Additional Prehearing Questions
For
John Carlin
Upon his nomination to be
Assistant Attorney General for National Security
Department of Justice

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 (DNI) but to the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities. Section 503 establishes a similar requirement concerning covert actions. Sections 502(a)(2) and 503(b)(2) provide that these officials shall furnish to the congressional intelligence committees any information or material concerning intelligence activities or covert actions, including the legal basis for them, that is requested by either of the committees in order to carry out its legislative or oversight responsibilities. 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 (FBI) to keep the congressional intelligence committees, including all their Members, fully and currently informed?

Answer: Section 502 of the National Security Act of 1947 imposes an obligation on the Director of National Intelligence and the heads of all agencies involved in intelligence activities to keep the congressional intelligence committees "fully and currently informed of all intelligence activities . . . including any significant anticipated intelligence activity and any significant intelligence failure." The Act also provides that this responsibility be exercised "to the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters." These obligations apply to intelligence activities undertaken by the FBI and DEA components that are part of the Intelligence Community.

b. To what components of the Department of Justice, including the FBI, does this obligation apply?

Answer: The FBI and DEA have obligations to keep the congressional intelligence committees fully and currently informed about their intelligence activities, as set forth in Section 502 of the National Security Act. These pertain to certain activities of the FBI's National Security Branch and the Drug Enforcement Administration (DEA)'s

Office of National Security Intelligence, both of which are Intelligence Community elements.

c. What is your understanding of the obligation of the Attorney General to provide to the congressional intelligence committees any information or material concerning the legal basis for intelligence activities, including those conducted by elements of the Intelligence Community outside the Department of Justice, which either committee requests in order to carry out its legislative or oversight responsibilities?

Answer: The congressional intelligence committees in particular have a unique and important role in authorizing and overseeing the Executive Branch's intelligence activities. To facilitate that role, it is important for the Committees to receive timely information concerning the legal basis for intelligence activities or covert actions, as Sections 502 and 503 provide. The intelligence agencies themselves are required to provide information or material relating to their own intelligence activities to the committees as set forth in the National Security Act. The Attorney General, like all department heads, has responsibility for ensuring that Intelligence Community elements within the Department fulfill this obligation with respect to their activities.

d. Do you agree that the Department of Justice and FBI should fully notify and brief the congressional intelligence committees on potential counterterrorism and counterintelligence threats to the United States, as well as FBI intelligence-related activities to thwart such threats? The committees' legislative and oversight responsibilities include assessing the utility and effectiveness of counterterrorism and counterintelligence authorities, as well as the legality of those authorities as applied. Do you agree that notifications and briefings provided by the Department and FBI should include detailed information on the use of these authorities in ongoing as well as completed investigations?

Answer: I agree that the congressional intelligence committees should be briefed by the appropriate intelligence agencies on significant counterterrorism and counterintelligence threats, as well as intelligence activities to thwart such threats. These intelligence briefings must be conducted in a way that keeps the intelligence committee fully informed as required, consistent with law enforcement and intelligence responsibilities.

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 DNI for the Department of Justice.

a. What is your understanding of how this responsibility has been performed? Describe the principal ways in which the AAG/NS should carry out this responsibility.

Answer: As the Department's primary liaison to the DNI, the AAG and, by extension, NSD as a whole work extremely closely with the Office of the Director of National Intelligence (ODNI) and the Office of General Counsel for ODNI. This responsibility is best carried out through regular consultations and coordination with ODNI and its Office of General Counsel, thereby facilitating protection of national security consistent with the law. I and many others within NSD meet regularly with ODNI personnel on issues related to the Foreign Intelligence Surveillance Act (FISA) and NSD's responsibility to represent the Executive Branch before the Foreign Intelligence Surveillance Court (FISC), counterintelligence matters, the handling of United States person information in multiple contexts, the Department's work with Intelligence Community elements to develop and implement guidelines for intelligence activities conducted under Executive Order 12333, declassification and transparency related matters, and numerous operational, legal, and policy issues that arise in the course of intelligence investigations and operations.

b. Have you discussed with the DNI, and with personnel in the Office of the Director of National Intelligence (ODNI), your respective understandings of that responsibility? If so, please describe.

Answer: Yes. As Acting AAG for National Security, I communicate regularly with the Director of National Intelligence and the General Counsel of ODNI. Through those conversations, we have shared our understanding of issues of priority to the Intelligence Community, and I have gained a greater understanding of how NSD can best carry out its responsibility to facilitate protection of national security consistent with the law, especially as we represent the Executive Branch before the FISC and provide support to the Intelligence Community.

QUESTION 3: In her May 2011 responses to Committee questions, Lisa Monaco, then nominee to be AAG/NS, stated that, "[t]he AAG regularly consults with the ODNI and with the Office of the General Counsel."

a. What is the role of the National Security Division (NSD) in ensuring that the Office of Legal Counsel (OLC) assesses the legality of U.S. intelligence activities? What is your view of when an intelligence activity should be submitted to the OLC for review?

Answer: The decision to submit intelligence activities for legal review by OLC is typically made by the Intelligence Community component that engages in the activity, based on all the facts and circumstances. OLC may, in certain matters, consult with NSD in connection with such referrals. In addition, NSD provides legal assistance and advice, in coordination with OLC as appropriate, to Government agencies on matters of national security law and policy. *See* 28 C.F.R. §0.72(a)(5).

b. What is the role of the NSD in ensuring that the OLC has accurate, complete and current information on intelligence activities it is reviewing?

Answer: The principal responsibility for ensuring that OLC has accurate, complete, and current information concerning intelligence activities that it is reviewing lies with the Intelligence Community component that engages in the activity.

c. What is the role of the NSD in ensuring that U.S. intelligence activities are conducted in compliance with the opinions and memoranda of the OLC?

