicable law, regulations, and departmental objectives and report to the Attorney General.

- a. What is your understanding of the National Security Division's oversight role concerning intelligence activities of the FBI?

Answer: My current understanding is that the National Security Division is responsible for overseeing the FBI's foreign intelligence, counterintelligence, and other national security activities to ensure compliance with the law and the protection of civil liberties. I know that NSD has a number of specific oversight responsibilities relating to the approval of investigations and operational techniques under the Attorney General Guidelines. NSD obviously exercises oversight through the FISA process and the various reviews mandated by the amended FISA statute. I understand that both FISA and the Guidelines embody an expectation that NSD will conduct robust oversight of FBI national security activities, and I am fully committed to maintaining NSD's role in this respect. I look forward to working with this Committee in enhancing NSD's ability to conduct effective oversight of FBI operations.

- b. What is your understanding of its oversight role concerning intelligence activities, and related prosecutorial activities, undertaken in the offices of United States Attorneys?

Answer: My current understanding is that NSD's oversight role concerning national security prosecutions and related activities in the U.S. Attorney's offices is exercised in two ways. First, there are a number of formal coordination requirements established by the Attorney General that give NSD official approval authority over the use of certain statutes relevant to national security prosecutions. Second, on a less formal level, NSD coordinates the efforts of the U.S. Attorneys to shape consistent approaches to national security threats. This coordination effort involves primarily the interaction that NSD's Counterespionage and Counterterrorism Sections have with the U.S. Attorney's Offices, as well as the support and training that NSD provides to Assistant U.S. Attorneys and through the Anti-Terrorism Advisory Councils.

- c. What is your understanding of its oversight role concerning intelligence activities of IC elements outside of the Department of Justice?

Answer: I understand that NSD exercises some oversight of IC elements outside the Department of Justice by virtue of FISA statute. Activities of IC elements that fall within FISA are necessarily reviewed by NSD as part of the process of obtaining FISA authority. In addition, I understand that NSD serves as the Attorney General's principal liaison to the Office of the Director of National Intelligence, and thus reviews any ODNI policy that requires consultation with, or the approval of, the Attorney General pursuant to Executive Order 12333 or other legal authorities. As a nominee, and an outsider, I do not have direct experience of how these processes function in practice.

- d. Are there improvements, in terms of resources, methodology, and objectives that you believe should be considered?

Answer: At present, I do not have access to all the information on how NSD's oversight responsibilities are implemented and on issues that may be arising from the oversight process. If confirmed, I will make it a priority to review all of NSD's oversight activities and will then be in a better position to recommend improvements.

Counterterrorism Prosecutions

QUESTION 15:

28 C.F.R. § 0.72(a)(8) assigns to the Assistant Attorney General for National Security the responsibility to prosecute and coordinate prosecutions and investigations targeting individuals and organizations involved in terrorist acts at home or against U.S. persons or interests abroad, or that assist in the financing of or providing support to those acts.

- a. Describe the personnel resources, both attorneys and others, within the National Security Division that are devoted to the prosecution of terrorism cases.
- b. **Answer:** As I understand it, the Counterterrorism Section (CTS) within NSD currently has 51 attorneys and 18 support staff.
- c. Describe the role that the Division has played since its inception in terrorism prosecutions in United States district courts and on appeal to the U.S. courts of appeals.

Answer: In my current position as a nominee and an outsider, I do not believe I can provide the specific information sought by this question. As I understand it, based on publicly available information, the Counterterrorism Section, working in conjunction with the United States Attorneys' Offices, is responsible for cases involving domestic and international terrorism, including terrorist financing. Its prosecutions fall under a variety of statutes, including material support of terrorism, weapons of mass destruction crimes, hostage-taking, conspiracy within the United States to murder, kidnap, or maim persons or to damage property overseas, and murder of United States nationals abroad, to name just a few offenses.

