Nomination of Stuart Delery to be Associate Attorney General of the United States
Questions for the Record
November 12, 2015

QUESTIONS FOR THE RECORD FROM SENATOR TILLIS

1. **As you know, the Inspector General serves as an independent checking power to deter fraud and promote efficiency within the Department of Justice and other agencies. Under the Inspector General Act, the Inspector General has the authority "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act." 5 U.S.C. App. § 6 (a)(1). In some situations, the Attorney General may prohibit investigations, audits, or issuance of subpoenas if the Attorney General provides written notice to the Inspector General explaining the reason such action complies with 5 U.S.C. App. § 8E (1), (2), and (3).**

   According to testimony from Inspector General Michael Horowitz in 2013, the Department of Justice obstructed his authority to access certain documents. Instead, the practice of Attorney General Holder required the Inspector General to receive written permission before the Inspector General obtained access to certain records. In my view, this practice violates the plain reading of the statute and requires the Inspector General to give additional deference to the agency it is auditing, which clearly defeats the statutory purpose and independence vested in the Inspector General.

   If confirmed as Associate Attorney General, do you believe the Department of Justice should continue this practice?

   a. **If yes, specifically explain where you find statutory authority to require the Inspector General to comply with the practice of requiring written permission to access certain documents?**

      i. **If the Attorney General can unilaterally withhold information from the Inspector General without statutory justification, what prevents other federal agencies from obstructing investigations and interfering with the independent powers given to inspector generals?**

   b. **If no, please specifically explain what steps you will take to ensure the independence of the Inspector General's ability to audit the Department of Justice?**

RESPONSE: The Department of Justice fully agrees that inspectors general play a critical role in identifying and preventing waste, fraud, and abuse in the federal government, and I certainly do, as well. Department officials have expressed in correspondence and testimony a shared commitment to ensuring that the Department's Office of the Inspector General (OIG) has access to the information it requires to fulfill its essential oversight functions. As Attorney General

Lynch and Deputy Attorney General Yates have stated consistently and unequivocally, the Department believes that an effective, efficient, and independent OIG is absolutely critical to a well-functioning Department of Justice. I share that view.

The Department also takes very seriously compliance with its legal obligations, including statutory limitations on the disclosure of certain information related to criminal investigations. When the question arose whether Department components could lawfully provide the Inspector General with access to information protected from disclosure by statutes such as the Federal Wiretap Act, Rule 6(e) of the Federal Rules of Criminal Procedure, and section 626 of the Fair Credit Reporting Act (FCRA), the Department worked with the Inspector General and Department components to provide the Inspector General the access he sought in a manner that complied with the requirements of those statutes. I am unaware of any occasion in which the OIG sought access to documents or information protected from disclosure by statute and did not receive them.

When the current Inspector General sought to have the broader legal question resolved, the Department asked the Office of Legal Counsel (OLC) to consider the requirements of current law. OLC's opinion is available at http://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/07/23/2015-07-20-doj-oig-access.pdf, and I would refer you to that opinion for a description of OLC's reasoning.

In keeping with its commitment, the Department also provided this Committee with draft legislative language that would guarantee that our OIG has access to the information it needs to conduct its investigations and reviews without further action by Department leadership, including information covered by the Wiretap Act, Rule 6(e), and section 626 of the FCRA. The Department looks forward to continuing to work with Congress and this Committee on a legislative solution. I will continue to support that effort and work to make sure that the OIG has access to the information it needs and maintains independent authority to carry out its important work.

2. **In a December 2014 report entitled "Professional Misconduct: DOJ Could Strengthen Procedures For Disciplining Its Attorneys,"[1] the Government Accountability Office concluded: "The Department of Justice (DOJ) has made changes to improve its processes for managing complaints of attorney professional misconduct since 2011 but has not implemented plans to improve processes for demonstrating that discipline is implemented, or achieving timely and consistent discipline decisions." At your Committee hearing, you claimed that you were unfamiliar with this report or that you did not remember reading it. If confirmed as Associate Attorney General, you will have management responsibilities over several divisions of the Department of Justice.**

    i. **If confirmed, will your office work with the Attorney General to implement policies consistent with GAO's recommendations?**

    ii. **If not, why not?**

[1] http://www.gao.gov/products/GAO-15-156

RESPONSE: I appreciate your reference to this specific report, and with it I now recall the report and am aware that in it the GAO made two recommendations to improve the Department's process for investigating complaints of, and implementing discipline for, professional misconduct. First, the GAO recommended that each Department component develop a tracking system to demonstrate that discipline imposed is actually carried out. Second, the GAO recommended that the jurisdiction of the Professional Misconduct Review Unit be expanded to all Department attorneys found by the Office of Professional Responsibility to have engaged in professional misconduct. The Department is implementing both recommendations. I will continue to support the Attorney General in that process.