Answer: The principal responsibility for ensuring that intelligence activities are conducted in compliance with the opinions and memoranda of the OLC, lies with the Intelligence Community component that engages in the activity and has received the OLC advice.

Priorities of the National Security Division

QUESTION 4: Have you discussed with the Attorney General his specific expectations of you, if confirmed as AAG/NS, and his expectations of the NSD as a whole? If so, please describe those expectations.

Answer: Yes. In connection with my selection as Acting AAG for National Security, and through my ongoing work in that capacity, I have discussed with the Attorney General his expectations for how we must accomplish the Department's top priority of protecting the country against national security threats. I understand that the Attorney General expects NSD to lead the Department's coordinated approach to national security matters and provide a single focal point within the Department for its national security functions. If I am fortunate enough to be confirmed, I expect to continue consulting with the Attorney General regularly to ensure that the Division is fulfilling its mission to address the Department's top priority.

QUESTION 5: Based on your experience in the NSD, please provide any observations or recommendations related to the strengths or weaknesses of the NSD, including with regard to its organization, responsibilities, personnel, allocation of resources, and any other matters that you believe are relevant to strengthening the NSD.

Answer: Based on my experience at the Department – including at the FBI – and my work with previous Assistant Attorneys General for National Security, I believe NSD has successfully implemented the goals of the legislation guiding its creation. Today, NSD leads the Department's efforts to centrally manage counterterrorism, counterintelligence, and national security cyber prosecutions; foreign intelligence surveillance; and coordination of policy and operations involving national security issues. NSD has established an oversight program and is continuing to develop training for the Intelligence Community elements to enable them to maintain their operational effectiveness in a manner that is consistent with applicable laws. The previous Assistant Attorneys General established and developed a structure that realized the key goals of NSD's creation – to ensure greater coordination and unity of purpose between prosecutors and law enforcement agencies, on the one hand, and intelligence attorneys and the Intelligence Community, on the other, and to focus all of the Department's national security functions under one roof. Based on my experience at DOJ both before and after the creation of

NSD, I believe the general structure and focus of the Division are sound.
If confirmed, it would be my priority to ensure the Division is able to nimbly anticipate and adapt to evolving threats to the national security, including emerging cyber threats, along with a range of new and changing terrorism threats. To that end, I plan to continually assess the organization, responsibilities, personnel, and allocation of resources within the Division; learn lessons where applicable from our partners in the Intelligence Community; and look for new ways to continue strengthening NSD, building upon the solid foundation laid by previous Assistant Attorneys General.

Oversight of Intelligence Activities

QUESTION 6: 28 C.P.R.§ 0.72(17) provides that the AAG/NS 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. In your responses to the Committee's questionnaire, you wrote that "[t]he AAG assists the Attorney General and the Deputy Attorney General in ensuring that intelligence matters are carried out consistent with the rule of law," and that, "[t]he AAG should ensure that the Division is a resource for United States Attorneys, the FBI, and the rest of the Intelligence Community, in order to provide advice, guidance and expertise in carrying out their national security operations ranging from intelligence investigations and operations to prosecutions."

a. What is your understanding of the NSD's oversight role, including the manner in which it has been exercised, concerning intelligence activities of the FBI?

Answer: NSD performs oversight of certain activities through the Oversight Section of its Office of Intelligence, which ensures that the FISC and Congress are informed of identified instances of FISA-related non-compliance. In addition to oversight related to its role as government counsel before the FISC, NSD also conducts other oversight functions in its review of investigative activities of the FBI, including:

- Review of certain investigative activities under the Attorney General Guidelines;
- Implementation and compliance reviews of FISA minimization procedures;
- National Security Reviews conducted with lawyers from FBI's Office of General Counsel to review national security investigations conducted by FBI Field Offices, including review of the use of National Security Letters by the FBI;
- Review of the accuracy of FISA applications;
- Training at FBI field offices throughout the year to ensure FBI personnel are equipped with the knowledge to comply with legal authorities applicable to FBI national security investigations and FISA court orders; and
- Review of certain undercover operations regarding national security.

b. What is your understanding of the NSD's oversight role, including the manner in which it has been exercised, concerning intelligence activities, and related prosecutorial activities, undertaken in the offices of United States Attorneys?

Answer: NSD is responsible for ensuring that national security activities conducted by United States Attorney's Offices are coordinated as part of a national program. To fulfill that responsibility, NSD supervises the application of most federal criminal laws related to counterterrorism and counterespionage. Through its authority to approve the use of certain statutes in national security prosecutions, NSD seeks to ensure a coordinated and consistent approach in combating national security threats. NSD also ensures that the Department's national security activities are coordinated with other members of the Executive Branch's national security apparatus.

NSD utilizes the Anti-Terrorism Advisory Councils (ATACs) in each United States Attorney's Office as a mechanism for coordination between NSD's counterterrorism and counterintelligence prosecutors and counterespionage prosecutors in the field. The ATAC program facilitates a process of information sharing and coordination that serves as the focal point for the Department's counterterrorism and counterintelligence national security initiatives. Similarly, NSD has developed a new National Security Cyber Specialists (NSCS) Network, consisting of personnel from NSD, DOJ's Criminal Division, and at least one individual from each United States Attorney's Office, to facilitate coordination of action on cyber threats to the national security.

NSD also provides national security-related support and training to United States Attorneys' Offices and works with the Executive Office of United States Attorneys (EOUSA) to ensure a robust mechanism for exchanges of information, ideas, and resources with the United States Attorneys' community and Main Justice.

