

**Nomination of Loretta E. Lynch to be Attorney General of the United States**  
**Questions for the Record**  
**Submitted February 9, 2015**

**QUESTIONS FROM SENATOR CRUZ**

**Questions on Executive Amnesty**

**I. Deferred Action**

- On two occasions, the Obama Administration has granted amnesty (otherwise known as “deferred action” because it suspends removal proceedings otherwise required by law) to entire classes of illegal immigrants:
  - o Deferred Action for Childhood Arrivals (“DACA”): In a June 2012 memorandum, then Secretary of Homeland Security Janet Napolitano announced that certain illegal immigrants under the age of 31 who came to the United States as children could apply for deferred action.<sup>1</sup>
  - o Deferred Action for Parental Accountability (“DAPA”): In a November 2014 memorandum, the current Secretary of Homeland Security Jeh Johnson expanded the DACA program to include childhood arrivals who are now over the age of 30 and announced a new program that would allow certain parents of children who are either citizens or lawful residents of the United States to apply for deferred action. This most recent program would grant amnesty to an estimated 5 million illegal immigrants.<sup>2</sup>

In a subsequent legal memorandum issued by the Department of Justice’s Office of Legal Counsel (OLC), the Administration justified the legality of its decision to grant deferred action to a class of 5 million illegal immigrants as a legitimate exercise of its prosecutorial discretion.<sup>3</sup>

**1. Based on the material and information contained in the OLC opinion, please answer each of the following questions separately:**

**a. Do you agree or disagree with the legal conclusions in the OLC opinion?**

**RESPONSE:** As I indicated at my hearing, the opinion by the Office of Legal Counsel is based upon a thorough review of precedent, prior actions by Congress, as well as the discretionary

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<sup>1</sup> Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (Jun. 15, 2012).

<sup>2</sup> Jeh Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014).

<sup>3</sup> U.S. Department of Justice, Office of Legal Counsel, *The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (Nov. 19, 2014).

authority of the Department of Homeland Security to prioritize the removal of the most dangerous aliens within the United States and recent border crossers. Accordingly, the legal analysis by the Office of Legal Counsel appears reasonable.

**b. Cite the 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.**

**RESPONSE:** It is my understanding that this issue is currently the subject of pending litigation and that it 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.

**c. Define prosecutorial discretion.**

**RESPONSE:** As I described during my testimony before the Committee, as a career prosecutor and United States Attorney, I know well that prosecutors, acting in good faith, must look at the facts of a matter and the law, and consider both the benefits of a prosecution as well as the resources necessary and available.

**d. Are the President's actions a proper exercise of prosecutorial discretion as you have defined it and why?**

**RESPONSE:** As I have stated, the memoranda issued by the Secretary of Homeland Security appears 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.

**e. Does the fact that Congress has expressly authorized deferred action for certain classes of removable aliens<sup>4</sup> but not for the classes covered by DACA and DAPA establish that there is no authority for the President to grant deferred action under DACA and DAPA?**

**RESPONSE:** It is my understanding that this issue is currently the subject of pending litigation and that it 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.

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<sup>4</sup> See e.g., 8 U.S.C. 1154(a)(1)(D)(i)(II), (IV) (providing that certain individuals are "eligible for deferred action"); 8 U.S.C. 1227(d)(1) (authorizing an "administrative stay of a final order of removal" for T and U visa applicants who can demonstrate a prima facie case for approval); 115 Stat. 272, 361 (authorizing "deferred action" for certain family members of lawful residents killed on 9/11); 117 Stat. 272, 361 (authorizing "deferred action" for certain family members of certain U.S. citizens killed in combat).

- Article II, Section 3 of the United States Constitution states that the President “shall take Care that the Laws be faithfully executed.” Although it may not be feasible for the President to enforce every law in every case, there is a difference between declining to enforce a law for an entire class of people (which is nothing more than rewriting the law) and declining to enforce a law based on the facts and equities of a particular case (which is a legitimate exercise of prosecutorial discretion).
- 2. Is it a violation of the Take Care Clause for the President to refuse to enforce the immigration laws for a distinct class of individuals who are not otherwise exempted by Congress?**

**RESPONSE:** It is my understanding that this issue is currently the subject of pending litigation and that it 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.