The cases handled by the Counterterrorism Section often involve challenging issues including the scope of U.S. jurisdiction over overseas offenses, admissibility of statements obtained by agents of other governments, the applicability of the Classified Information Procedures Act, the application of the Foreign Intelligence Surveillance Act to admission of certain evidence, issues of statutory interpretation, and constitutional challenges.

- d. Describe the role that the Division has played with respect to decisions whether to prosecute before U.S. military commissions, and in matters for which prosecutions had occurred or had begun.

Answer: As a nominee, and an outsider, I do not exactly know what role the Division has played other than that which has been made publicly available. As I understand it, shortly before the creation of the National Security Division, President Bush announced that a number of high value detainees had been transferred to Guantanamo Bay Naval Base and would be considered for prosecution by military commission. The first Assistant Attorney General for National Security designated a group of approximately twelve experienced prosecutors who, along with a large group of FBI agents and analysts, worked alongside the Department of Defense in assembling the evidence and putting together certain military commission cases. It is also my understanding that pursuant to President Obama's January 22, 2009 Executive Order, military commission proceedings have been halted.

- e. Describe the role that the Division is expected to play in the implementation of the President's executive order on Guantanamo, including prosecutions that occur as a result of that executive order.

Answer: As a nominee, and an outsider, I do not exactly know what role the Division will play, but I do expect that it will be significantly involved in implementation of the executive order, including prosecutions, and as I noted in my opening statement to the Senate Judiciary Committee, the Division's senior career deputy has been named as the Executive Director of the detainee review.

OLC Opinions on Matters within Responsibility of the National Security Division

QUESTION 16:

With respect to opinions of the Office of Legal Counsel on matters within or related to the responsibilities of the National Security Division, or if preceding the establishment of the Division were related to such matters as electronic surveillance, physical searches, or other methods of national security investigations that would now be of interest to the Division, how should the Assistant Attorney General for National Security respond if requested by the Committee to undertake the following in conjunction with the Office of Legal Counsel:

- a. Provide to the Committee a comprehensive list and description of OLC opinions on these subjects for opinions that remain precedent of the Office of Legal Counsel or are of significant historical value in understanding the development of the Government's legal theories in support of the matters addressed in the opinions.
- b. Provide to the Committee copies of those opinions, for handling in accordance with their classification, which are identified by or on behalf of the Committee as useful to it in the performance of its oversight responsibilities.
- c. Promptly update the list and description as new opinions are issued and provide such new opinions to the Committee on request.

Answer: As a nominee, and an outsider, I have no access to the requested documents and information about the current practices of OLC. I am aware that the Attorney General is committed to greater transparency in general. I share the Attorney General's belief that transparency and cooperation with Congress are important. In general, I understand that knowing the legal advice guiding the actions of the federal government officers on national security matters is important to the Committee's oversight function. I understand that Department has begun a review of many of the opinions in this area already and that OLC has already released a number of heretofore undisclosed opinions bearing on national security and Presidential power. If confirmed, I will work closely with the AAG for OLC to ensure that the Committee receives appropriate, timely information regarding the issuance of new OLC opinions in this area.

Status of Litigation on the President's Terrorist Surveillance Program and the FISA Amendments Act of 2008

QUESTION 17:

For pending litigation on (1) the constitutionality and implementation of the liability protection provisions of Title VIII of the Foreign Intelligence Surveillance Act of 1978 (as added by Title II of the FISA Amendments Act of 2008), now pending in the Northern District of California in *In Re: National Security Agency Telecommunications Records Litigation*, MDL No. 06-1791-VRW; and (2) alleged violations of the Constitution and federal laws by the National Security Agency and named U.S. Government officials arising from the President's Terrorist Surveillance Program, now pending in the Northern District of California in *Jewel, et al. v. National Security Agency, et al.* No. 08-cv-4373-VRW, describe the following:

- a. Your understanding of the main issues in each of these cases.
- b. The position of the U.S. Government on those issues and whether and what the Department of Justice has stated, in filings after the change of Administration concerning the position of the United States.
- c. Whether the position of the United States is not yet resolved.
- d. If the position of the United States is not yet resolved, the role of the Assistant Attorney General for National Security in determining what the position of the United States should be.
- e. And your views on the legal principles that should be brought to bear in determining what the position of the United States should be.