If confirmed, my goal would be to continue to advance the partnership between United States Attorneys' Offices and NSD in pursuing the Department's top priority of combating terrorism and protecting the American people, while ensuring prosecutions are carried out in a manner consistent with Intelligence Community equities.

c. What is your understanding of the NSD's oversight role, including the manner in which it has been exercised, concerning the activities of other components of the Department of Justice?

Answer: NSD coordinates closely with the Civil and Criminal Divisions, as well as others, when their efforts have national security implications.

d. What is your understanding of the NSD's oversight role, including the manner in which it has been exercised, concerning intelligence activities of Intelligence Community elements, and other U.S. government departments and agencies, outside of the Department of Justice? Please address, specifically:

1. NSA, with regard to activities conducted under the Foreign Intelligence Surveillance Act (FISA) and activities conducted under other authorities, including Executive Order 12333;

   Answer: In its role as administrator of FISA and as the government's representative before the FISC, NSD oversees all electronic surveillance and other activities conducted under FISA – including the application of minimization procedures – and files all applications for orders from the FISC, including on behalf of NSA. NSD also works closely with NSA and ODNI to ensure that all FISA authorities are carried out consistent with applicable law.

   NSD does not oversee NSA activities conducted under Executive Order 12333. However, NSD is involved in developing the Attorney General Guidelines required under Executive Order 12333, which govern the collection, retention, and dissemination of information concerning U.S. persons by Intelligence Community agencies, and also provides guidance on questions as they arise concerning intelligence activities conducted under Executive Order 12333. In addition, certain activities conducted under Executive Order 12333 or the Guidelines require the Attorney General's approval, and NSD is involved in requests for those approvals.

2. Cyber operations, conducted by NSA under Title 50, Cyber Command under Title 10, and other U.S. intelligence, law enforcement and military entities;

   Answer: NSD does not have statutory oversight authority over cyber operations conducted by NSA or Cyber Command. However, NSD, along with other DOJ components, participates in an interagency process whereby some cyber operations are subject to legal and policy discussions, as appropriate in light of established authorities and precedents.

3. CIA, with regard to both foreign intelligence collection and covert action operations;

   Answer: See answer to 6(d)(1) above regarding NSA, which applies equally to CIA to the extent it engages in relevant activities. Also, depending on the operation at issue, regardless of the authority under which it may be conducted, NSD could be involved in any legal or policy discussions involving DOJ.

4. Department of Defense, with regard to both intelligence collection and military operations conducted outside of declared war zones; and

Answer: See answer to 6(d)(1) above answer regarding NSA, which applies equally to the Department of Defense (DoD) to the extent it engages in relevant activities. Also, depending on the operation at issue, regardless of the authority under which it may be conducted, NSD could be involved in any legal or policy discussions involving DOJ.

5. Any other U.S. intelligence or law enforcement entity, particularly those whose activities involve collection, retention and dissemination of U.S. person information.

   Answer: See answer to 6(d)(1) above answer regarding NSA, to the extent another agency engages in relevant activities. In addition, depending on the operation at issue, regardless of the authority under which it may be conducted, NSD could be involved in any legal or policy discussions involving DOJ.

d. Are there improvements, in terms of resources, scope, methodology, and objectives, in the conduct of this oversight that you believe should be considered?

   Answer: If I am confirmed, one of my top priorities will be to continue reviewing NSD's current oversight activities – including the resources and methods currently devoted to those efforts – in order to evaluate whether any changes or adjustments should be made to those efforts, in light of current priorities.

e. What are the most significant lessons that have been learned as a result of NSD oversight of intelligence activities?

   Answer: Based on my experience in the Department, including at the FBI, I believe significant lessons have been learned by those entities subject to NSD's oversight. For instance, in the wake of the Inspector General's report on the use of National Security Letters, the FBI and NSD put into place a series of reforms and compliance mechanisms to ensure that this vital national security tool is used with appropriate predication and documentation, that there are processes and procedures in place to minimize human error, and that there is a robust program of review after-the-fact to monitor compliance and to identify and correct, expeditiously, instances of noncompliance.

Representations to the U.S. Courts and the Use of Evidence Collected Pursuant to FISA

QUESTION 7: What responsibility does the NSD have with regard to ensuring that representations made to the U.S. courts by elements of the Department of Justice and by elements of the U.S. Intelligence Community with regard to intelligence activities and other classified matters are accurate and complete? What responsibility does the NSD have to correct any inaccurate or incomplete representations? Please describe how the NSD fulfills this responsibility.

Answer: NSD has the responsibility to ensure that the Department's representations in court are accurate, and to do its utmost to ensure that the same is true of representations made by the Intelligence Community in matters handled by NSD. To fulfill this responsibility, NSD attorneys must work diligently to understand the facts of intelligence activities and other national security-related matters that may be at issue in litigation or other matters for which they are responsible. Our lawyers are officers of the court, and with that role comes the responsibility to ensure that their representations are accurate—and, if any mistakes are made, that they are corrected promptly.

QUESTION 8: In October 2013, federal prosecutors informed a criminal defendant that they intended to offer into evidence "information obtained or derived from" intelligence collected pursuant to Section 702 of FISA. In November 2013, the Attorney General informed the *Washington Post* that "[w]e will be examining cases that are in a variety of stages, and we will be, where appropriate, providing defendants with information that they should have so they can make their own determinations about how they want to react to it."

a. Please describe your understanding of the scope of the Department's new policy, including whether it applies to FISA authorities beyond Section 702, and how the Department defines information "obtained or derived from" collection under FISA authorities.

