Nomination of Loretta E. Lynch to be Attorney General of the United States
Questions for the Record
Submitted February 20, 2015

QUESTIONS FROM SENATOR CRUZ

Questions on Executive Amnesty

I. Deferred Action

- Question 1(a)[1] asked if you agreed or disagreed with the legal conclusions of the Department of Justice's Office of Legal Counsel (OLC) memorandum addressing the legality of President Obama's deferred action decisions. Your answer, which addressed the basis for the OLC memorandum, did not answer the question asked.

    1. **Please take the opportunity to clarify or revise your answer: do you agree or disagree with the legal conclusions in the OLC memorandum?**

RESPONSE: As I indicated in my prior response, the legal analysis of the Office of Legal Counsel appears reasonable. Accordingly, I have no basis to disagree with its legal conclusions.

- Question 1(b) asked you to cite specific provisions of the United States Code that authorize the President to grant deferred action to illegal alien childhood arrivals and the illegal alien parents of U.S. citizens. You answered that it was your "understanding" that a Department of Justice brief that has been filed as part of pending litigation on the subject provided that information.

    2. **Are you familiar with, or have you personally read, the relevant portion(s) of the Department brief that you referenced in your original answer?**

RESPONSE: I am familiar with the Department's brief. I am also familiar with the fact that a federal district court recently issued a preliminary injunction against the government, and believe that decision is subject to appeal.

3. **Is your original answer an indication that you have no independent legal understanding of this particular legal issue, or is your answer an indication that you agree with the Department's legal position?**

RESPONSE: As I am not a subject matter expert in this area, I have no basis to disagree with the position taken by the Department on this legal question.

[1] The original set of questions for the record and your responses to those questions as submitted to the Committee on or about February 9, 2015, are incorporated by reference. Please refer to them as needed.

4. **Would you consider an independent understanding of an important legal issue such as this to be a prerequisite for holding the position of Attorney General?**

RESPONSE: The advice and consent power of Article II, Section 2 of the Constitution rests with the Senate, and the ultimate determination of prerequisites to be Attorney General rests with that body. I would not presume to offer any opinion about how the Senate should carry out this responsibility. As a career prosecutor and two-term United States Attorney, I believe I have conducted myself with personal and professional integrity, and have acted with fidelity to the law and with reverence to the Constitution. If confirmed as Attorney General, I would hold myself to these same standards.

5. **Are you under the impression that, because there is ongoing litigation involving the issue at hand, that you are not free to comment on the issue as a nominee for Attorney General?**

RESPONSE: As I have stated previously, I am currently the United States Attorney for the Eastern District of New York, and am not in a position to know the details of why the Department has taken positions in certain litigation and what decisions have led to those positions.

- Question 1(d) asked if you thought that President Obama's deferred action decisions represented a proper exercise of prosecutorial discretion (in accordance with your definition of prosecutorial discretion, in your answer to question 1(c)). You answered that "the memoranda issued by the Secretary of Homeland Security appears [*sic*] to be an exercise of discretion, consistent with stated congressional priorities, to focus limited agency resources on the prosecution and removal of high priority aliens, such as criminals, threats to national security, and recent border crossers."

6. **Is it fair to assess your answer as agreeing with the statement that these memoranda do represent appropriate exercises of prosecutorial discretion?**

RESPONSE: As I have indicated, the legal analysis by the Office of Legal Counsel appears reasonable. Accordingly, I have no basis to disagree with its conclusions, including the conclusion that the memoranda are legally valid.

- Question 2 asked if you thought that President Obama's refusal to enforce the immigration laws for a distinct class of individuals who are not otherwise exempted by Congress violated the Take Care Clause of the United States Constitution. You answered that it was your "understanding" that a Department of Justice brief that has been filed as part of pending litigation on the subject provided that information.

7. **Are you familiar with, or have you personally read, the relevant portion(s) of the Department brief that you referenced in your original answer?**

RESPONSE: I am familiar with the Department's brief. I am also familiar with the fact that a federal district court recently issued a preliminary injunction against the government, and believe that decision is subject to appeal.

8. **Is your original answer an indication that you have no independent legal understanding of this particular legal issue, or is your answer an indication that you agree with the Department's legal position?**

RESPONSE: As I am not a subject matter expert in this area, I have no basis to disagree with the position taken by the Department on this legal question.

9. **Would you consider an independent understanding of an important legal issue such as this to be a prerequisite for holding the position of Attorney General?**

RESPONSE: The advice and consent power of Article II, Section 2 of the Constitution rests with the Senate, and the ultimate determination of prerequisites to be Attorney General rests with that body. I would not presume to offer any opinion about how the Senate should carry out this responsibility. As a career prosecutor and two-term United States Attorney, I believe I have conducted myself with personal and professional integrity, and have acted with fidelity to the law and with reverence to the Constitution. If confirmed as Attorney General, I would hold myself to these same standards.

10. **Are you under the impression that, because there is ongoing litigation involving the issue at hand, that you are not free to comment on the issue as a nominee for Attorney General?**

RESPONSE: As I have stated previously, I am currently the United States Attorney for the Eastern District of New York, and am not in a position to know the details of why the Department has taken positions in certain litigation and what decisions have led to those positions.

- Question 3 asked if "the President" (meaning either President Obama or any future president) had the authority to exercise executive discretion to categorically exempt a class of people from (a) enforcement of the Affordable Care Act, (b) enforcement of federal environmental laws, and/or (c) enforcement of the Internal Revenue Code. You answered that your "understanding of the deferred action guidance issued by the Department of Homeland Security is that the guidance does not grant deferred action on a systematic basis," but rather "establishes a series of factors, to be applied on a case-by-case basis, by those individuals responsible for enforcing our nation's immigration laws in order to prioritize the limited resources afforded to the agency."

11. **Your answer mentions the application of a "series of factors" that "those individuals responsible for enforcing our nation's immigration laws" are to apply on a "case-by-case basis." To clarify, do you agree or disagree that federal employees of United States Citizenship and Immigration Services (USCIS) are free to ignore the deferred action criteria established by the Secretary of Homeland Security? <u>If you disagree with this statement, please provide a detailed explanation as to why.</u>**

RESPONSE: As set forth in the OLC Memorandum, "the case-by-case discretion given to immigration officials under DHS's proposed program alleviates potential concerns that DHS has abdicated its statutory enforcement responsibilities with respect to, or created a categorical, rule-like entitlement to immigration relief for, the particular class of aliens eligible for the program. An alien who meets all the criteria for deferred action under the program would receive deferred action only if he or she 'present[ed] no other factors that, in the exercise of discretion,' would 'make[] the grant of deferred action inappropriate.' Johnson Deferred Action Memorandum at 4. The proposed policy does not specify what would count as such a factor; it thus leaves the relevant USCIS official with substantial discretion to determine whether a grant of deferred action is warranted. In other words, even if an alien is not a removal priority under the proposed policy discussed in Part I, has continuously resided in the United States since before January 1, 2010, is physically present in the country, and is a parent of an LPR or a U.S. citizen, the USCIS official evaluating the alien's deferred action application must still make a judgment, in the exercise of her discretion, about whether that alien presents any other factor that would make a grant of deferred action inappropriate." OLC Mem. at 28-29.

12. **Your answer mentions the application of a "series of factors" that "those individuals responsible for enforcing our nation's immigration laws" are to apply on a "case-by-case basis." From a legal perspective, would you have concern about the soundness of the deferred action programs if you knew (for example) that the deferred action applications were not being carefully inspected by USCIS employees, but were rather being screened through some automated process?**

RESPONSE: I am unclear what you mean by "being screened through some automated process." If confirmed as Attorney General, I would seek to ensure that any advice provided by the Department concerning the implementation of such programs is consistent with the law.

13. **In the event the Department of Homeland Security or USCIS uses some sort of automated review during any stage of the deferred action application review process, do you agree or disagree that such a process cannot be considered to be the result of the application of a "series of factors" on a "case-by-case basis"?**

RESPONSE: I am unclear what you mean by "some sort of automated review." If confirmed as Attorney General, I would seek to ensure that any advice provided by the Department concerning the implementation of such programs is consistent with the law.

14. **Could President Obama or a future president refuse to enforce some or all of the Affordable Care Act, some or all federal environmental laws, and/or some or all of the Internal Revenue Code if he or she "establishes a series of factors, to be applied on a case-by-case basis, by those individuals responsible for enforcing our nation's ... laws in order to prioritize the limited resources afforded to the [relevant] agency"?**

RESPONSE: Prosecutorial discretion is a longstanding principle that exists in a number of different areas. Each exercise of such discretion depends on the facts of the individual circumstances, including the discretion afforded the agency by Congress. As I understand it, that discretion is particularly broad in the immigration context.