Answer: As a nominee, and an outsider, my knowledge and understanding of ongoing litigation, and the development and assertion of government positions, is limited to that set forth in public information regarding that litigation. I do not have non-public knowledge of information regarding whether the government intends to change its position in the cases mentioned above. If I am confirmed, I will coordinate with the Civil Division to ensure that the National Security Division's views are considered in the development and assertion of government positions. I believe the position of the United States in any litigation should be determined the applicable law and, where the law does not determine a specific position, the best interest of the United States.

Professional Experience

QUESTION 18:

For each of the following, describe specifically how your experiences will enable you to serve effectively as the Assistant Attorney General for National Security. Include within each response a description of issues relating to the National Security Division that you can identify based on those experiences.

- a. President-Elect Transition Team, Member of the Department of Justice Agency Review Team

Answer: As described above, the Agency Review Team was divided into groups, and I led the group reviewing the National Security Division, the FBI, and another component. In that capacity, I interviewed personnel from the National Security Division and the FBI, reviewed unclassified documents, and had access to some limited classified information in certain areas. This experience was part of what led me to my opening statement before the Senate Judiciary Committee, which identifies three procedural issues and three substantive issues on which I would expect to focus in the short run if confirmed. I understand that the Committee is already in possession of that statement; I am happy to provide additional copies upon request.

- b. Co-Author, *National Security Investigations and Prosecutions*, and other public commentary on national security authorities

Answer: My treatise, and my other scholarly work, have given me an appreciation and understanding of the law that governs national security investigations and other national security activity undertaken by the National Security Division and the FBI.

- c. Senior Vice President and Deputy General Counsel, Chief Ethics and Compliance Officer, and formerly Vice President, Legal Department, Time Warner, Inc.

Answer: At Time Warner, I further developed my management, administrative, and budget-related skills. I also learned more about the exercise of governmental power, as I worked on the SEC and DOJ investigations of Time Warner's AOL Division.

- d. Associate Deputy Attorney General, Department of Justice

Answer: As Associate Deputy Attorney General, my responsibilities included (1) developing and implementing national security law and policy, conducting oversight of the Intelligence Community, and representing the Department of Justice in the National Security Council and other inter-agency settings; (2) briefing and testifying before

Congress, in open and closed sessions, to support proposed legislation and respond to oversight requests; (3) supervising national security wiretapping and related investigatory matters, including use of the Foreign Intelligence Surveillance Act of 1978 (FISA); and (4) devising and implementing a national security curriculum and training program for FBI agents and Department attorneys who work on foreign intelligence matters. All of these experiences should enable me, if confirmed, to serve effectively as the Assistant Attorney General for National Security.

- e. Attorney, Criminal Division (Appellate Section), Department of Justice

Answer: My work as a trial and appellate prosecutor helped me learn about litigation and criminal law, including domestic terrorism (through the prosecution of the Montana Freeman). It also helped me understand the work of the U.S. Attorneys' Offices. This experience would be relevant to my supervision of the Counterterrorism and Counterespionage Sections in the National Security Division, and my approval of indictments and other actions in national security cases under Title 9-90.020 of the U.S. Attorney's Manual and related authorities, if I were confirmed.

QUESTION 19:

In your testimony before the Senate Judiciary Committee, you testified that the recent FISA Court of Review case “stands for the proposition that the PAA is constitutional.” However, the court did not consider whether the PAA or any of its provisions were constitutional on their face and did not uphold the constitutionality of its application in all cases, but rather only as it was applied to one company. As the court stated, it “may not speculate about the validity of the law as it might be applied in different ways or on different facts.” Do you agree that the court upheld the constitutionality of the PAA only as applied, and only as applied to one company?