   Answer: My understanding is that DOJ's practice has always been to provide notice to aggrieved parties when the government intends to use at trial evidence that it understands to be obtained or derived from FISA surveillance. DOJ recently reviewed the particular question of whether and under what circumstances information obtained through surveillance under Title I of FISA or physical search under Title III of FISA could also be considered derived from surveillance under Title VII of FISA (the FISA Amendments Act). The Department has concluded that the term "obtained or derived from" incorporates legal principles similar to those applied under the Fourth Amendment's "fruit of the poisonous tree" doctrine and Title III of the Wiretap Act. The Department has therefore determined that, consistent with practice under the Wiretap Act, information obtained or derived from Title I FISA collection may, in particular cases, also be derived from prior Title VII FISA collection, such that notice concerning both Title I and Title VII should be given in appropriate cases with respect to the same information.

   The Department will continue to comply with its legal obligations to notify aggrieved persons of the use of information obtained or derived from an acquisition under the applicable provisions of FISA in judicial or administrative proceedings against such persons.

b. What role has the NSD played in the review described by the Attorney General? Please provide an update on the status of the review.

Answer: The Department has publicly stated that it is conducting a review of cases in a variety of stages, and NSD has played an active part in that review. The process associated with that review is still ongoing.

The Foreign Intelligence Surveillance Act and the Findings and Recommendations of the President's Review Group on Intelligence and Communications Technologies

QUESTION 9: What is your view of the December 12, 2013, report of the President's Review Group on Intelligence and Communications Technologies (the Review Group)? Are there particular principles, findings of fact or analyses of law included in the report that you believe should be highlighted, refuted or clarified?

Answer: The Review Group Report, which set out 46 significant recommendations, is one important contribution to the debate over how we can best protect both national security and privacy when conducting intelligence collection activities. The Administration is working to implement the directives announced by the President in his January 17 speech, which are related to many of the group's recommendations.

QUESTION 10: What is your view of the specific recommendations made by the Review Group? Please address the Review Group's recommendations related to Section 215 of the PATRIOT Act (Recommendations 1, 5), National Security Letters (Recommendations 2, 3, 7, 8, 9, 10), bulk collection generally (Recommendations 4, 6, 35), transparency (Recommendations 7, 10, 11), non-disclosure orders (Recommendations 8, 9), Section 702 of the Foreign Intelligence Surveillance Act (FISA) (Recommendation 12), surveillance and privacy generally (Recommendation 13, 14, 26, 27, 28, 36), emergency authorities for NSA (Recommendation 15), and cybersecurity measures, to the extent they relate to legal authorities (Recommendation 30, 31, 33, 34).

Answer: The 28 recommendations of the Review Group to which this question refers raise a number of difficult and complex issues. As the President announced in his January 17 speech, the Administration plans to end the 215 program as it currently exists, while working on alternatives that will preserve the valuable capabilities it provides. In addition, to implement President's directives, the Administration is currently working to: ensure that nondisclosure for National Security Letters does not last indefinitely; increase transparency through the declassification of FISC opinions; allow private companies to disclose more information than ever before about the orders they receive; and look for opportunities to revise our procedures regarding the government's ability to retain, search, and use in criminal cases U.S. person information incidentally collected when targeting non-U.S. persons overseas under Section 702. If confirmed, I will continue working on all of these efforts, which aim to, as the President said in January, "protect ourselves and sustain our leadership in the world, while upholding the civil liberties and privacy protections that our ideals and our Constitution require."

QUESTION 11: 28 C.F.R. § 0.72(6) provides that the Assistant Attorney General for National Security shall administer the FISA. Based on your experiences within the NSD,

what improvements, if any, would you make to this administration, in terms of policies, resources, technology and record keeping, and relations with both the FISA Court and elements of the Intelligence Community?

Answer: In my time at NSD, I have found extremely valuable the increasingly close consultation between lawyers at NSD and lawyers and operators at NSA, ODNI, FBI, and elsewhere. Our regularized, frequent interactions have helped to facilitate compliance with the Constitution, FISA, orders of the FISC, and other applicable sources of law. If I am fortunate enough to be confirmed, I will look for additional ways to ensure that such consultation continues and increases. NSD also has an interactive relationship with the FISC. We work diligently to ensure that our representation before the Court is of the highest quality and provides the Court with accurate and timely information on the programs it authorizes. Of course, as the programs change, and as the need for oversight increases, I will, if confirmed, continue to monitor NSD's policies, resources, technology, and record keeping, as they pertain to the FISC and elements of the Intelligence Community, to identify any opportunities to strengthen these areas in the coming years.

QUESTION 12: You testified to the Senate Judiciary Committee that, "in terms of the Foreign Intelligence Surveillance Court, there are certain cases that involve significant interpretations of the law where the court may decide that it would benefit from the view of another party." Authority for the Foreign Intelligence Surveillance Court to appoint *amicus curiae* would be established by S. 1631, the *FISA Improvements Act of 2013,* reported by the Senate Select Committee on Intelligence on October 31, 2013. Please describe your views on how this reform should be implemented.

Answer: As the President stated in his January 17 speech at the Department of Justice, the Executive Branch supports "the establishment of a panel of advocates from outside government to provide an independent voice in significant cases before the Foreign Intelligence Surveillance Court." An amicus would need to hold the requisite security clearance and be provided access to the necessary classified information. The amicus should be charged with providing independent views on issues, rather than being required as a general matter to assert or advocate for any particular position.

Declassification of FISA Opinions and Other Legal Matters

QUESTION 13: In recent months, numerous opinions of the FISA Court, as well as government certifications and pleadings, have been declassified. You testified to the Senate Judiciary Committee that "additional steps" need to be taken to assure the public about the court's interpretation of law and the government's use of its authorities.

a. Please describe what additional information, or documents, should be declassified.

Answer: I support the recent, unprecedented steps to enhance transparency with respect to the FISC. If I am fortunate enough to be confirmed, I will work diligently with the DNI and Intelligence Community in implementing the President's call "to review

annually for the purposes of declassification any future opinions of the court with broad privacy implications." I also support the ongoing declassification review of FISC opinions.

b. What process do you believe should be established to review and declassify FISA court opinions and associated certifications and pleadings going forward? Please describe the priority that you would give to this effort.