- Question 3[2] asked if you agreed that President Obama's decision to defer removal actions for certain categories of illegal aliens is unreviewable by Article III courts. You answered that it was your "understanding" that a Department of Justice brief that has been filed as part of pending litigation on the subject provided that information.

15. **Are you familiar with, or have you personally read, the relevant portion(s) of the Department brief that you referenced in your original answer?**

RESPONSE: I am familiar with the Department's brief. I am also familiar with the fact that a federal district court recently issued a preliminary injunction against the government, and believe that decision is subject to appeal.

16. **Is your original answer an indication that you have no independent legal understanding of this particular legal issue, or is it an indication that you agree with the Department's legal position?**

RESPONSE: As I am not a subject matter expert in this area, I have no basis to disagree with the position taken by the Department on this legal question.

[2] This second "Question 3" was a typographical error, and should have been sent to you as "Question 4."

17. **Would you consider an independent understanding of an important legal issue such as this to be a prerequisite for holding the position of Attorney General?**

RESPONSE: The advice and consent power of Article II, Section 2 of the Constitution rests with the Senate, and the ultimate determination of prerequisites to be Attorney General rests with that body. I would not presume to offer any opinion about how the Senate should carry out this responsibility. As a career prosecutor and two-term United States Attorney, I believe I have conducted myself with personal and professional integrity, and have acted with fidelity to the law and with reverence to the Constitution. If confirmed as Attorney General, I would hold myself to these same standards.

18. **Are you under the impression that, because there is ongoing litigation involving the issue at hand, that you are not free to comment on the issue as a nominee for Attorney General?**

RESPONSE: As I have stated previously, I am currently the United States Attorney for the Eastern District of New York, and am not in a position to know the details of why the Department has taken positions in certain litigation and what decisions have led to those positions.

19. **In your independent legal judgment, under what circumstances do courts not have authority to review the legality of the President's conduct in a case where standing can be established?**

RESPONSE: There are numerous instances in which courts are barred from reviewing the merits of a claim despite the existence of Article III standing. Those include, but are not limited to, matters that are committed to agency discretion, the lack of a waiver of sovereign immunity, and lawsuits that present a political question. Many of these limitations are imposed by Congress.

II. Work Authorization

- Question 3 asked if you agreed or disagreed that the statutory language cited in the question meant that the Secretary of Homeland Security had complete discretion to grant work authorizations to <u>any</u> alien. You answered that it was your "understanding" that a Department of Justice brief that has been filed as part of pending litigation on the subject provided that information.

1. **Are you familiar with, or have you personally read, the relevant portion(s) of the Department brief that you referenced in your original answer?**

RESPONSE: I am familiar with the Department's brief.

2. **Is your original answer an indication that you have no independent legal understanding of this particular legal issue, or is it an indication that you agree with the Department's legal position?**

RESPONSE: As I am not a subject matter expert in this area, I have no basis to disagree with the position taken by the Department on this legal question.

3. **Would you consider an independent understanding of an important legal issue such as this to be a prerequisite for holding the position of Attorney General?**

RESPONSE: The advice and consent power of Article II, Section 2 of the Constitution rests with the Senate, and the ultimate determination of prerequisites to be Attorney General rests with that body. I would not presume to offer any opinion about how the Senate should carry out this responsibility. As a career prosecutor and two-term United States Attorney, I believe I have conducted myself with personal and professional integrity, and have acted with fidelity to the law and with reverence to the Constitution. If confirmed as Attorney General, I would hold myself to these same standards.

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RESPONSE: As I have stated previously, I am currently the United States Attorney for the Eastern District of New York, and am not in a position to know the details of why the Department has taken positions in certain litigation and what decisions have led to those positions.

- Question 4 asked if you agreed or disagreed that the statutory language cited in the question meant that the Secretary of Homeland Security had complete discretion to grant work authorizations to <u>all</u> aliens. You answered that it was your "understanding" that a Department of Justice brief that has been filed as part of pending litigation on the subject provided that information.

5. **Are you familiar with, or have you personally read, the relevant portion(s) of the Department brief that you referenced in your original answer?**

RESPONSE: I am familiar with the Department's brief.

6. **Is your original answer an indication that you have no independent legal understanding of this particular legal issue, or is it an indication that you agree with the Department's legal position?**

RESPONSE: As I am not a subject matter expert in this area, I have no basis to disagree with the position taken by the Department on this legal question.

7. **Would you consider an independent understanding of an important legal issue such as this to be a prerequisite for holding the position of Attorney General?**

RESPONSE: The advice and consent power of Article II, Section 2 of the Constitution rests with the Senate, and the ultimate determination of prerequisites to be Attorney General rests with that body. I would not presume to offer any opinion about how the Senate should carry out this responsibility. As a career prosecutor and two-term United States Attorney, I believe I have conducted myself with personal and professional integrity, and have acted with fidelity to the law and with reverence to the Constitution. If confirmed as Attorney General, I would hold myself to these same standards.

8. **Are you under the impression that, because there is ongoing litigation involving the issue at hand, that you are not free to comment on the issue as a nominee for Attorney General?**

RESPONSE: As I have stated previously, I am currently the United States Attorney for the Eastern District of New York, and am not in a position to know the details of why the Department has taken positions in certain litigation and what decisions have led to those positions.

III. Advance Parole as Pathway to Citizenship/Benefits

- Question 1 asked if you agreed or disagreed that the Secretary of Homeland Security lacked the legal authority to grant "advance parole" to illegal aliens covered by DAPA (i.e., the parents of U.S.-born children who, but for their unlawful presence, would be eligible for green cards). You answered that you are "not an expert in immigration law," and that you are "not familiar with the authority that the Secretary of Homeland Security exercises over parole decisions." (You provided an identical response to Question 2, which asked if you thought that the Secretary of Homeland Security had the legal authority to grant "advance parole" to illegal aliens covered by DAPA, and whether you agreed or disagreed that granting advance parole could allow the Secretary of Homeland Security to then grant lawful permanent resident status to those aliens, thereby placing them on a "path to citizenship.")

1. **Please familiarize yourself with the relevant legal authorities and provide your best independent legal assessment.**

RESPONSE: It is my understanding that the statutory framework for paroling aliens into the United States is set forth in 8 U.S.C. § 1182(d)(5)(A). The memorandum issued by the Secretary of Homeland Security in November 2014 regarding Deferred Action for Childhood Arrivals and Deferred Action for Parental Accountability does not authorize the parole of any alien. Independently, any alien who is granted deferred action for any reason may separately apply for advance parole to travel abroad for a limited period of time if the alien can establish that the requisite statutory criteria are met.

IV. Driver's Licenses to DACA and DAPA Recipients

- Question 3 asked if you thought that federal law compelled states to issue driver's licenses to DACA and DAPA recipients who are in the United States illegally. You answered that you were not involved in on-point litigation in the Eastern District of New York, but that "neither the 2014 Deferred Action Guidance nor any federal statute compels states to provide driver's licenses to DACA and DAPA recipients, so long as the states base eligibility on existing federal alien classifications—such as deferred action recipients, or other categories of aliens—rather than creating new state-law classifications of aliens."

1. **If a state can deny driver's licenses to all deferred action recipients, then why, in your independent legal opinion, can it not deny driver's licenses to a subset of deferred action recipients?**

RESPONSE: As I understand from the Department's prior filing, what a state cannot do is attempt to redefine categories of aliens that differ from those established by federal law. Otherwise a state has broad discretion in structuring its system for providing driver's licenses.

2. **Is it your understanding that deferred action confers a federal alien classification under federal law?**

RESPONSE: My understanding from the OLC Memorandum is that "[d]eferred action does not confer any lawful immigration status, nor does it provide a path to obtaining permanent residence or citizenship." OLC Mem. at 2.

3. **Is there any federal statute that authorizes deferred action for illegal aliens covered by DACA and DAPA?**

RESPONSE: As you are aware, this issue is currently the subject of pending litigation and has been addressed in a brief filed by the Department. I would respectfully refer you to the Department's brief for a full discussion of this issue.

4. **If not, then on what legal basis can states ever be compelled to provide driver's licenses to DACA and DAPA recipients?**

RESPONSE: Federal preemption extends both to law created by statute as well as law created by administrative action, such as regulation. If a state classification of alien status attempts to redefine categories of aliens in a manner inconsistent with federal law, then it is preempted by that law.