Answer: Yes. The Court of Review expressly states that where “a statute has been implemented in a defined context, an inquiring court may only consider the statute’s constitutionality in that context; the court may not speculate about the validity of the law as it might be applied in different ways or on different facts.” Opinion at page 12. The Court determined that it would “deem petitioner’s challenge an as-applied challenge and limit our analysis accordingly.” *Id.* (Other aspects of the Court’s analysis – e.g., its discussion of Fourth Amendment “special needs” doctrine – appear to be more general.) At the end of its opinion, the Court of Review refers to its “decision to uphold the PAA as applied in this case.” *Id.* at 29 (emphasis added).

QUESTION 20:

In your testimony before the Senate Judiciary Committee, you testified that “much of [the FISA Court of Review’s] analysis would be applicable to the FISA Amendments Act.” However, the PAA included a “clearly erroneous” standard for review that is not included in the FAA. Given that the court placed the burden of proof on the petitioner to prove “actual harm, any egregious

risk of error, or any broad potential for abuse” and that it relied on the good faith of the government, do you believe that this change in the standard of review could alter how the court would review the facts of a case involving the FAA and could result in different legal analysis?

Answer: Yes, various differences between the two statutes, or the facts of the situations in which they are applied (see answer above), could result in different legal analysis.

QUESTION 21:

In your testimony before the Senate Judiciary Committee, you testified that the recent FISA Court of Review case was a “well written opinion.” However, the process was not fully adversarial, in that the petitioner did not have access to all relevant information. Do you agree that the court’s analysis could have been altered had the petitioner had access to all relevant information, including problems related to the implementation of the PAA, and been able to bring it before the court?

Answer: I do not know precisely to what extent the petitioner had access to all relevant information, or whether and to what extent such access could have altered the Court of Review’s analysis (assuming the Court itself had access to all relevant information), but in my testimony I referred to the redacted portions of the Court of Review’s opinion, noted that “I would want to see those and understand more fully what was going on there,” and stated that “[t]hose are some of the concerns and caveats that I have about the opinion.”

QUESTION 22:

In your testimony before the Senate Judiciary Committee, you testified that, under the third category of the Justice Jackson analysis, “there are situations where the president may disregard the statute.” At his confirmation hearing, Attorney General Holder gave two examples of statutes that the president had the constitutional authority to disregard, both of which were “obviously unconstitutional”: a law making the Secretary of Defense Commander-in-Chief and a law removing women’s right to vote.

Do you agree that constitutional authority for the president to disregard a statute almost always will be based, as Attorney Holder indicated, on the statute being outside of Congress’s constitutional authority?

Answer: I agree with the Attorney General’s testimony.

Attorney General Holder testified that he did not see in the FISA statute anything to indicate that the president can disregard the statute. Do you agree?

Answer: Yes. I do not see anything in the FISA statute to indicate this.

If you agree with these propositions, please explain your testimony that you “could not evaluate the constitutionality of the [Terrorist Surveillance Program] without the facts. I think it’s a fact intensive question.”

Answer: I believe that these questions can turn on the facts, and I believe it is important to understand the facts before rendering a final judgment on such a grave and important matter of constitutional law. That does not mean, however, that the President’s authority to disregard a federal statute is broad. On the contrary, as I testified before the Senate Judiciary Committee, as far as I know the Supreme Court has never upheld the exercise of the President’s power as Commander-in-Chief to violate a federal statute. It would be a grave and extraordinary event for the President to disregard a duly enacted statute. By far the better approach, I believe, would be for the President to work with Congress, in an effort to place himself within the first, rather than the third, of the three categories identified in Justice Jackson’s famous concurring opinion in the Steel Seizure case. This is where the President is strongest.

QUESTION 23:

Attorney General Holder was asked whether the president has “the authority, acting as the commander in chief, to authorize warrantless searches of Americans’ homes and wiretaps of their conversations in violation of criminal and foreign intelligence statutes.” He replied “it’s difficult to imagine a set of circumstances, given the hypothetical you used and given the statutes that you referenced, that the president would be acting in an appropriate way given the Jackson construct that I see as a good one.” Do you agree?

Answer: Yes.