Answer: There is an already-established process for declassification review of FISC opinions, which has been described to this Committee. I support using that process for declassification review of future FISC opinions, and if I am fortunate enough to be confirmed, I am committed not only to making it a priority, but also to making every effort to expedite that process.

c. How do you view the difference between "secret law" and "sources and methods"? How does this view inform your position on declassification of FISA Court opinions and associated government certifications and pleadings, opinions of the Office of Legal Counsel, and other classified legal opinions?

Answer: We should strive to provide interpretations of the law wherever possible, while protecting classified sources and methods. As the President stated in his January 17 speech, we must approach these issues in a way that will allow us "to protect ourselves and sustain our leadership in the world, while upholding the civil liberties and privacy protections that our ideals and our Constitution require . . . not only because it is right, but because the challenges posed by threats like terrorism and proliferation and cyber-attacks are not going away any time soon."

With regard to FISC opinions, as recent declassification efforts have demonstrated, it is possible in some cases to share with the public portions of those rulings, consistent with the imperatives of national security. To that end, in his January 17 speech the President directed the Director of National Intelligence, in consultation with the Attorney General, to "annually review for the purposes of declassification any future opinions of the court with broad privacy implications." I support those transparency efforts and, if confirmed, would continue to support the efforts of the DNI and the Intelligence Community to strike the proper balance between protecting sources and methods, on the one hand, and informing the American public about the state of the law, on the other. With regard to other opinions, while I am not in a position to offer commitments as to how the Department may respond to particular requests for documents created by another Department component, I understand that it is important for the Committee to receive information on the legal basis for intelligence activities or covert actions.

d. What is the role of the NSD in ensuring that the classification of and declassification of information is conducted consistent with Executive Order [13526]?

Answer: Under Executive Order 13526, each agency that classifies information has specific responsibility to identify its equities and the level of classification appropriate to protect the information. NSD bases its classification determinations on the classification of the information provided to NSD by such agencies. Therefore, the Intelligence Community components are generally responsible for classifying and declassifying information that NSD handles. The Division coordinates with the appropriate equity holders when there are any requests for declassification of information, whether under the Executive Order, in response to Freedom of Information Act requests, or pursuant to court orders to review information for declassification.

Protection of Classified Information

QUESTION 14: Describe the personnel resources, both attorneys and others, within the NSD that are devoted to the prosecution of unauthorized disclosures of classified information, and how the NSD divides responsibility on these matters with the Criminal Division. Please describe any recommendations related to prosecutions connected to unauthorized disclosures of classified information with regard to policies and resources.

Answer: NSD's Counterespionage Section supervises the investigation and prosecution of violations of the Espionage Act and related statutes, and provides coordination and advice on cases involving unauthorized disclosures of classified information. Currently, the Counterespionage Section has 21 attorneys and 11 non-attorneys on staff.

If NSD is recused from a case, matters may be handled through DOJ's Criminal Division. The Criminal Division also retains responsibility for some cases which predate NSD's formation.

Effective enforcement with respect to unauthorized disclosures of classified information is vital to protecting our national security. NSD works with a number of agencies to investigate and prosecute those matters.

QUESTION 15: Please provide up-to-date information on the status of major prosecutions related to unauthorized disclosure of classified information during the last two years.

Answer: There have been a number of significant prosecutions in the past two years wherein NSD or the Criminal Division, working in conjunction with the relevant United States Attorney's Office, has charged individuals in connection with the unlawful disclosure of classified information. These include: *United States v. Kiriakou*, in which the defendant pleaded guilty to 18 U.S.C. § 421(a) and was sentenced to 30 months; *United States v. Sachtleben*, in which the defendant pleaded guilty to violating 18 U.S.C. § 793(d) and (e) and was sentenced to 43 months; *United States v. Kim*, in which the defendant pleaded guilty to a violation of 18 U.S.C. § 793(d) with an agreed upon sentence of 13 months (sentencing is scheduled for April 2, 2014); and *United States v. Sterling*, which is pending trial.

QUESTION 16: Please describe how the NSD ensures the protection of information within the NSD itself, including the use of auditing and monitoring of information technology systems. Recommendations 37-46 of the President's Review Group on Intelligence and Communications Technologies address the protection of classified information. Do any of these recommendations apply to the NSD? If so, please describe.

Answer: NSD employs multiple practices, procedures, and layers of physical and technical security to safeguard information within the organization. All Justice Department employees, including NSD employees, must complete annual training on information security. Furthermore, all NSD attorneys must possess and maintain a Top Secret security clearance, which must be updated every five years and includes non-disclosure requirements. All NSD employees also receive mandatory initial and refresher briefings on the proper handling of classified information from Department security officials. FBI and Intelligence Community officials also provide additional counterintelligence awareness training to new NSD attorneys and paralegals, including information on safeguarding classified information.

In addition to vetting and training its personnel, NSD has its own dedicated security staff to coordinate the oversight of information security within the Division. NSD security staff members conduct random, periodic inspections of all sections within NSD and provide regular, recurring security briefings to NSD employees.

Furthermore, NSD maintains Sensitive Compartmented Information Facilities (SCIFs) as well as secure classified computer networks, safes, faxes, and telephone and video equipment for the proper handling of classified information. With respect to information technology systems, NSD is required to comply with regulations set forth by the Office of Management and Budget as well as the Committee on National Security Systems regarding the security of information technology systems that process national security information. NSD information technology systems are also subject to annual reviews by information technology security officials in the Justice Department's Justice Management Division as well as periodic audits and reviews by the Justice Department's Office of Inspector General.