<u>Questions on DOJ Legal Positions and Practices</u>

I. Attorney General's Advisory Committee

- Question 2 asked if you provided any written or verbal advice, feedback, or information, or communicated in any direct or indirect way, via official or non-official channels, with either the Attorney General, the Deputy Attorney General, or the Associate Attorney General, on an array of important legal subjects or issues that have been handled by the Obama Administration. Your answer referred us to the Advisory Committee "summaries of our monthly meetings, which I understand the Department made available in unredacted form to Committee staff for the purpose of its consideration of my record despite their pre-decisional, deliberative nature." Your answer also stated that "some of the topics you have highlighted above arose in AGAC meetings, such as the lessons that United States Attorney's Offices can learn from the flawed Operation Fast and Furious." While appreciated and helpful, your answer is only partially responsive.

1. **With respect to the Obama Administration's approach to immigration policies:**

   a. **Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**

   b. **Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**

2. **With respect to the Obama Administration's approach to the Defense of Marriage Act (DOMA), including the Administration's decision to no longer defend DOMA in federal court:**

   a. **Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**

b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?

3. With respect to the Obama Administration's approach to enforcement of the Voting Rights Act or other federal laws pertaining to voting rights:

a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?

b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?

4. With respect to the Obama Administration's resistance to states' efforts to enhance or enact voter identification laws:

a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?

b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?

5. With respect to the Obama Administration's approach to enforcement of federal drug laws:

a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?

b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?

6. **With respect to the Obama Administration's refusal to appoint a special prosecutor to investigate alleged Internal Revenue Service (IRS) political targeting of private organizations seeking tax-exempt status:**

    a. **Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**

    b. **Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**

7. **With respect to the Obama Administration's handling of Operation Fast and Furious, including Attorney General Holder's handling of his contempt citation:**

    a. **Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**

    b. **Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**

8. **With respect to the Department of Justice's surveillance of reporters:**

    a. **Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**

    b. **Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?**

9. **With respect to the Department of Justice's application of the Foreign Corrupt Practices Act (FCPA):**

    a. **Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?**

b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?

10. With respect to the Department of Justice's investigative response to the terrorist murder of U.S. citizens in Benghazi, Libya, on September 11, 2012:

a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?

b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?

11. With respect to the Obama Administration's decision to close the Guantanamo Bay Detention Facility (GTMO), including decision-making regarding the transfer of individual detainees or groups of detainees:

a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?

b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?

12. With respect to the Obama Administration's decision to close its Office of Political Affairs (OPA) in January 2011:

a. Did you ever supply any pre-decisional input to the Attorney General, Deputy Attorney General, or Associate Attorney General on the above outside of the formal Advisory Committee setting?

b. Did you ever communicate verbally or in writing (including via paper or electronic correspondence, including via personal e-mail) with the Attorney General, Deputy Attorney General, or Associate Attorney General about the above outside of the formal Advisory Committee setting?

13. **It is our understanding that the Executive Office for United States Attorneys is the component of the Department of Justice that provides logistical support for the Advisory Committee meetings. <u>Given your leadership roles within the Advisory Committee, please provide information about the number of Department personnel who worked on Advisory Committee issues, the physical resources of the Department used in support of the Advisory Committee meetings, and any relevant cost estimates.</u>**

14. **In the event that you are confirmed to serve as Attorney General, will you commit or not commit to release some or all of the Advisory Committee materials to the general public? <u>If you will not commit to this step, please provide a detailed explanation as to why.</u>**

RESPONSE (Questions 1-14): No. However, as I stated in my previous answer, the best and most comprehensive record of my work in connection with the Attorney General's Advisory Committee (AGAC) would be reflected in the AGAC meeting minutes that the Department made available to the Committee for review.

With respect to your question about the resources that the Executive Office for United States Attorneys devotes to AGAC activities, the AGAC meets at the Robert F. Kennedy Main Justice building in Washington, D.C., and comprises ten subcommittees and sixteen working groups; these smaller groups meet both in Washington and outside of the Washington area depending on the nature of the subcommittee/working group. As is reflected in the minutes made available to the Committee, the AGAC has worked hard to conserve costs in recent years, including by conducting business through teleconferences.

In general, every subcommittee/working group has an EOUSA staff attorney liaison (former or current Assistant United States Attorney) assigned to each group. Very often these staff attorney liaisons cover more than one committee/working group and assist the subcommittee/working groups as a subject matter expert and assist with meeting logistics. These staff attorneys' time commitments are best described as a wide range from a few hours every few months to daily interaction when the AGAC is in session in Washington. The AGAC and its subcommittees and working groups spent $490,743 on travel for meetings last fiscal year.

It is my understanding that when the Department provided the Committee with access to the minutes for the AGAC in connection with my nomination, it was with the explanation that the AGAC's value derives in large part from the United States Attorneys' ability to deliberate fully and frankly in meetings about operational, management, and policy issues with the understanding that such discussions would not be made public.

II. DOJ Refusal to Defend DOMA

- Question 1 asked if you agreed or disagreed with Attorney General Holder that no "reasonable" arguments could be made in defense of a law that defines marriage as limited to the union of one man and one woman. You responded that no reasonable arguments could be made in defense of such a law given that discrimination on the basis of sexual orientation is reviewed under heightened scrutiny.

1. **To date, is there any Supreme Court authority holding that classifications based on sexual orientation are subject to heightened scrutiny?**

RESPONSE: The Supreme Court's decision in *Windsor v. United States* appears to reflect a less deferential review than that traditionally associated with rational basis review, but the Court did not explicitly address what standard of review applies to classifications based on sexual orientation.

2. **If not, then is it fair to say that there are reasonable grounds for defending a law that defines marriage as limited to one man and one woman since the Department is free to argue that a lower standard of scrutiny should apply?**

RESPONSE: As the Attorney General stated in a February 23, 2011 letter to Speaker Boehner, the determination that heightened scrutiny applies to classifications based on sexual orientation was based on criteria previously set forth by the Supreme Court in cases such as *Bowen v. Gilliard* and *City of Cleburne v. Cleburne Living Center*. It is my understanding that based on prior Supreme Court precedent, the Attorney General determined that no reasonable argument could be made that the classification made in Section 3 of the Defense of Marriage Act (DOMA) is substantially related to an important government objective.

3. **Do you think it is unreasonable for an individual to define marriage as the union between one man and one woman?**

RESPONSE: I do not believe it would be unreasonable for an individual to adopt that view of marriage as his or her personal belief. The question of what is unreasonable for an individual to believe, however, is different from the question of what is unreasonable for a government to require. Most constitutional provisions, including the Equal Protection Clause and the Due Process Clause, constrain the actions of governments, not of individuals.

- Question 2 asked if you agreed or disagreed with Attorney General Holder's decision to not defend the Defense of Marriage Act (DOMA). Your answer appears as if it contains an inadvertent typographical error.

1. **Please take this opportunity to complete your answer.**

RESPONSE: Thank you for the opportunity to correct the typographical error. The last sentence of my answer to your question should read: "With respect to DOMA, the Supreme Court has now invalidated Section <u>3, the provision of the statute that the Attorney General determined not to defend</u>." You are correct that I inadvertently omitted the underlined text from the response I submitted. My answer as a whole is: "When Congress passes a law, the Department of Justice should vigorously defend the constitutionality of that law. That is a vitally important principle and a longstanding tradition of the Department of Justice, which affords appropriate respect to Congress as a co-equal branch of government, and I fully subscribe to it. As I have stated elsewhere, however, there are limited exceptions to this rule. With respect to DOMA, the Supreme Court has now invalidated Section 3, the provision of the statute that the Attorney General determined not to defend."

III. DOJ Refusal to Enforce Federal Marijuana Laws

- Question 4 asked if you agreed or disagreed with the statement that states that have legalized marijuana for <u>medicinal</u> use have done so in violation of existing federal law. Your answer stated that the "manufacture and distribution of marijuana is prohibited by federal law, specifically, the Controlled Substances Act (CSA), except as authorized pursuant to limited exceptions within the CSA concerning research and related activities." Your answer did not answer the question asked.

  1. **Please take the opportunity to clarify or revise your answer: do you think that states that have passed so-called medical marijuana laws are in compliance with federal law?**

RESPONSE: The Controlled Substances Act (CSA) does not distinguish between medicinal and recreational uses of marijuana. Accordingly, my response applies equally to marijuana intended for either use.

  2. **Please take the opportunity to clarify or revise your answer: do you think that states with so-called medical marijuana laws cannot, by definition, be in compliance with federal law, given your own admission that "[m]arijuana is a Schedule I controlled substance with no currently accepted medical use in the United States"?**

RESPONSE: As stated in response to Question 1 above, the CSA does not distinguish between medicinal and recreational uses of marijuana. Accordingly, my response applies equally to marijuana intended for either use. The statement that "marijuana is a Schedule I controlled substance with no currently accepted medical use in the United States" is the determination of the Department of Health and Human Services and the Drug Enforcement Administration. As previously stated, the potential for medicinal uses of marijuana and its components is the subject of ongoing research. Such research is appropriately assessed and evaluated by the Department of Health and Human Services within the statutory framework of the CSA, which I understand has occurred in the past, as recently as 2011, in the consideration of petitions to reschedule marijuana.