a. **Should an attorney disciplined by a state bar, or one found to have committed prosecutorial misconduct, be allowed to serve as an attorney at the Department of Justice? Surely we can agree that attorneys who have committed prosecutorial misconduct or who have been disciplined by a state bar have not always carried out their duties with integrity and professionalism. Do you, in fact, agree with that statement—yes or no?**

RESPONSE: The Department takes into consideration all aspects of a candidate's suitability for employment when making hiring and retention decisions, including whether the attorney has a history of professional misconduct or has been disciplined by a state bar. By their nature, professional misconduct findings are fact-based and varied. The Department carefully considers the allegations and conclusions of any prior misconduct findings or discipline, including the severity of the conduct in question, when evaluating candidates for employment or when reviewing the status of current employees. I will continue to follow the Department's policies regarding hiring and employee discipline and support measures that ensure Department attorneys carry out their duties consistently adhering to all applicable professional responsibilities.

i. **I asked a similar question to Attorney General Loretta Lynch, and she stated that she would hold Department of Justice attorneys to the "highest standards." Would you, consistent with any due process rights of such an employee, dismiss an employee who does not uphold the "highest standards?"**

RESPONSE: I will continue to support appropriate discipline for Department employees who violate the relevant standards of professional conduct, and to promote an environment in which they carry out their duties with the highest level of integrity and professionalism. When misconduct rises to a level to warrant dismissal, I will not hesitate to pursue that course as appropriate, consistent with applicable procedures.

ii. **For you, what do the "highest standards" look like, and what metrics will you use to measure whether attorneys under your supervision are satisfying these standards?**

RESPONSE: Like the Attorney General, I believe that public service is a public trust. The career attorneys and staff of the Department are its most important resource. Seeing their talent, dedication, and commitment to protecting the interests of the country and its citizens has been one of the highlights of my time in government.

I take seriously my obligation to represent the interests of the United States with vigor and to the best of my ability in all circumstances, as well as my obligations under government ethics and professional responsibility rules. I expect the same from the attorneys and staff under my supervision. The Department has a history of outstanding and independent legal analysis and advocacy, and my first priority is to preserve and advance that proud tradition.

I will continue to support measures that ensure Department attorneys carry out their duties consistently adhering to all applicable professional responsibilities. I also will continue to support efforts to ensure that any questions regarding the conduct of attorneys are addressed fairly. The Department has an infrastructure in place to address allegations of professional misconduct by its attorneys. The Office of Professional Responsibility (OPR), reporting directly to the Attorney General and the Deputy Attorney General, is responsible for investigating allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice. When OPR issues reports finding professional misconduct by Department attorneys, the Professional Misconduct Review Unit (PMRU), which reports to the Attorney General through the Deputy Attorney General, is responsible for making determinations about disciplinary actions and state bar referrals. Through OPR and PMRU, the Department ensures independent, consistent, and fair investigations and decisions regarding allegations of professional misconduct by its attorneys.

3. **As Acting Assistant Attorney General, you signed several briefs challenging the constitutionality of certain states' immigration laws. Do you believe that the Federal Government has the sole authority to legislate laws—both civil and criminal—and promulgate rules regarding removal proceedings as they relate to illegal immigrants residing in states?**

    a. **Does your answer change if the Federal Government refuses to enforce its own laws?**

    b. **Should cities and municipalities have the ability to refuse to comply with ICE detainers or refuse to permit municipal funds or resources to be applied in furtherance of enforcement of federal immigration laws?**

    c. **Do you agree that if states and municipalities cannot create their own immigration laws, they should also not be able to refuse to comply with federal law?**

RESPONSE: In *United States v. Arizona*, 567 U.S. __, 132 S. Ct. 2492 (2012), the Supreme Court reaffirmed that "Federal law makes a single sovereign" – the Federal government – "responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders." *Id.* at 2508. That said, state and local governments undoubtedly have legitimate interests in certain matters concerning aliens and retain some authority to act on certain matters that may affect aliens and immigration. In its briefs in these cases, the

Department has made clear that states serve as critical partners in assuring the effective enforcement of the federal immigration laws (although, as the Supreme Court confirmed, federal law also makes clear that such state efforts must proceed in cooperation with the federal government). *See id.* at 2508 ("Consultation between federal and state officials is an important feature of the immigration system."). The issue in the preemption cases is that federal law precludes state efforts to directly regulate immigration or to interfere with federal immigration law and policy. As the Supreme Court said, a state "may have understandable frustrations with the problems caused by illegal immigration . . . but the State may not pursue policies that undermine federal law." *Id.* at 2510. Specifically, the Court called prosecutorial discretion by immigration officials a "principal feature of the removal system." *Id*. at 2499.