With regard to recommendations 37-46 of the Review Group's Report, most issues related to personnel vetting in connection with security clearances, to which Recommendations 37-41 pertain, are not handled directly by NSD. With regard to network security of classified systems, to which Recommendations 42-46 pertain, NSD works closely with the Justice Management Division and others throughout the cybersecurity community within the Executive Branch to implement cybersecurity best practices and implement procedures that combat insider threats.

QUESTION 17: On July 12, 2013, the Administration announced ten revisions to the Department of Justice's policies related to investigations involving members of the news media. Please describe how the Department has implemented each of these ten revisions. What is your view on whether modifications to these revisions should be made or whether additional changes are appropriate.

Answer: In the wake of concerns about certain investigations that involved members of the news media, at the President's direction, the Attorney General led a comprehensive review of Department policies and practices governing how law enforcement tools can be utilized to obtain information and records from or concerning the news media in criminal and civil investigations. This review produced significant revisions to Department policies, intended to ensure that the government strikes the appropriate balance between protecting the American public by investigating alleged criminal activity and safeguarding the essential role of a free press. Specifically, DOJ now requires additional review by senior Department officials. The changes also clarified and expanded the presumption of negotiations with, and notice to, the news media when the Department requests authorization to seek records relating to newsgathering activities. Additionally, the changes provide more formal safeguards for the handling of communications records of the media.

QUESTION 18: The July 12, 2013, Report on Review of News Media Policies reiterated the Administration's continued support for a media shield law, which would codify the principles implemented by the Administration while establishing a statutory basis for measures the Administration cannot adopt unilaterally. In particular, the report, noted that a media shield law would provide a new mechanism for advance judicial review of the use of investigative tools such as subpoenas when they involve the news media. Please describe your views on this and other provisions of a media shield law.

Answer: This Administration has long supported appropriate media shield legislation, and continues to do so. The Attorney General expressed his support for S. 987, the Free Flow of Information Act of 2013, in a letter to Senate Judiciary Committee Chairman Leahy on July 29, 2013. While the Administration continues to review the bill reported by the Senate Judiciary Committee in November 2013 to ensure that it fulfills the specific objectives the Administration seeks to accomplish, the Administration supports the goals and principles behind the bill.

The FBI's Domestic Investigations and Operations Guide (DIOG)

QUESTION 19: On October 15, 2011, then-FBI Director Robert Mueller III approved revisions and updates to the FBI's Domestic Investigations and Operations Guide (DIOG). Please describe the most important changes included in those revisions and how they have been implemented. Do you believe further revisions or updates are warranted?

Answer: The Attorney General's Guidelines for Domestic FBI Operations (AGG-Dom) were issued on September 29, 2008. The FBI issued its Domestic Investigations and Operations Guide (DIOG) in December 2008 in order to implement the AGG-Dom and other guidelines and to standardize policy so that criminal, national security, and foreign intelligence investigative activities would be conducted in a consistent manner, whenever possible, including the same approval, notification and reporting requirements. The FBI periodically updates the DIOG. In 2011, the FBI made more extensive revisions after experienced FBI agents and lawyers, in consultation with the Department, conducted an in-depth review of the FBI's activities. Many of the changes involved reorganizing or restructuring the DIOG to make it easier for FBI personnel to use in light of the FBI's experience with the 2008 version. More substantive changes affected

areas such as the FBI's interview and *Miranda* policies, undisclosed participation in certain kinds of organizations, and the use of certain techniques or FBI personnel in assessments. NSD recognizes that additional revisions to the DIOG may be needed in light of ongoing experience and in an effort to ensure that FBI investigative activity is performed with care to protect individual rights, that investigations are confined to matters of legitimate government interest, and that FBI's policies adequately respond to the nature of the threats facing the nation.

Interrogations

QUESTION 20: What is your assessment of the effectiveness of the High Value Detainee Interrogation Group (HIG)? What lessons have been learned from IDG deployments and resulting intelligence production with regard to effective interrogation methods, and how do those lessons apply to other FBI interrogations? What other lessons have been learned from the IDG, with regard to preparations for interrogations, inter-agency coordination, and dissemination of intelligence?

Answer: The High Value Detainee Interrogation Group (HIG) was developed as a result of an interagency task force that included representatives from across the Intelligence Community. A central purpose of the HIG is to integrate the most critical resources from across the government – including experienced interrogators, subject matter experts, intelligence analysts, and linguists – to conduct interrogations of terrorists, wherever they are encountered, with the best expertise focused on targets of the most intelligence value. Elements of the HIG have been deployed both internationally and domestically, and the HIG has contributed to the productive interrogation of terrorists suspects in all these settings.

QUESTION 21: Please describe your view on when, and under what circumstances, terrorist suspects, inside and outside the United States, should be provided *Miranda* warnings. Under what circumstances do you believe the public safety exception established in *New York v. Quarles* applies?

Answer: The policy issued by the FBI and incorporated into the DIOG makes clear that the first priority for interrogation of terrorists is to gather intelligence. The policy also directs agents to use, to the fullest extent, the public safety exception to the *Miranda* rule, as articulated by the Supreme Court in *New York v. Quarles*, in order to gather immediate threat information. The policy recognizes that the terrorism threat we face is complex and evolving, and that agents must exhaust all appropriate avenues of inquiry to identify imminent threats posed by an operational terrorist whom they may confront. I believe that is sound policy.

There is no legal requirement to provide a terrorist suspect with *Miranda* warnings prior to custodial interrogation. The consequence of not doing so is that the statements received may not be admissible in court if the questions exceed the scope of the *Quarles* exception, and this consequence is a factor to consider in determining whether to provide *Miranda* warnings in a given case.