- Question 9 asked you what steps you would take to require states that have legalized the cultivation, distribution, and sale of marijuana to cease and desist in their support of such activities (in order to come into compliance with federal law). You answered that you were "not in a position to take the types of action" suggested because of your current position. The question could have been more clearly phrased.

3. **<u>In the event you are confirmed to serve as the next Attorney General,</u> what <u>specific</u> steps will you take <u>as Attorney General</u> to require these states to cease and desist their support of the cultivation, distribution, and sale of marijuana, or to otherwise bring these states into compliance with existing federal controlled substance law?**

RESPONSE: If confirmed as Attorney General, I can assure you that the Department of Justice will continue to enforce the CSA in *all* states and will focus federal resources on the most significant threats to our communities. As in all areas of civil and criminal enforcement, the Department uses its discretionary enforcement authority in a manner that seeks to focus limited investigative and prosecutorial resources to address the most significant public health and public safety threats. In doing so, the Department's August 29, 2013 memorandum identifies eight enforcement priorities that historically have been and continue to be of primary importance in guiding the exercise of prosecutorial discretion in the area of marijuana enforcement. The guidance also explains the Department's expectation that state and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems to address the threat those state laws could pose to public safety, public health, and other law enforcement interests. The system not only must have robust controls and procedures in place, but also be effective in practice.

- Question 12 asked if you agreed or disagreed with the Obama Administration's decision to effectively suspend enforcement of the federal ban on marijuana (except with respect to certain enforcement priorities) in states that have legalized the cultivation, distribution, and sale of marijuana. You answered that "[n]either the Administration nor the Department of Justice has suspended enforcement of the Controlled Substances Act in states that have legalized the cultivation, distribution, or sale of marijuana," and went on to cite Department guidance on marijuana enforcement.

4. **Would you agree or disagree with the statement that the Department of Justice's guidance on marijuana enforcement, in the form of four separate memoranda that have been issued over the course of the Obama Administration, amount to a rollback of federal marijuana enforcement efforts? <u>If you disagree with this statement, please provide a detailed explanation as to why.</u>**

RESPONSE: I respectfully disagree with this statement. As noted above and as I can assure you from my experience as the United States Attorney for the Eastern District of New York, the Department of Justice continues to enforce CSA in *all* states, focusing federal resources on the most significant threats to our communities in its exercise of prosecutorial discretion in the area of marijuana enforcement. The Department has not suspended or rolled back enforcement of the CSA in states that have legalized the cultivation, distribution, or sale of marijuana. The Department's August 2013 memorandum simply provides guidance, applicable to federal prosecutors in every state, regarding the use of the Department's limited investigative and prosecutorial resources to address the most significant public health and public safety threats in an effective, consistent and rational way.

IV. DOJ Refusal to Appoint Special Prosecutors for IRS Matters

- Questions 1 and 2 asked you if you agreed with Attorney General Holder's decision to not appoint a special prosecutor to investigate potential IRS abuses, and also if you would commit to appointing a special prosecutor to investigate those abuses. Your joint answer to those two questions praised the objectivity of Department of Justice officials and deferred to the judgment of Attorney General Holder. Your answer did not answer the question asked.

  1. **Please take the opportunity to clarify or revise your answer: will you or will you not commit to appointing a special prosecutor to investigate the reported IRS abuses?**

RESPONSE: In my current position as United States Attorney for the Eastern District of New York, I am not privy to the details of the current investigation concerning allegations of improper targeting of certain tax exempt organizations by IRS employees. It is my understanding that the investigation into IRS targeting of certain tax-exempt organizations is being conducted by career prosecutors in the Department's Criminal Division and Civil Rights Division, working alongside professional law enforcement agents with the FBI and the Treasury Inspector General for Tax Administration (TIGTA). I also understand that the Attorney General has committed that those career professionals will carry out this investigation thoroughly and fairly, and he has determined that there is no need for the appointment of a Special Counsel under the Department's regulations, 28 C.F.R. § 600.1. If confirmed as Attorney General, I can assure the Committee that I will request a briefing concerning the status of the investigation and will ensure that all aspects of the investigation will be conducted in accordance with Department policies and procedures. Based on the information currently available to me, I have no reason to question the ability of our career prosecutors and law enforcement agents to conduct the IRS investigation fairly and professionally.

2. **During your time as Vice Chair and (subsequently) Chair of the Attorney General's Advisory Committee, but prior to revelations of these IRS abuses entering the public domain, were you aware of any contact or communication between former IRS Commission Lois Lerner and any other Department of Justice officials, including, but not limited to, Attorney General Holder?**

RESPONSE: No.

V. Operation Fast and Furious

- Question 1 asked if you agreed or disagreed that Operation Fast and Furious was effective in tracking and monitoring how Mexican drug cartels obtained firearms. You answered that you "share[d] the perspective of many, including the Department of Justice's Inspector General and Attorney General Holder, that [Operation Fast and Furious] was a flawed operation."

    1. **Please take the opportunity to clarify or revise your answer: by stating that you believe that Operation Fast and Furious was a "flawed operation," would you admit that it is fair to say that it was ineffective?**

    2. **Please take the opportunity to clarify or revise your answer: by stating that you believe that Operation Fast and Furious was a "flawed operation," would you admit that it may have jeopardized the safety of both U.S. citizens and Mexican nationals?**

    3. **Please take the opportunity to clarify or revise your answer: by stating that you believe that Operation Fast and Furious was a "flawed operation," would you admit that it may have increased the flow of firearms into Mexico, whereas traditional enforcement measures would have prevented some of those weapons from entering cartel members' hands?**

    4. **In the event you are confirmed to serve as the next Attorney General, as Attorney General, will you commit or not commit to at least conferring with the relevant congressional committee chairs prior to initiating any similar law enforcement operations (particularly if there is an international dimension to the operation)? <u>If you will not commit to the above course of action, please provide a detailed explanation as to why.</u>**

RESPONSE (Questions 1-4): It is my understanding that the Attorney General has stated unequivocally, and the Inspector General's report found, that the tactics employed in that operation were flawed, that the IG report also found that the operation failed to adequately mitigate risks to public safety, and that the Department has taken extensive steps to ensure that such tactics are not used again in the future.

- Question 3 asked for your legal understanding of the origins, nature, and purpose of the doctrine of executive privilege (which is the doctrine President Obama invoked, and to some degree is still invoking, to withhold documents pertaining to Operation Fast and Furious). You answered, in substance, that the "doctrine is constitutionally-based," that it is a tool available to the executive branch "in order to preserve the separation of powers." Respectfully, your answer demonstrates a potential, significant misunderstanding of the doctrine and application of executive privilege, and clarification is required, particularly insofar as you view it as a device for preserving the separation of powers.

5. **Please take the opportunity to clarify or revise your answer: by stating that the "doctrine [of executive privilege] is constitutionally-based," is it your position that the doctrine of executive privilege is authorized by a specific clause or clauses of the United States Constitution? <u>If your answer is yes, please cite the clause or clauses that serve as the basis for position.</u>**

RESPONSE: As the Supreme Court explained in *United States v. Nixon*, the seminal case on Executive Privilege, "[t]he privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S. 683, 708 (1974).

6. **Please take the opportunity to clarify or revise your answer: by stating that the doctrine of executive privilege exists "in order to preserve the separation of powers," is it your position that executive privilege is available for use on <u>any</u> occasion when a president or his personnel do not wish to disclose potentially problematic or embarrassing information to Congress? <u>If your answer is yes, please provide a detailed explanation of your position, with appropriate citations to existing provisions in the United States Code and precedential federal case law.</u>**

RESPONSE: It is not my understanding that the President has invoked Executive Privilege over information because it is "potentially problematic or embarrassing." Rather, the privilege was invoked to protect important constitutional considerations, including the separation of powers. If confirmed as Attorney General, I would ask the President to invoke Executive Privilege, if at all, only in appropriate circumstances, and not because the information is "potentially problematic or embarrassing."