- 3. Do you believe the President has the authority to exercise executive discretion to:**
- a. categorically exempt a class of people from enforcement of the Affordable Care Act?**
  - b. categorically exempt a class of people from enforcement of federal environmental laws?**
  - c. categorically exempt a class of people from enforcement of the Internal Revenue Code?**

**RESPONSE:** To the extent that this question attempts to characterize the effect of the deferred actions on immigration by analogy to other enforcement prioritizations, my 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. Instead, it 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. As a career prosecutor and a United States Attorney, I know full well the resource constraints that require those who enforce the law to prioritize the prosecution of those who pose the greatest threats to our country.

- In the lawsuit that Texas and more than 20 other states have brought against the United States challenging the President’s actions,<sup>5</sup> the United States Government has taken the position that its deferred action decisions are judicially unreviewable non-enforcement decisions.<sup>6</sup>
- 3. Do you agree that the President’s decision to defer removal actions for certain categories of illegal aliens is unreviewable by Article III courts? If your answer is yes, please provide a detailed explanation as to why.**

<sup>5</sup> See, e.g., <https://www.texasattorneygeneral.gov/files/epress/files/20141203ImmigrationExecutiveOrderLawsuit.pdf> (last viewed Feb. 5, 2015).

<sup>6</sup> Pl.’s Reply in Support of Mot. for Preliminary Inj., United States v. Texas, No. 1:14-cv-254 (S.D. Tex.) (“Plaintiffs’ redress . . . is through the political process, not the courts.” (quoting Def. Opp. at 29)).

**RESPONSE:** It is my understanding that this issue is currently the subject of pending litigation and that it 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.

## **Questions on Executive Amnesty**

### **II. Work Authorization**

- Under both DACA and DAPA, illegal immigrants granted deferred action would be eligible to apply for work authorization in the United States.
- 1. Do you agree or disagree that the President lacks the authority to grant work authority to illegal aliens who are eligible for deferred action under DACA or DAPA? If you disagree with this statement, please provide a detailed explanation as to why, including citations to the relevant statutory authority.**

**RESPONSE:** It is my understanding that this issue is currently the subject of pending litigation and that it 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.

- 2. Do you agree or disagree that affirmatively granting illegal aliens the right to work is not an exercise of prosecutorial discretion? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** It is my understanding that this issue is currently the subject of pending litigation and that it 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.

- In his November 20, 2014 memorandum on DAPA, Secretary Johnson cites Section 274A(h)(3) of the Immigration and Nationality Act (8 U.S.C. 1324a(h)(3)) as the basis for his authority to grant work authorizations to illegal aliens.<sup>7</sup> For purposes of determining work authorization, that provision defines the term "unauthorized alien" as an alien who is not "(A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General" (emphasis added). (Note: The language referencing the Attorney General represents unchanged "legacy" language that has not been changed since the Department of Homeland Security was first authorized in 2002.)
- 3. Do you agree or disagree that the statutory language cited above means that the Secretary of Homeland Security has complete discretion to grant work**

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<sup>7</sup> Jeh Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014).

**authorizations to any alien? If you agree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** It is my understanding that this issue is currently the subject of pending litigation and that it 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. Do you agree or disagree that the statutory language cited above gives the Secretary of Homeland Security complete discretion to grant work authorizations to all aliens? If you agree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** It is my understanding that this issue is currently the subject of pending litigation and that it 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.

### **Questions on Executive Amnesty**

#### **III. Advance Parole as Pathway to Citizenship/Benefits**

- INA Section 212(d)(5) (8 U.S.C. 1182(d)(5)) authorizes the Secretary of Homeland Security to parole otherwise inadmissible immigrants "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." INA Section 245(a) (8 U.S.C. 1255(a)), in turn, allows an alien to have his status adjusted to legal permanent resident if that alien was "admitted or paroled" into the United States.
- 1. Do you agree or disagree that the Secretary of Homeland Security lacks 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)? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** As a United States Attorney who is not an expert in immigration law, I am not familiar with the authority that the Secretary of Homeland Security exercises over parole decisions. However, if confirmed as Attorney General, I will support the strong enforcement of our nation's immigration laws.

- 2. If you think that the Secretary of Homeland Security does have the legal authority to grant "advance parole" to illegal aliens covered by DAPA, do you agree or disagree 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"? If you agree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** As a United States Attorney who is not an expert in immigration law, I am not familiar with the authority that the Secretary of Homeland Security exercises over parole decisions. However, if confirmed as Attorney General, I will support the strong enforcement of our nation's immigration laws.