Because we face an adaptable and evolving terrorist threat, we must use all tools at our disposal to detect and disrupt that threat. This includes using the public safety exception to *Miranda* in order to gather intelligence and to identify any imminent threat posed by that individual or others with whom they may be working. If I am confirmed, I would make it a priority to ensure that we bring all tools to the table to detect and disrupt national security threats – including prosecution in the civilian justice system, and military, intelligence, and diplomatic tools.

QUESTION 22: Please describe your view on the efficacy of debriefings after the issuance of *Miranda* warnings. Please describe the efficacy of debriefings after detainees are charged in the criminal justice system, including the role of proffer agreements and plea bargaining negotiations in eliciting additional information.

Answer: We have had great success in obtaining intelligence information from terrorists even after they have been read their *Miranda* rights. Similarly, proffer agreements and plea bargaining, with the assistance of defense counsel, can also be an important incentive in obtaining intelligence information from criminal defendants.

QUESTION 23: What role should the HIG or the NSD play with regard to the debriefings of individuals who have been charged in the criminal justice system and the dissemination of information obtained from those debriefings?

Answer: The HIG has the capability to elicit intelligence information domestically or overseas from persons charged in the criminal justice system in connection with our counterterrorism efforts. The HIG also has the ability to disseminate information obtained in questioning conducted by its personnel. NSD plays an important role in making sure that those debriefings and any disseminations are handled appropriately and in a way that is consistent with the government's national security interests, including in intelligence collection and criminal prosecution.

Counterterrorism Prosecutions

QUESTION 24: 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 NSD that are devoted to the prosecution of terrorism cases.

   Answer: NSD's Counterterrorism Section (CTS) supervises a coordinated national counterterrorism enforcement program through close collaboration with Justice Department leadership, the National Security Branch of the FBI, the Intelligence Community and the 93 U.S. Attorneys' Offices around the country. Currently, the CTS has 46 attorneys and 12 non-attorneys on staff.

b. Please provide up-to-date information on the status of major terrorism prosecutions during the last two years.

Answer: Below are examples of major public terrorism prosecutions during the past two years:

- Ahmed Abdulkadir Warsame: On December 21, 2011, Warsame pleaded guilty, pursuant to a cooperation agreement, to a nine-count indictment charging him with providing material support to al Shabaab and al Qaeda in the Arabian Peninsula (AQAP), as well as conspiring to teach and demonstrate the making of explosives, possessing firearms and explosives in furtherance of crimes of violence, and other violations. The guilty plea was unsealed on March 25, 2013. This prosecution remains pending.

- Mustafa Kamel Mustafa: On October 5, 2012, Mustafa (a/k/a Abu Hamza al Masri) was extradited to the Southern District of New York from the United Kingdom on an indictment charging multiple crimes, including conspiracy to take hostages and hostage-taking, and conspiracy to provide and providing material support to terrorists and al Qaeda. Mustafa is charged in connection with his alleged role in a hostage-taking in Yemen in 1998 that resulted in four deaths; a conspiracy to establish a terrorist training camp in Bly, Oregon; and supporting violent jihad in Afghanistan and 2000 and 2001. This prosecution remains pending.

- 1998 Embassy Bombing: Three defendants – Adel Abdel Bary, Khaled al Fawwaz, and Anas al Liby – are being prosecuted in the Southern District of New York in connection with the 1998 bombings of the U.S. Embassies in Kenya and Tanzania, which caused the deaths of 224 individuals and injured thousands more. Fawwaz and Bary were extradited from the United Kingdom on October 5, 2012. On October 12, 2013, Anas Al-Liby was arrested by the FBI on the indictment after his overseas transfer of custody from the Department of Defense. Since 2001, five other co-conspirators have been convicted of various offenses in connection with their roles in the al Qaeda conspiracies that culminated in the Embassy bombings and sentenced to life imprisonment. This prosecution remains pending.

- Sulaiman Abu Ghayth: Abu Ghayth has been charged with conspiracy to kill U.S. nationals and conspiracy to provide and providing material support to terrorists. According to court documents, from at least May 2001 up to around 2002, Abu Ghayth allegedly served alongside Usama bin Laden, appearing with bin Laden and his then-deputy Ayman al-Zawahiri, speaking on behalf of the terrorist organization and in support of his mission, and warning that attacks similar to those of September 11, 2001, would continue. This prosecution remains pending.

- Ibrahim Harun: On October 4, 2012, Harun was extradited from Italy to the Eastern District of New York on an indictment charging several terrorism-related

crimes, including conspiracy to murder American military personnel in Afghanistan, conspiracy to bomb American diplomatic facilities in Nigeria, conspiracy to provide and providing material support to al Qaeda, and related firearms and explosives counts. According to court documents, he allegedly arrived in Afghanistan shortly before the September 11, 2001 attacks. He then joined al Qaeda, received military-type training at al Qaeda training camps, and ultimately fought against United States and Coalition forces in Afghanistan with an al Qaeda fighting group based in Pakistan. In 2003, Harun traveled to Africa with the intent to conduct attacks on U.S. diplomatic facilities in Nigeria. After the arrest of a co-conspirator, Harun traveled to Libya, *en route* to Europe, but was apprehended in early 2005. He remained in Libyan custody until June 2011, when he was released and then arrested by Italian authorities. This prosecution remains pending.

- Dzhokhar Tsarnaev: On April 19, 2013, Tsarnaev was arrested in the District of Massachusetts in connection with his alleged role in the bombing attack on the Boston Marathon on April 15, 2013, the murder of MIT police officer Sean Collier, and the carjacking of a vehicle in Watertown, Massachusetts. On June 27, 2013, a federal grand jury subsequently returned a 30-count indictment that includes use of a weapon of mass destruction resulting in death and conspiracy, use of a firearm in during and in relation to a crime of violence causing death, and carjacking resulting in serious bodily injury. On January 30, 2014, the Attorney General determined that the United States would seek the death penalty in this matter. This prosecution remains pending.

c. What is your view of the effectiveness of the Classified Information Procedures Act (CIPA) and the federal courts generally in protecting classified information while prosecuting terrorist suspects?