7. **Please take the opportunity to clarify or revise your answer: by stating that the doctrine of executive privilege exists "in order to preserve the separation of powers," is it your position that executive privilege can be invoked in circumstances other than the narrow circumstance of shielding advice and counsel provided by a president's "inner circle" of advisors? <u>If your answer is yes, please provide a detailed explanation of your position, with appropriate citations to existing provisions in the United States Code and precedential federal case law.</u>**

RESPONSE: Yes. Executive Privilege has been invoked by administrations of both parties to protect against the disclosure of a wide variety of information from across the Executive Branch, including national security information and sensitive information concerning foreign relations. It is my understanding that the district court presiding over the lawsuit filed by the House Committee on Oversight and Government Reform has determined that Executive Privilege may be asserted over materials going beyond "advice and counsel provided by a president's 'inner circle' of advisors." For additional information about this topic, I would refer you to the brief filed by the Department on this issue in that litigation.

8. **Existing case law on the subject of executive privilege seems to support the principle that the doctrine of executive privilege is very limited, and can only be applied in the narrow circumstance of shielding advice and counsel provided by a president's "inner circle" advisors. Do you agree or disagree with this view of the limits of application of the doctrine of executive privilege? <u>If you disagree with this view, please provide a detailed explanation as to why, with appropriate citations to existing provisions in the United States Code and precedential federal case law.</u>**

RESPONSE: Please see my answer to the previous question. It is my understanding that your question does not accurately capture the existing precedent on this issue.

9. **In the event you are confirmed to serve as the next Attorney General, as Attorney General, will you commit or not commit to advising the President of the current, precedent-based limitations of the application of the doctrine of executive privilege? <u>If you will not commit to the above course of action, please provide a detailed explanation as to why.</u>**

RESPONSE: Yes. In any instance in which I or any other Executive Branch official would request the assertion of Executive Privilege, I would commit to advising the President about the applicable law and precedent underlying the assertion.

- Question 5 asked you if you would commit to turning over to both chambers of Congress any and all remaining documents that Attorney General Holder has refused to provide during prior congressional investigation of Operation Fast and Furious. You answered that you would only commit to "being open to a negotiated resolution of the dispute that balances the legislative need for the documents at issue with the important Executive and constitutional interests at stake."

10. **Please take the opportunity to clarify or revise your answer: by stating that you would be "open to a negotiated resolution," is it your position that the executive branch can <u>never</u> be required to produce documents, even in accordance with a duly issued subpoena? <u>If your answer is yes, please provide a detailed explanation of your position, with appropriate citations to existing provisions in the United States Code and precedential federal case law.</u>**

11. **Please take the opportunity to clarify or revise your answer: by stating that you would be "open to a negotiated resolution," is it your position that the executive branch can <u>never</u> be compelled to produce documents, even if it is an Article III federal court that compels that production? <u>If your answer is yes, please provide a detailed explanation of your position, with appropriate citations to existing provisions in the United States Code and precedential federal case law.</u>**

12. **One could interpret your answer as an indication that the executive branch can never be compelled to produce documents, even under circumstances where an Article III federal court compels that production. Would you agree that the executive branch is compelled to produce documents when instructed to do so by an Article III federal court? If you would not agree with this statement, please provide a detailed explanation as to why, with appropriate citations to existing provisions in the United States Code and precedential federal case law.**

13. **Please take the opportunity to clarify or revise your answer: by stating that you would be "open to a negotiated resolution of the dispute that balances the legislative need for the documents at issue with the important Executive and constitutional interests at stake," is it your position that the executive branch gets to make the determination about what materials to turn over or not to turn over to Congress based on what the executive branch believes Congress needs for legislative purposes? If your answer is yes, please provide a detailed explanation of your position, with appropriate citations to existing provisions in the United States Code and precedential federal case law.**

14. **Please take the opportunity to clarify or revise your answer: by stating that you would be "open to a negotiated resolution of the dispute that balances the legislative need for the documents at issue with the important Executive and constitutional interests at stake," is it your position that the legislative branch does not possess independent constitutional authority to compel production of documents for oversight purposes? If your answer is yes, please provide a detailed explanation of your position, with appropriate citations to existing provisions in the United States Code and precedential federal case law.**

15. **In the event you are confirmed to serve as the next Attorney General, as Attorney General, will you commit or not commit to complying with all duly issued subpoenas and Article III federal court orders that call for the production of Department of Justice documents? If you will not commit to the above course of action, please provide a detailed explanation as to why.**

RESPONSE (Questions 10-15): As the United States Attorney for the Eastern District of New York, I have not had occasion to study the doctrine of Executive Privilege, but my understanding is that the doctrine is constitutionally-based. I also understand that the scope of the privilege is the subject of ongoing litigation. It is also my understanding that in the course of that litigation, the Department has produced documents consistent with the district court's order. I commit that, if I am confirmed as Attorney General, I would work closely with Congress to accommodate its legislative interests, consistent with the constitutional and statutory obligations of the Executive Branch. I would hope that these efforts would eliminate the need for a congressional subpoena.

- Question 6 asked you if you would commit to preserving the entire amount of Operation Fast and Furious documents in the possession of the Department of Justice, in order to permit a subsequent Administration or federal court the opportunity to review those documents (if they so chose). You answered that you would only commit to "ensuring that the Department complies with its preservation obligations."

16. Please take the opportunity to clarify or revise your answer: by stating that you would only commit to "ensuring that the Department complies with its preservation obligations," is it your position that the Department has the authority to dispose of investigation-related documents or other sensitive documents? <u>If your answer is yes, please provide a detailed explanation of your position.</u>

RESPONSE: According to the Federal Records Act (44 U.S.C. § 3101) and the National Archives and Records Administration Act (NARA) regulations (36 C.F.R. §§ 1225 and 1226), the Department has the authority to dispose of records only in accordance with the applicable NARA-approved records retention schedules, and, if applicable, only consistent with independent preservation obligations, such as those required in civil litigation.

17. In light of recent concerns about federal agency record destruction and federal agency failure to preserve records, and your knowledge as the United States Attorney for the Eastern District of New York, please provide detailed information about the following:

a. Your understanding of the Department's <u>statutory</u> record preservation obligations.

RESPONSE: Please see the answer to Question 16 above.

b. Your understanding of the Department's <u>regulatory</u> record preservation obligations.

RESPONSE: Please see the answer to Question 16 above.

c. Your understanding of the Department's <u>internal</u> (i.e., Department-established) record preservation obligations.

RESPONSE: My understanding is that the Department has numerous internal record preservation obligations, including DOJ Order 802, Management of Preservation Responsibilities, which was issued on July 17, 2014. The Department also has independent record preservation obligations, such as in response to litigation.

18. **As the United States Attorney for the Eastern District of New York, you should be familiar with the array of statutory options for criminal prosecution of individuals who violate record or information preservation requirements. Please provide a complete list of the federal criminal statutes that would apply to individuals who violate record or information preservation requirements (including the relevant statutes of limitation for each of those options).**

RESPONSE: In certain circumstances, an individual who violates record or information preservation requirements with criminal intent could be prosecuted for Obstruction of Justice offenses under Chapter 73 of Title 18. For example, a person may be prosecuted under 18 U.S.C. § 1505 where such individual corruptly "influences, obstructs, or impedes or endeavors to influence, obstruct, or impede" a pending proceeding before a United States agency or department or "any inquiry or investigation . . . being had by either House, or any committee of either House or any joint committee of the Congress." 18 U.S.C. § 1515(b) clarifies that this can include withholding or concealing a document or other information. Similarly, under 18 U.S.C. § 1519, it is a crime to knowingly conceal or cover up any record or document with the intent to influence a matter within the jurisdiction of any department or agency of the United States. The relevant statute of limitations for these and most other federal crimes is five years. *See* 18 U.S.C. § 3282(a).

19. **As the United States Attorney for the Eastern District of New York, please explain if the above list of federal criminal statutes covering the destruction of record or information preservation requirements would be applicable to federal employees.**

RESPONSE: Depending on the facts, these federal criminal statutes could potentially apply to federal employees.

20. **As the United States Attorney for the Eastern District of New York, do you think that, if it is determined that a Department of Justice employee destroyed Department records (regardless of subject matter), and that destruction in fact violated federal law, the employee who violated federal law should be prosecuted? <u>If you disagree with this view, please provide a detailed explanation as to why.</u>**

RESPONSE: If it is determined that a Department of Justice employee destroyed Department records in violation of federal law, I would exercise prosecutorial discretion using similar—but not identical—factors I use in weighing whether to prosecute non-Department employees. These would include evaluating the strength of the evidence, including evidence of requisite criminal intent, the duration and magnitude of the alleged misconduct, and any potential defenses. In addition, if the acts were committed by a Department employee, I would take into account the elevated responsibility we have to uphold the law and maintain the public's trust and confidence.