### **Questions on Executive Amnesty**

#### **IV. Driver's Licenses to DACA and DAPA Recipients**

- 1. Do you think that federal law compels states to issue driver's licenses to DACA and DAPA recipients who are in the United States illegally? Whether you answer yes or no, please provide a detailed explanation as to why.**

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I was not involved in the preparation of the Department's amicus brief in the Ninth Circuit regarding this issue. It is my understanding, however, that as a matter of preemption, 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.

### **Questions on DOJ Legal Positions and Practices**

#### **I. Attorney General's Advisory Committee**

- It is our understanding that you have served on the Attorney General's Advisory Committee of U.S. Attorneys (Advisory Committee) almost since the start of your second tenure as United States Attorney for the Eastern District of New York. Specifically, since assuming your duties as United States Attorney on May 3, 2010, you were appointed by Attorney General Eric Holder, also in May 2010, to serve on the Advisory Committee.<sup>8</sup> In September 2011, you were appointed by Attorney General Holder to serve as vice chair of the Advisory Committee.<sup>9</sup> In January 2013, you were appointed by Attorney General Holder to serve as chair of the Advisory Committee,<sup>10</sup> and you continue to hold that chair.

The Advisory Committee, according to regulation, appears to provide very broad latitude in terms of the type and scope of input the Advisory Committee and its members may

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<sup>8</sup> U.S. Department of Justice Press Release, *U.S. Attorneys Paul J. Fishman and Loretta E. Lynch to Lead Attorney General's Advisory Committee* (Sept. 1, 2011) (noting your initial appointment to the Advisory Committee in May 2010).

<sup>9</sup> *Id.*

<sup>10</sup> CNN Library, *Loretta Lynch Fast Facts*, CNN (Dec. 5, 2014) (noting your appointment as chair of the Advisory Committee in January 2013).

provide to the Attorney General, the Deputy Attorney General, and the Associate Attorney General.<sup>11</sup> The regulation provides (with emphasis added):

(b) The Committee shall make recommendations to the Attorney General, to the Deputy Attorney General and to the Associate Attorney General concerning *any matters which the Committee believes to be in the best interests of justice*, including, but not limited to, the following:

(1) *Establishing and modifying policies and procedures* of the Department;

(2) Improving management, particularly with respect to the relationships between the Department and the U.S. Attorneys;

(3) Cooperating with State Attorneys General and other State and local officials for the purpose of *improving the quality of justice in the United States*;

(4) Promoting *greater consistency in the application of legal standards throughout the Nation* and at the various levels of government; and

(5) Aiding the Attorney General, the Deputy Attorney General and the Associate Attorney General in *formulating new programs for improvement of the criminal justice system at all levels, including proposals relating to legislation* and court rules.<sup>12</sup>

1. **Do you agree or disagree that the subject matter scope of the Advisory Committee, as provided for in the above regulatory language, is essentially limitless? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** While the language of the regulation is broad, the purpose of the Committee is to provide the Attorney General with recommendations in the best interests of justice. The United States Attorneys conduct an extremely wide range of litigation in the United States District Courts throughout the country, and we work closely with state, tribal, and local officials and community organizations. As such, we provide the Attorney General with a perspective that is shaped by our diverse experiences as the Department's representatives around the country so that the Attorney General can make the most informed decisions regarding the Department's policies and procedures on any matter affecting the administration of justice.

2. **Have you, in any of your capacities on the Advisory Committee (i.e., as an entering member, vice chair, or chair) provided any written or verbal advice, feedback, or information, or communicated in any direct or indirect way, via**

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<sup>11</sup> 28 CFR 0.10(b).

<sup>12</sup> 28 C.F.R. 0.10(b).