Answer: CIPA has proven to be a useful tool in the prosecution of national security cases and provides a carefully crafted balance between the Government's need to protect classified information and the rights of the accused to mount a full, vigorous defense. CIPA has been used extensively in the last thirty years in a variety of criminal cases; and while unauthorized disclosure cases present particular challenges, without CIPA the Government simply could not obtain criminal convictions in certain cases involving national security matters while simultaneously protecting the classified information necessarily involved in such matters.

Counterespionage Prosecutions

QUESTION 25: 28 C.F.R. §0.72(a)(7) assigns to the Assistant Attorney General for National Security the responsibility to prosecute federal crimes involving national security, foreign relations and terrorism, including espionage statutes.

a. Describe the personnel resources, both attorneys and others, within the NSD that are devoted to the prosecution of espionage cases.

Answer: As noted in response to question 14, NSD's Counterespionage Section supervises the investigation and prosecution of espionage and related statutes. Currently, the Counterespionage Section is composed of 21 attorneys and 11 non-attorneys.

b. Please provide up-to-date information on the status of major counterespionage and related prosecutions during the last two years.

Answer: Below are examples of major public counterespionage and related prosecutions during the past two years:

- United States v. Underwood, in which the defendant pleaded guilty to attempting to communicate national defense information in violation of 18 U.S.C. § 794 and was sentenced to 9 years;

- United States v. Soueid, in which the defendant was convicted at trial of violating 18 U.S.C. § 951 and was sentenced to 18 months;

- United States v. Mascheroni, in which the defendant pleaded guilty to numerous violations, including 42 U.S.C. § 2274 and 18 U.S.C. § 793, and has not yet been sentenced;

- United States v. Hoffman, in which the defendant was convicted of attempting to communicate national defense information in violation of 18 U.S.C. § 794 and has not yet been sentenced;

- United States v. Liew, in which the defendant was charged with numerous violations, including 18 U.S.C. § 1831, and the trial is ongoing;

- United States v. Corezing et al., in which numerous defendants were charged with conspiracy to defraud the United States through the illegal shipment of military antennas to the People's Republic. Defendants Hia Soo Gan Benson, also known as "Benson Hia," and Lim Kow Seng, also known as "Eric Lim," pleaded guilty to conspiracy to defraud the United States by dishonest means, in violation of 18 U.S.C. § 371, and were sentenced to 37 and 34 months respectively.

- United States v. Pratt & Whitney Canada, in which Pratt & Whitney Canada Corp. (PWC), a Canadian subsidiary of the Connecticut-based defense contractor United Technologies Corporation (UTC), pleaded guilty to violating the Arms Export Control Act and making false statements in connection with its illegal export to China of U.S.-origin military software used in the development of China's first modern military attack helicopter, the Z-10. In addition, UTC, its U.S.-based subsidiary Hamilton Sundstrand Corporation (HSC), and PWC agreed to pay more than $75 million as part of

a deferred prosecution agreement in connection with the China arms export violations and for making false and belated disclosures to the U.S. government about these illegal exports.

- United States v. Ming Suan Zhang, in which Zhang pleaded guilty to violating the International Emergency Economic Powers Act by attempting to illegally export massive quantities of aerospace-grade carbon fiber from the United States to China and was sentenced to 57 months.

- United States v. Fishenko, in which 11 defendants were charged in a conspiracy to illegally ship high-tech microelectronics components to Russia. Defendants are pending trial.

OLC Opinions on Matters Within the Responsibility of the National Security Division

QUESTION 26: With respect to OLC opinions on matters related to the responsibilities of the NSD, or, if preceding the establishment of the NSD, 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 NSD, will you, if confirmed, undertake to do the following:

a. Provide to the Committee a comprehensive list and description of OLC opinions on these subjects, particularly opinions that remain in force or are of significant historical value in understanding the development of the Government's legal theories;

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 legislative and oversight responsibilities; and

c. Promptly update the list and description as new opinions are issued and provide such new opinions to the Committee on request?

d. If your answer to any part of Question 26 is no, or is qualified, please describe the basis, if any, for the Department of Justice to decline to provide information or material requested by the Committee under sections 502 or 503 of the *National Security Act of 1947* for the purpose of being fully and currently informed about the legal basis for intelligence activities or covert actions. Please identify in any such description the level of authorization in the Executive Branch required for any such refusal.

Answer: I appreciate the importance of the Committee's oversight role and its interest in the legal basis for intelligence activities or covert actions. However, I am not in a position to offer commitments as to how the Department may respond to particular requests for documents created by another Department component. I

understand that it is important for the Committee to receive information on the legal basis for intelligence activities or covert actions. If confirmed, I will consider it my responsibility to ensure that requests to the National Security Division for information over which it has control receive a timely and respectful response.

State Secrets

QUESTION 27: The Attorney General's September 23, 2009 memorandum on state secrets states, "[t]he Department will provide periodic reports to appropriate oversight committees of Congress with respect to all cases in which the Department invokes the privilege on behalf of departments or agencies in litigation, explaining the basis for invoking the privilege." Do you agree to fully comply with this obligation, including with regard to pending litigation?

Answer: I understand that the Department's policy remains to provide periodic reports to appropriate oversight committees of Congress regarding invocations of the State Secrets Privilege in litigation, and the Department provided its initial report to Congress on April 29, 2011. I believe that the Department plans to submit another report in the near future.