With respect to questions (b) and (c), the Department believes that efforts should be undertaken to get state and local law enforcement authorities to notify ICE of pending releases of criminal aliens during the time that these individuals are otherwise in custody under state or local authority so that the individuals can be taken into ICE custody for removal. This is a valid and important law enforcement objective to protect the public safety. Going forward, I will continue to guide litigation and make decisions based on the long-term institutional interests of the United States and established legal principles.

4. **As an overseer of the Civil Rights Division you may be asked to initiate investigations when law enforcement officers use lethal force against criminal suspects. What factors do you consider when determining whether civil rights investigations by the Department of Justice are appropriate?**

RESPONSE: The federal criminal statute that enforces Constitutional limits on uses of force by law enforcement officers is 18 U.S.C. § 242, which provides in relevant part as follows:

> Whoever, under color of any law, . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States [shall be guilty of a crime].

To prove a violation of Section 242, federal prosecutors must prove the following elements beyond a reasonable doubt: (1) that the officer was acting under color of law; (2) that he deprived a victim of a right protected by the Constitution or laws of the United States; (3) that he acted willfully; and (4) that the deprivation resulted in bodily injury and/or death.

To initiate an investigation, the principles of federal prosecution, set forth in the United States Attorneys' Manual (USAM), require an attorney for the government to have "probable cause to believe that a person has committed a Federal offense within his/her jurisdiction." *See* USAM § 9-27.200. I will continue to faithfully apply these legal standards when evaluating any possible investigation under Section 242.

5. **There is little doubt that Operation Choke Point had a chilling effect on lawful businesses' ability to obtain financing. At the Committee hearing, you stated that you were aware of these consequences, but you consistently stated that this result**

was not the intent of Operation Choke Point. If confirmed, you will no doubt be responsible for directing and structuring how the Department manages future enforcement initiatives. What steps, policies, or practices will you put into place to ensure that lawful businesses are able to continue conducting their legitimate business activities without being overly concerned that they will become the targets of a Department investigation?

RESPONSE: I have not condoned, and would not condone, investigations that target businesses acting lawfully. I am confident that the Department's dedicated career lawyers would not either. In the context of Operation Chokepoint, the Office of Professional Responsibility (OPR) conducted a nine-month investigation. A letter summarizing its investigative findings is attached. As the letter describes, OPR "did not find evidence of an effort to improperly pressure lawful businesses," OPR Letter at 3-4, and concluded that "the evidence did not demonstrate that Operation Choke Point compelled banks to terminate business relationships with other lawful businesses," OPR Letter at 34.

As I testified at the Committee hearing, I am aware of anecdotal reports that some merchants believe they lost bank accounts as a result of Operation Chokepoint. As reflected in the cases brought to date, the Department's investigations should not have led banks to stop doing business with lawful merchants. Those investigations targeted only illegal conduct that caused hundreds of millions of dollars to be taken out of the bank accounts of more than a million different consumers without their authorization. The reports may confuse the Department's cases with the separate, independent actions taken by financial regulators, or with banks making their own determinations about how to structure their businesses, how to comply with their legal obligations, and with whom they do business.

Regardless of the accuracy of these reports, I took them seriously from the time I first became aware of them. Specifically, I communicated internally and externally that the Department's policy is and must be to base investigations on specific evidence that a financial institution is breaking the law by knowingly facilitating fraud, and not on the types of industries with which they do business. I confirmed with the Department's career lawyers handling these investigations and their managers that the banks with which they were in discussions understood that the Department was focused only on fraudulent activity. The cases that have been brought to date, including those against CommerceWest Bank, Plaza Bank, and Four Oaks Bank, show that this was the case. To reinforce that message to Congress, the public, and industry, the Department and I took steps that included:

- A June 23, 2014, video message from the Attorney General posted on the Department's web site, which can be found here: http://www.justice.gov/opa/video/combating-consumer-fraud
- Posts on the Department of Justice Blog dated May 7, 2014 and March 27, 2015, which can be found here: http://www.justice.gov/opa/blog/holding-accountable-financial-institutions-knowingly-participate-consumer-fraud and http://www.justice.gov/opa/blog/holding-financial-institutions-accountable-fraud.
- Briefings for, and letters to, industry groups, informing the financial industry and other concerned organizations about the Department's focus on illegal conduct; and

- Testimony, briefings, and letters to Congress, beginning immediately when questions about the Department's work in this area were first raised in August 2013, as well as the production to Congress of numerous documents reflecting the Department's policies, as well as the origin and implementation of these efforts.

Of course, in all contexts, I believe the Department should consider any effects that its actions might have on institutions that it is not investigating, and I take seriously any suggestion of unintended consequences. I will continue to review the Department's enforcement efforts and its messaging to minimize any consequences on institutions that are not under investigation, and will continue to ensure that the Department makes clear to the public what it is and is not doing.