**official or non-official channels, with either the Attorney General, the Deputy Attorney General, or the Associate Attorney General, on any of the following subjects:**

- a. Any aspect of the Administration's immigration policy, including executive amnesty for illegal aliens or work authorization for illegal aliens?**
- b. Any aspect of the Administration's approach to the Defense of Marriage Act (DOMA), including the Administration's decision to no longer defend DOMA in federal court?**
- c. Any aspect of the Administration's enforcement of the Voting Rights Act or other federal laws pertaining to voting rights, including its resistance to states' efforts to enhance or enact voter identification laws or its selective enforcement of voting rights protections?**
- d. Any aspect of the Administration's enforcement of federal drug laws, including its executive decisions to not pursue enforcement in states that have legalized marijuana for recreational use?**
- e. Any aspect of the Internal Revenue Service's (IRS) political targeting of private organizations seeking tax-exempt status, including the decision to not appoint a special prosecutor to investigate that targeting?**
- f. Any aspect of Operation Fast and Furious, including Attorney General Holder's contempt finding or the litigation related to that contempt finding?**
- g. Any aspect of the Department of Justice's surveillance of reporters?**
- h. Any aspect of the Department of Justice's application of the Foreign Corrupt Practices Act (FCPA), including discussion of potential FCPA targets?**
- i. Any aspect of the Administration's response to the terrorist murder of U.S. citizens in Benghazi, Libya, on September 11, 2012, including decisions regarding the post-incident investigation by the Federal Bureau of Investigation?**
- j. Any aspect of the Administration's decision to close the Guantanamo Bay Detention Facility (GTMO), including the decision to transfer detainees out of GTMO?**
- k. Any aspect of the Administration's decision to close its Office of Political Affairs (OPA) in January 2011, including discussion with the U.S. Office of Special Counsel regarding the investigation into OPA?**

**RESPONSE:** I believe that the most comprehensive and accurate record of the work of the AGAC would be the 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. I would note 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.

### **Questions on DOJ Legal Positions and Practices**

## **II. DOJ Refusal to Defend DOMA**

- According to Attorney General Eric Holder, it is the longstanding practice of the Department of Justice to defend “the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense.” Yet, in February 2011, the Attorney General announced that the Department would no longer defend the constitutionality of Section 3 of the Defense of Marriage Act, which defined marriage under federal law as the union of one man and one woman. The Attorney General offered two reasons for this decision: (1) the Department does not consider the arguments in defense of DOMA to be “reasonable,” and (2) the President concluded that DOMA was unconstitutional.<sup>13</sup>

**1. Do you agree or disagree 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? If you agree with his position, please provide a detailed explanation as to why.**

**RESPONSE:** 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. There are limited exceptions to that rule, however, and I understand that the Attorney General, in a February 23, 2011, letter to Speaker Boehner, concluded that, under the Equal Protection component of the Due Process Clause, discrimination based on sexual orientation is reviewed under heightened scrutiny standard of review, and based on that conclusion determined that there were not reasonable arguments to be made in defense of Section 3 of the Defense of Marriage Act. The Supreme Court has now invalidated Section 3 of DOMA.

**2. Do you agree or disagree with the Attorney General’s decision to not defend DOMA?<sup>14</sup> If you agree with his decision, please provide a detailed explanation as to why.**

**RESPONSE:** 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. Do you agree or disagree with Attorney General Holder that the President can refuse to defend a law in court that the President believes is unconstitutional? If you agree with his position, please provide a detailed explanation as to why.**

**RESPONSE:** 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

<sup>13</sup> Press Release, *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, Dept. of Justice (Feb. 23, 2011).

<sup>14</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013) (Slip op. at 12, 6 n.2.).

of government, and I fully subscribe to it. There are only two exceptions. The first is where a statute violates the separation of powers by infringing on the President's constitutional authority. The second is where there are no reasonable arguments that can be offered in defense of a statute. These exceptions are narrow, and they should be invoked only after the most careful deliberation.

### **Questions on DOJ Legal Positions and Practices**

#### **III. DOJ Refusal to Enforce Federal Marijuana Laws**

- The Obama Administration arguably refuses to fully enforce federal drug laws with respect to marijuana, which is still listed as a Schedule I controlled substance in accordance with the Controlled Substance Act. Marijuana continues to be listed under Schedule I because it has long been considered by federal law enforcement and medical authorities to be both dangerous and without medicinal value.

- 1. Do you agree or disagree with the federal position that marijuana is a dangerous controlled substance? If you disagree with the federal position, please provide a detailed explanation as to why.**

**RESPONSE:** As I stated in my testimony before the Committee, I do not support the legalization of marijuana. It is the Administration's position to oppose the legalization of marijuana and other drugs because legalization would increase the availability and use of illicit drugs, and pose significant health and safety risks to all Americans, particularly young people.