21. **In the event you are confirmed to serve as the next Attorney General, as Attorney General, will you commit or not commit to prosecuting a Department of Justice employee under the above circumstances? <u>If you will not commit to the above course of action, please provide a detailed explanation as to why.</u>**

RESPONSE: Please see the answer to Question 20 above.

22. **Putting aside formal preservation requirements, do you agree or disagree that most, if not all, Department of Justice documents in connection with Operation Fast and Furious investigation now have significant historical value, and ought to be preserved out of an abundance of caution for ensuring the completeness of the historical record? <u>If you disagree with this view, please provide a detailed explanation as to why.</u>**

RESPONSE: While the requirements of applicable records schedules are mandatory, the Department may determine that particular groups of records merit longer retention periods, depending on the circumstances, in coordination with (and subject to approval by) NARA. The Department may make such a determination with respect to the Operation Fast and Furious investigation documents, in coordination with (and subject to approval by) NARA, as necessary based on the appropriate factors and circumstances.

VII. DOJ Foreign Corrupt Practices Act Abuses

- Question 1 asked if you agreed or disagreed with the claim that the ability of the Department of Justice to keep and use FCPA settlement fines incentivized application of the Foreign Corrupt Practices Act (FCPA). You answered that you disagreed with the claim, which you "believe[d] is built on a faulty premise regarding the process by which criminal fines and other financial penalties are paid and subsequently put to use." You went on to say that FCPA-related fines were not "kept" or "used" by the Department, that "no such use incentivizes application of the FCPA," and that funds from these fines were "paid into the U.S. Treasury [and] are not available for use by the Department except through the appropriations process or by statute." In subsequent parts of your answer, you specifically cited 42 U.S.C. 10601 and 28 C.F.R. 527 as the basis for your claim that the Department does not keep these funds, although you acknowledge the existence and use of the "3% Fund" and its ability to be used to "support certain litigation, data administration, and personnel costs." Additional information is required about the Department's ability to access and use the resources of the Crime Victim Fund.

1. **Please take the opportunity to clarify or revise your answer: by stating that funds resulting from FCPA fines were "paid into the U.S. Treasury [and] are not available for use by the Department except through the appropriations process or by statute," is it your position that the Crime Victim Fund is not**

an offsetting account, set apart from the general fund? <u>If your answer is yes, please provide a detailed explanation of your position.</u>

RESPONSE: The Crime Victims Fund is governed by statute and is a separate account set apart from the general fund.

2. **42 U.S.C. 10601(c) essentially states that sums that are deposited in the Crime Victim Fund are available for expenditure without fiscal year limitation.[3] Would you agree or disagree that this means that the Department of Justice's access to the Crime Victim Fund is not restricted by the "appropriations process," at least insofar as it means the Fund's revenue is not dependent on the distribution of additional revenue from the general fund of the Treasury? <u>If you disagree with this statement, please provide a detailed explanation as to why.</u>**

RESPONSE: Fines in criminal cases are imposed by courts and directed to the Crime Victims Fund, pursuant to Title 42, United States Code, Section 10601. The expenditure of these funds is controlled by statute and can only be disbursed for victim-related purposes. As I understand it, the disbursement of funds for victim-related purposes is restricted by the appropriations process.

3. **During your most recent tenure as the United States Attorney for the Eastern District of New York, did you ever require, as part of an FCPA settlement, that a corporation or individual had to contribute funding to a non-profit or for-profit organization, rather than paying just a fine to the federal government? <u>If your answer is yes, please describe the circumstances when this was done and, for each instance, provide the name of the organization and the justification for this approach.</u>**

RESPONSE: During my tenure as the United States Attorney for the Eastern District of New York, I have not required, as part of an FCPA settlement, that a corporation or individual contribute funding to any non-profit or for-profit organization, rather than paying a monetary penalty to the federal government.

[3] 42 U.S.C. 10601(c) states in its entirety: "Sums deposited in the Fund shall remain in the Fund and be available for expenditure under this chapter for grants under this chapter without fiscal year limitation. Notwithstanding subsection (d)(5) of this section, all sums deposited in the Fund in any fiscal year that are not made available for obligation by Congress in the subsequent fiscal year shall remain in the Fund for obligation in future fiscal years, without fiscal year limitation."

4. **Please take the opportunity to clarify or revise your answer: would you agree or disagree that, by virtue of the existence of the 3% Fund (which you acknowledge), the Department <u>does</u> receive revenue as a result of its FCPA investigations? <u>If you disagree with this statement, please provide a detailed explanation as to why.</u>**

RESPONSE: Pursuant to Public Law 113-234 and 28 C.F.R. Section 527, three percent of penalties associated with certain financial recoveries, which may or may not constitute FCPA resolutions, are paid into the 3% Working Capital Fund. As I understand it, the Collection Resources Allocation Board, overseen by the Justice Management Division, undertakes a review and determines whether and how the Department may award funds from the 3% Fund to support certain litigation, data administration, and personnel costs.

5. **Please take the opportunity to clarify or revise your answer: would you agree or disagree that, by virtue of the fact that the 3% Fund permits the Department to use Fund revenue to "support certain litigation, data administration, and personnel costs," that it arguably <u>does</u> incentivize the initiation of FCPA investigations, even if indirectly? <u>If you disagree with this statement, please provide a detailed explanation as to why.</u>**

RESPONSE: I disagree. As with all cases, including all financial crime cases, career prosecutors evaluate leads, such as whistleblower complaints and referrals from law enforcement agencies and regulators, to make independent decisions regarding whether or not to initiate FCPA investigations. Career prosecutors subsequently consider the strength of the evidence and other long-standing policy considerations (*see, e.g.*, United States Attorney's Manual (USAM) 9-28.300) in determining the appropriate charging and/or resolution decision for each particular investigation, regardless of whether that decision results in a contribution to the 3% Fund. Moreover, the ultimate allocation of money from the 3% Fund is determined by the Collection Resources Allocation Board and overseen by the Justice Management Division, not by the Criminal Division, where the prosecutors who initiate, investigate and prosecute FCPA cases work.

6. **During your most recent tenure as the United States Attorney for the Eastern District of New York, please indicate:**
    a. **How much revenue your office has received from the 3% Fund since FY 2010.**
    b. **If any revenue, how much of that revenue went to "support certain litigation."**
    c. **If any revenue, how much of that revenue went toward "data administration."**
    d. **If any revenue, how much of that revenue went toward "personnel costs."**
    e. **If any of that revenue went toward "personnel costs," how much of that revenue was paid out in the form of bonuses, cash awards, or non-salary payments.**

f. **If any of that revenue went toward "personnel costs," and any of that "personnel costs" revenue was paid out in the form of bonuses, cash awards, or non-salary payments, if any of that revenue was paid to Eastern District of New York attorneys who handled FCPA investigations.**

RESPONSE: As noted above, my Office does not make determinations about whether and how the Department disburses 3% Fund monies to support certain litigation, data administration and personnel costs. However, I can tell you that since FY 2010, the Eastern District of New York (EDNY) received roughly $5.7 million in resources in 3% Fund monies.

Of that, approximately $978,000 has been allocated for litigation and other non-personnel purposes, and approximately $4.8 million has been allocated to support personnel costs. As I understand it, of the 3% Fund monies used for personnel costs, none of these funds were directed to salaries of the attorneys in the EDNY who have handled FCPA investigations.

Additionally, approximately $1.9 million was allocated from the Department's Civil Division 3% Funds to EDNY to support contractors working on civil enforcement in the Residential Mortgage-Backed Securities arena.

- Question 2 asked if the Eastern District of New York, during your tenure as United States Attorney, has actually tried any FCPA cases to a verdict in federal court. You answered that your office has brought several "significant FCPA investigations [to] corporate resolutions." The hyperlinks to two news stories describing major FCPA investigations make clear, however, that none of these cited investigations were in fact resolved at trial, but actually involved out-of-court resolution. Your citation to the news story recounting the conviction of former Morgan Stanley managing director Garth Peterson did involve a court, but it was in connection with Peterson's guilty plea on criminal charges for evading Morgan Stanley's own internal accounting controls. You acknowledge in your answer that "the United States Attorney's Office for the Eastern District of New York has not had an FCPA trial to date."

7. **Would you agree or disagree that the absence of federal court involvement in FCPA cases (given that all of the FCPA cases you have handled within the Eastern District of New York) prevents the establishment of precedent that could serve as important public-domain guidance for companies seeking to remain in compliance with the provisions of the FCPA?**

RESPONSE: I disagree that there has been an absence of federal court involvement in FCPA cases. Within the past year alone, a circuit court has rendered two opinions interpreting various aspects of the FCPA, and two district courts have similarly issued written opinions on the FCPA. The Second Circuit, Fifth Circuit, Eighth Circuit, and Eleventh Circuit, as well as a number of district courts in other circuits, have rendered opinions regarding the scope and application of the FCPA. Courts also have presided over and approved a significant number of corporate and individual guilty pleas relating to the FCPA, including ten in 2014 alone.