6. **Please provide my office with the approximate cost of implementation of Operation Choke Point.**

RESPONSE: I understand that the Civil Division's system of tracking costs does not track costs relating to Operation Chokepoint in a manner that would allow the Department accurately to answer your question. A small number of attorneys and paralegals within the Consumer Protection Branch (CPB) of the Civil Division, as well as a small number of other staff and investigators, have expended time on investigations and prosecutions that were part of this effort. CPB supervisors used their discretion to allocate staff and resources to these matters, consistent with their authorized budgets, as they do with other staffing decisions.

7. **A 2013 report by the Department of Justice's Inspector General[2] revealed disturbing behavior amongst attorneys within the Voting Section of the Civil Rights Division, which included harassment and ostracism of employees because of their political ideologies or affiliations. One conclusion of the report reads:**

> **Given the troubling history of polarization in the Voting Section, Division leadership needs to promote impartiality, continuity, and professionalism as critical values in the Voting Section, and leadership and career staff alike must embrace a culture where ideological diversity is viewed as beneficial and dissenting viewpoints in internal deliberations are welcomed and respected. We also believe that leadership and career staff must be continually mindful of the need to ensure the public's confidence in the Voting Section's impartiality. We were surprised and dismayed at the amount of blatantly partisan political commentary that we found in e-mails sent by some Voting Section employees on Department computers.**

   a. **Do you agree with the Inspector General's findings?**

      i. **If so, what steps have you taken as Acting Associate Attorney General to ensure that this type of behavior has ceased?**

[2] https://oig.justice.gov/reports/2013/s1303.pdf

ii. **If not, why?**

iii. **Will you commit to punishing attorneys or other employees who harass or ostracize their coworkers for the political affiliations or ideologies?**

RESPONSE: The October 2013 Report by Department of Justice Inspector General entitled *A Review of the Operations of the Voting Section of the Civil Rights Division* (2013 OIG Report) examined, among other things, complaints regarding mistreatment of Voting Section employees because of their political ideology. These complaints were concentrated in the period from 2004 to 2007, but included two examples that occurred in 2009. These incidents were troubling and have no place in the Department. The Department takes very seriously any allegations of harassment, mistreatment, unauthorized disclosure of internal information, and other unprofessional conduct.

As the 2013 OIG Report notes, the Civil Rights Division took steps to address a number of these specific incidents of improper conduct at the time they arose in the period between 2004 and 2007, and the Division also later took steps to prevent similar incidents form recurring. For example, the Division implemented training for all staff on their anti-discrimination and anti-harassment obligations, including "providing annual [equal employment opportunity (EEO)] and anti-harassment training to all employees and managers; issuing EEO, prohibited personnel practice and anti-harassment policies that are available to all employees on the CRT Intranet and that set forth the various procedures for reporting misconduct; and sending periodic reminders to all employees about their obligations to conduct themselves in a professional manner at all times." 2013 OIG Report at 133. In response to the 2013 OIG Report, the Civil Rights Division reiterated to all Division staff their professionalism obligations, including the prohibition on harassment based on perceived political ideology.

After the 2013 OIG Report was issued, Congress mandated (P.L.113-76, "Consolidated Appropriations Act, 2014") an independent assessment of the operations of the Civil Rights Division. The National Academy of Public Administration (NAPA) was chosen to conduct this broad review focusing on the Civil Rights Division's policies and management practices. NAPA also addressed a number of issues that had been identified in a 2013 OIG Report, including work environment. In January 2015, NAPA issued a report entitled *Department of Justice Civil Rights Division; A Strategic Management Framework for Building on the Past, Moving to the Future* ("NAPA Report"). Among other findings, NAPA concluded:

> CRT comprises a workforce of deeply committed employees dedicated to the CRT mission. Both the department and division have proactively undertaken a number of actions to directly address issues raised in the 2013 OIG report, as well as several earlier OIG and Office of Professional Responsibility (OPR) reports detailing issues related to improper hiring and other prohibited personnel actions, and made progress in addressing many of those issues. CRT has also taken a number of actions in response to employee concerns. . . . The progress CRT has made,

> combined with the division's deeply committed workforce, provides a strong foundation for making continued improvements that will position CRT for the future.

NAPA Report at 16. The NAPA Report also included a number of recommendations to foster a workplace culture that is fair, constructive, and inclusive. *See* NAPA Report at 84.

Partisan political considerations have no place in law enforcement decisions of any kind. As Acting Associate Attorney General, I am working with the Civil Rights Division to continue to implement NAPA's recommendations in this regard to the fullest extent possible. I commit that I will continue to support an environment in which the Department's actions are based on fair consideration of the facts and the law and in which open, respectful discourse about our work is promoted.