- 2. Do you agree or disagree with the federal position that marijuana has no medicinal value? If you disagree with the federal position, please provide a detailed explanation as to why.**

**RESPONSE:** Marijuana is a Schedule I controlled substance with no currently accepted medical use in the United States. The potential for medicinal uses of marijuana and its components is the subject of ongoing research, and such research is appropriately assessed and evaluated by the Department of Health and Human Services within the statutory framework of the Controlled Substances Act as I understand has occurred in the past, as recently as 2011, in the consideration of petitions to reschedule marijuana.

- 3. Do you agree or disagree with the statement that states that have legalized marijuana for recreational use have done so in violation of federal law? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** 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.

4. Do you agree or disagree with the statement that states that have legalized marijuana for medicinal use have done so in violation of existing federal law? If you disagree with this statement, please provide a detailed explanation as to why.

RESPONSE: Please see response to Part III, Question 3, above.

5. Do you agree or disagree with the statement that federal prosecutors possess the prosecutorial discretion to refuse to prosecute all federal marijuana cases as a class or group? If you agree with this statement, please provide a detailed explanation as to why.

RESPONSE: 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 every instance, prosecutors must make decisions about how limited resources are brought to bear to best confront those threats. The Department's policies, including in the area of marijuana enforcement, as stated in the Department's August 29, 2013 memorandum, are crafted to provide guidance on doing so in an effective, consistent and rational way, while giving prosecutors discretion within the constraints of that guidance to take into account the circumstances of each case.

6. Do you agree or disagree with the statement that federal prosecutors possess the prosecutorial discretion to refuse to prosecute federal marijuana cases where the amount of marijuana at issue falls below a certain threshold? If you agree with this statement, please provide a detailed explanation as to why.

RESPONSE: Please see my response to Question 5, above. Rather than focus solely on quantity, the Department's 2013 memorandum provides guidance for Department employees 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. In doing so, the guidance 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 further acknowledges the importance of examining the particular circumstances of each case and the authority of the Department to pursue investigations and prosecutions that otherwise serve an important federal interest.

- In April 2013, the Drug Enforcement Administration (DEA) released a report<sup>15</sup> that reaffirmed the following: (1) that marijuana remains a dangerous controlled substance,

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<sup>15</sup> U.S. Drug Enforcement Administration, *The DEA Position on Marijuana* (Apr. 2013).

and that its continued listing in Schedule I was entirely appropriate,<sup>16</sup> and (2) that many (if not all) major American medical association, including the American Medical Association, the American Society of Addiction Medicine, the American Cancer Society, and the American Academy of Pediatrics, reaffirm the view that marijuana does not have medicinal value.<sup>17</sup> The DEA's position on marijuana continues to be echoed by Dr. Nora Volkow, Director of the National Institutes of Health's National Institute on Drug Abuse, who is on record stating that marijuana is a harmful, non-medicinal substance.<sup>18</sup>

**7. Please read the cited DEA report and, based on the material and information contained in that report, answer each of the following questions separately:**

- a. Do you agree or disagree with any statement within, or portion of, the DEA April 2013 report? If you disagree with any statement within, or portion of, the DEA report, please provide a detailed explanation as to why.**

**RESPONSE:** While I have not read the report to which you refer, as I stated in my testimony and in response to Question 1 above, I do not support the legalization of marijuana. Marijuana is a Schedule I controlled substance with no currently accepted medical use in the United States. The potential for medicinal uses of marijuana and its components is the subject of ongoing research, and such research is appropriately assessed and evaluated by the Department of Health and Human Services within the statutory framework of the Controlled Substances Act as I understand has occurred in the past, as recently as 2011, in the consideration of petitions to reschedule marijuana.

- b. Do you agree or disagree with any of the American medical associations that marijuana has no medicinal value? If you disagree with any of these American medical associations, please provide a detailed explanation as to why.**

**RESPONSE:** While I have not reviewed the particular views stated by the American medical associations you reference, please see response to Part III, Question 2, above.

- c. Are you aware of any domestic medical associations that maintain that marijuana is either medicinal, not harmful, or otherwise beneficial to users?**

**RESPONSE:** While I am not aware of the particular views of every American medical association, please see my response to Part III, Question 2, above.