In addition to the cases that have been and are being litigated in court, the Department resolves many cases short of trial. While the Department is prepared to litigate cases, which might lead to additional court rulings regarding the FCPA, the Department does not litigate cases where a defendant seeks a resolution short of trial that is an advantageous outcome for the United States. The Department, however, makes its FCPA resolutions publicly available, including corporate resolution documents containing the factual basis and relevant considerations for such resolutions.

The Department also recently issued *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "*Resource Guide*"), as well as over 60 opinion letters in response to opinion requests concerning its enforcement intent about actions that may be perceived as violating the anti-bribery provisions of the FCPA, many of which advised that the Department did not intend to take any enforcement action. These steps by the Department all provide significant guidance to companies seeking to remain in compliance with the FCPA.

- Question 13 asked you if you would commit as Attorney General to publishing information about the FCPA cases that the Department has decided not to pursue or prosecute (in order to help provide guidance to companies who are seeking to avoid running afoul of federal law). You answered that you would commit to "continuing the Department's practice of actively pursuing and implementing means by which declinations and other information about the decision to prosecute, or not, can be responsibly and appropriately shared," but would not commit to sharing declination cases publicly.

8. With the understanding that providing information about declinations could allow some companies to circumvent federal law (which may be the Department's primary concern), would you acknowledge that some companies would use information about declinations to improve their FCPA compliance practices?

RESPONSE: I recognize the benefit of providing information about declinations and commit to continuing these efforts, in keeping with Department of Justice policy and fundamental fairness to individuals and companies that are not being prosecuted. The United States Attorneys' Manual (USAM) describes situations in which a United States Attorney can exercise discretion to provide notice that an investigation is being closed in all areas of corporate criminal prosecution, including FCPA cases. *See* USAM § 9-11.155. While the Department has a longstanding general practice of refraining from discussing non-public information on matters it has declined to prosecute, in large part to protect the privacy rights and other interests of the uncharged parties involved, the Department has provided anonymous examples of declinations in the *Resource Guide*, as well as in over 60 opinion letters often indicating that the Department did not intend to take any enforcement action. In addition, companies looking to improve their FCPA compliance practices have a number of guideposts that are publicly available. The United States Sentencing Commission Guidelines Manual contains a section titled, "Effective Compliance and Ethics Program," which includes several pages of in-depth commentary. The Department also discusses compliance programs at length in the *Resource Guide*, devoting ten pages to the "Hallmarks of Effective Compliance Programs" and providing a "Compliance

Program Case Study" and several hypothetical questions and answers. Moreover, in each of the Department's FCPA resolutions with companies, the company agrees to enhance its compliance program consistent with a detailed compliance undertaking that is attached to the resolution and made available to the public on the Department's website.

9. **Would you at least acknowledge that the Department's refusal to share information about declinations contributes to the perspective that the Department prefers ambiguity of what will and will not be pursued by the Department for revenue-generating purposes?**

RESPONSE: The Department has responsibly shared information about several declinations, and I have committed to continue to explore ways by which the Department can responsibly share information while protecting the many sensitive interests that federal criminal investigations implicate. The Department has taken significant steps to provide clarity and transparency in the FCPA context, including making all of its corporate FCPA resolutions, together with the corresponding resolution documents, publicly available on the Department's website; issuing more than 60 opinion letters, which are also available on the Department's website; and releasing the *Resource Guide*, which provides more than 100 pages of discussion regarding the FCPA and which can be downloaded from the Department's website.

The Department does not pursue any case for revenue-generating purposes. The Department considers the strength of the evidence and other long-standing policy considerations (*see, e.g.*, USAM 9-28.300) in determining whether to bring and how to resolve an FCPA prosecution, just as it does in all areas of corporate criminal prosecution.

VIII. DOJ Civil Asset Forfeiture Abuses

- Throughout your testimony and your question responses, you have hit upon the important theme of "taking the profit out of crime and preserving the availability of assets for return to crime victims." Admittedly, this an important goal, and I do not think there is any disagreement with the concept that reducing the profit potential of crime reduces the incidence of crime. This theme, however, raises precisely the concern that exists among individuals who support reining in what are perceived to be excesses in the federal government's civil asset forfeiture authority.

1. **Would you agree or disagree that it is at least possible that civil asset forfeiture has resulted in the <u>permanent</u> forfeiture of assets of innocent parties (i.e., individuals who have committed no crimes)?**

RESPONSE: By the very nature of civil forfeiture, there may be instances in which assets are seized and forfeited from individuals who did not commit the crimes that generated the seized property. This is due to the fact that criminals often go to great lengths to insulate themselves from the proceeds and instrumentalities of their criminal acts—including by providing those proceeds and instrumentalities to individuals who knowingly accept and retain the criminally tainted property, even though they did not engage in the criminal activity themselves. Civil forfeiture is often the only mechanism by which the government can take such assets out of circulation and, whenever possible, compensate victims for their losses.

At the same time, I agree that it is essential that we protect the due process rights of innocent individuals. Recognizing the importance of protecting the innocent, Congress put safeguards in place to protect innocent property owners when it passed the Civil Asset Forfeiture Reform Act (CAFRA). Even where the government has borne its burden of proving that property is linked directly to crime, CAFRA allows a property owner to defeat forfeiture where he is an innocent owner. In such cases, the government must return the seized assets to the innocent owner, who may also be entitled to attorney's fees. These protections are essential to preserve the integrity of the Asset Forfeiture Program and to ensure that individual due process rights are preserved and protected.

2. **In situations where it is determined that a civil asset forfeiture effort resulted in the seizure of assets of innocent parties, would you agree or disagree that those seized assets ought to be returned to the innocent owners? <u>If you disagree with this statement, please provide a detailed explanation as to why.</u>**

RESPONSE: Please see the answer to Question 1 above.

3. **As the United States Attorney in charge of the Eastern District of New York, has your office ever encountered an instance where Assistant United States Attorneys and/or the law enforcement with whom you collaborate seized the property of individuals who were ultimately determined to not be involved in any criminal activity or wrongdoing? If the answer to the above is yes, please indicate if:**

    a. **The seized property was ever returned to the owner(s).**

RESPONSE: In each case in which the U.S. Attorney's Office for the Eastern District of New York (the "Office") assists law enforcement in obtaining a warrant to seize an asset, the seizure is approved by a magistrate judge and based upon a showing of probable cause. The Office would not seek a warrant or file a forfeiture action unless there was probable cause to believe that the subject asset was linked to a crime and that pursuing its forfeiture was consistent with the law enforcement goals of taking the profit out of crime and ensuring victims are compensated. The interests of justice and public safety, as well as our credibility with the court, are of paramount importance, and certainly more important than forfeiting any particular asset.

I know that there have been instances where the Office has declined to pursue forfeiture of assets seized by law enforcement. In such instances, the Office has ensured that law enforcement returned the assets to their owners; such decisions, however, do not mean that the underlying seizures were unlawful. For example, in connection with the recent seizure of the contents of a safe deposit box owned by a drug trafficker that was seized pursuant to a state court warrant, hundreds of thousands of dollars in cash proceeds of drug trafficking were forfeited. However, the Office declined to pursue forfeiture of jewelry found with the cash, and ensured the return of that jewelry to a claimant who had no connection to the crime, without the need for any litigation.

Similarly, in connection with an investigation into an international drug trafficking organization, agents presented to the Office evidence that a target's residence was a drug distribution site and, as such, subject to forfeiture as facilitating property of the target's offenses. Further investigation, however, revealed that the residence was, in fact, owned by the target's parents and that the parents had taken steps to evict the target. Accordingly, at the Office's direction, no forfeiture action of any kind was taken against the residence.

b. Any internal review was conducted as to the circumstances that led to the seizure of such property.

RESPONSE: The Office has not conducted internal reviews as described in your question. As indicated above, the fact that property was seized and subsequently returned to the owner does not necessarily mean that the seizure was unlawful or improper. Evidence of, or information as to, a claimant's innocent ownership may be presented only after a seizure has taken place. The Department is currently engaged in a review of the asset forfeiture program, and the Office is providing support, as needed, in this important process.

c. If there was an internal review into the circumstances of a seizure, if there were any findings of inappropriate seizure (or use of inappropriate tactics in a seizure).

RESPONSE: As described above, there was not such a review.

d. If there was an internal review into the circumstances of a seizure, and there were any findings of inappropriate seizure (or use of inappropriate tactics in a seizure), if there were any disciplinary measures instituted.

RESPONSE: As described above, there was not such a review.

- Question 5 asked about the Department of Justice's ability to keep and use proceeds from civil asset forfeitures, and whether that ability incentivizes the Department's use of civil asset forfeiture. You answered that "[f]ederally forfeited assets are deposited into the Assets Forfeiture Fund," and that "[t]hese funds are in turn used to compensate victims of crime, pay administrative costs, and provide critical resources to state and local law enforcement." You also answered that, "[i]f forfeited assets were deposited into the General Treasury instead of the Assets Forfeiture Fund, they would no longer be available for victims of crime." Additional information is required about the Assets Forfeiture Fund.

4. Please cite the statutory authority for the Assets Forfeiture Fund.

RESPONSE: The Department of Justice Assets Forfeiture Fund (the "Fund") is a special fund created by the Comprehensive Crime Control Act of 1984 (P.L. 98-473, dated October 12, 1984), codified at title 28, United States Code, Section 524(c), and established in the Treasury to receive the proceeds of forfeitures pursuant to any law enforced or administered by the Department of Justice.

5. Would you agree or disagree with the statement that the Assets Forfeiture Fund is an offsetting account, which can be accessed without specific appropriations from Congress? <u>If you disagree with this statement, please provide a detailed explanation as to why.</u>

RESPONSE: As I understand it, the same statute that serves as the legal basis for the Assets Forfeiture Fund (28 U.S.C. 524(c)) also governs how the money in the Fund is to be used. The uses delineated by the statute include, but are not limited to, payments to victims, payments of the costs associated with the maintenance and disposal of forfeited property, and payments to cover the costs of pursuing illicit assets. My Office is not involved in the oversight and management of the Assets Forfeiture Fund. If confirmed, I look forward to learning more about the permitted uses of the Fund.

6. Are any of the funds held in the Assets Forfeiture Fund available in the form of funding or grants for non-profit or for-profit organizations? <u>If Assets Forfeiture Fund resources are available in the form of funding or grants for non-profit or for-profit organizations, please provide the following:</u>

a. A list of all organizations that have received funding from the Assets Forfeiture Fund in the Eastern District of new York.

RESPONSE: The monies deposited into the Fund are available to cover all expenditures in support of the Asset Forfeiture Program that are permitted by the Fund statute. Separately, <u>after</u> all victims are compensated for their losses, and fund expenses are paid, state and local law enforcement agencies may receive forfeited funds through the Equitable Sharing Program. As I understand it, state and local authorities may expend those funds for law enforcement purposes, in accordance with Departmental guidelines governing the Equitable Sharing Program and subject to state and local appropriation and procurement rules. While I am not personally aware of any funds going to non-profit or for-profit organizations in the Eastern District of New York, my Office is not involved in the oversight and management of the Equitable Sharing Program or the Assets Forfeiture Fund. If confirmed as Attorney General, I look forward to learning more about the permitted uses of the Fund.

b. **If any organizations have received funding from the Assets Forfeiture Fund in the Eastern District of new York, the amounts each group has received (broken down by calendar year, if necessary).**

RESPONSE: Please see the answer to Question 6.a above.

c. **An explanation as to why that group received funding from the Assets Forfeiture Fund, when such funds are asserted to be for crime victims.**

RESPONSE: Please see the answer to Question 6.a above.

7. **Please explain how, "[i]f forfeited assets were deposited into the General Treasury instead of the Assets Forfeiture Fund, they would no longer be available for victims of crime." Why would it not be possible, for instance, for forfeited assets to be deposited into the "General Treasury," with Congress appropriating funding annually for crime victim assistance or reimbursement?**

RESPONSE: Victims are compensated with assets forfeited in the case in which they are identified as victims, after costs are deducted for the seizure, maintenance, and liquidation of the assets forfeited in the case. I believe that since 2000, the Assets Forfeiture Fund has provided approximately $4 billion in compensation to victims for their losses. If the Fund were discontinued, victims would not be compensated absent specific appropriations. In addition, prior to creation of the Fund, costs associated with execution of asset forfeiture functions were absorbed by agency operating funds, resulting in a lesser ability to pursue illicit assets due to resource competition and insufficient funding. If the Fund were discontinued, in the absence of agency appropriations dedicated to asset forfeiture, we would be likely to see a significant decline in the quantity of assets forfeited and returned to victims.

<u>Questions on Voting Rights</u>

I. The Voting Rights Act's Preclearance Requirement

- Questions 1-3 asked you about your perspectives on the Supreme Court's *Shelby County v. Holder* Voting Rights Act decision, in which the Court invalidated Section 4 of the Voting Rights Act (thereby essentially striking down the functional aspects of the Voting Rights Act's preclearance requirement). In your answers, you declined to answer these questions on the ground that there was ongoing litigation on the subject. As a result, you did not answer the question.

1. **Please take the opportunity to clarify or revise your answer: would you agree or disagree with the statement that the Voting Rights Act formula, which was based on social conditions in 1965, is no longer an accurate reflection of**

today's social conditions, and therefore cannot adequately serve as the foundation for a current statute? <u>If you disagree with this statement, please provide a detailed explanation as to why.</u> (Please note that this question is now not litigation-specific.)

RESPONSE: My understanding is that the Voting Rights Act (VRA) was reauthorized by Congress in 2006. As you note, the "coverage" formula in Section 4 of the VRA was invalidated by the Supreme Court in the *Shelby County* case. The decisions of the Supreme Court are the law of the land.

2. **Please take the opportunity to clarify or revise your answer: would you agree or disagree with the statement that the imposition of a federal preclearance requirement for changes to a state's election laws violates the Tenth Amendment of the United States Constitution? <u>If you disagree with this view, please provide a detailed explanation as to why.</u> (Please note that this question is not litigation-specific.)**

RESPONSE: The decisions of the Supreme Court are the law of the land. In *Shelby County,* the Supreme Court stated: "We issue no holding on §5 [the federal preclearance requirement] itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an 'extraordinary departure from the traditional course of relations between the States and the Federal Government.'" *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013).

   a. **If you believe that the current Question 2 is litigation-specific, please explain why.**

RESPONSE: Please see the answer to Question 2 above.

3. **Please take the opportunity to clarify or revise your answer: would you agree or disagree with the statement that the preclearance requirement of the Voting Rights Act is obsolete in modern America? <u>If you disagree with this view, please provide a detailed explanation as to why.</u> (Please note that this question is not litigation-specific.)**

RESPONSE: Please see the answer to Question 2 above.

   a. **If you believe that the current Question 3 is litigation-specific, please explain why.**

RESPONSE: Please see the answer to Question 2 above.

4. **You indicated in your prior answers that the reason you could not answer these questions about the Voting Rights Act was that the *Shelby County v. Holder* litigation was ongoing. Please provide an update of the status of the *Shelby County* litigation.**

RESPONSE: My understanding is that the attorneys for Shelby County have filed an application for attorneys' fees in the *Shelby County v. Holder* litigation in the District Court. I understand that this application for attorneys' fees was denied by the District Court. I further understand that part of the District Court's decision on the fees application found that the Department of Justice's litigation position on the merits in defending the constitutionality of Section 5 in the case was not frivolous, unreasonable or without foundation. The county's attorneys have filed an appeal on the attorneys' fees issue to the Court of Appeals, which remains pending. Because this case remains in litigation, I cannot comment further.

II. Voter Identification Laws and Legislation

- Several questions under this section drew from public, recorded comments you made in Long Beach, California, about states' voter identification law efforts in the days immediately following your nomination to serve as the next Attorney General. Those comments raise serious questions about your perspectives regarding federal efforts to obstruct states' efforts to enhance or secure their voting rights laws.

1. **Please provide the following answers about this speech and the circumstances that led to this speech:**
   a. **The nature of this trip to Long Beach, California.**
   b. **Whether this trip was personal or professional, and, if professional, whether this was financed by the Department of Justice.**
   c. **If this trip was both professional and financed by the Department, the official basis for the trip.**
   d. **If this trip was both professional and financed by the Department, whether the speech that was recorded on the video is considered part of your official duties while on this trip.**

RESPONSE: This question appears to be based on the misconception that the speech that I made regarding the common struggles of Nelson Mandela and the Reverend Martin Luther King, Jr., occurred while I was on a trip to Long Beach, California sometime in November of 2014; I have never been to Long Beach, California. In fact, it was a speech given on January 20, 2014 (Martin Luther King Day) in Long Beach, New York, which is in Nassau County and in my district as the United States Attorney for the Eastern District of New York.