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<sup>16</sup> *Id.* at 1 (noting that “[m]arijuana is properly categorized under Schedule I of the Controlled Substances Act,” that [t]he clear weight of the currently available evidence supports this classification,” and that “there is a general lack of accepted safety for its use even under medical supervision”).

<sup>17</sup> *Id.* at 2-4 (citing these and other medical associations and organizations that reject the notion that smoked marijuana has any medicinal value).

<sup>18</sup> *e.g.*, New England Journal of Medicine, *Adverse Health Effects of Marijuana Use* (Jun. 5, 2014) (co-authored by Dr. Volkow, and discussing the short- and long-term harmful effects of smoking marijuana, which can include neurological impairment); American Psychological Association, *Marijuana addiction a growing risk as society grows more tolerant* (May 2011) (noting Volkow's comments about how smoking marijuana has the potential to interfere with cognitive development and function, particularly in developing brains).

8. Please read Dr. Volkow's cited *New England Journal of Medicine* article and, based on the material and information contained in that article, answer each of the following questions separately:
- a. Do you agree or disagree with the premise that smoked marijuana is harmful to a person's health? If you disagree with this statement, please provide a detailed explanation as to why.

**RESPONSE:** While I have not read the article to which you refer, I do not disagree with the premise that smoked marijuana is harmful to a person's health.

- b. Do you agree or disagree with Dr. Volkow's professional assessment about the potential short- and long-term effects of marijuana usage? If you disagree with Dr. Volkow's professional assessment, please provide a detailed explanation as to why.

**RESPONSE:** I have not read the article to which you refer, and have not personally studied the subject sufficiently to address particular short- and long-term effects of marijuana usage.

- Four states – Colorado, Washington, Oregon, and Alaska – have now legalized the cultivation, distribution, and sale of marijuana for purely recreational use, thereby creating a legalized and regulated market for the illegal controlled substance within their respective states. These states have taken these internal actions to promote marijuana, despite the fact that the cultivation, distribution, and sale of marijuana remain illegal under federal law.<sup>19</sup> Some of these states' efforts may have at least been encouraged by the Obama Administration's recent executive declarations about new federal marijuana-related enforcement priorities.<sup>20</sup> Colorado's legalization of the cultivation, distribution, and sale of marijuana has triggered at least one lawsuit by adjacent states, which now trace current marijuana enforcement difficulties to Colorado's legalization of marijuana.<sup>21</sup>

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<sup>19</sup> Governing, *State Marijuana Laws Map* (Jan. 20, 2015) (identifying Colorado, Washington, Oregon, and Alaska as recreational use states).

<sup>20</sup> James M. Cole, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), identifying the eight following federal priorities regarding the enforcement of federal law against marijuana: (1) preventing the distribution of marijuana to minors; (2) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (3) preventing the diversion of marijuana from states where it is legal under state law in some form to other states; (4) preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; (5) preventing violence and the use of firearms in the cultivation and distribution of marijuana; (6) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (7) preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and (8) preventing marijuana possession or use on federal property.

<sup>21</sup> Denver Post, *Nebraska and Oklahoma sue Colorado over marijuana legalization* (Dec. 18, 2014) (citing the multi-state lawsuit and the interstate ramifications of intrastate legalization).

- 9. Before you are confirmed to serve as the next Attorney General, what steps will you take 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:** As the United States Attorney for the Eastern District of New York, I am not in a position to take the types of action to which you refer.

- 10. Do you agree or disagree with the statement that state laws that affirmatively authorize the cultivation, distribution, or sale of marijuana and that attempt to regulate it are preempted by the Controlled Substances Act or other federal statutory law? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Preemption analysis is statute-specific and presents a question of whether a specific state law conflicts with a federal statutory regime. I have not personally studied the issue of preemption in the context of the particular state laws in existence sufficiently at this time to take a position with regard to any individual statutory scheme.

- 11. Do you agree or disagree with the statement that federal statutory law, by virtue of the fact that it unequivocally declares marijuana to be a Schedule I controlled substance, preempts state law on the subject of marijuana, and therefore necessarily precludes states from creating a marketplace for the cultivation, distribution, and sale of marijuana under state law? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Please see my response to Part III, Question 10, above.

- 12. Do you agree or disagree 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? If you agree with this decision, please provide a detailed explanation as to why.**

**RESPONSE:** Neither 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. The Department's 2013 memorandum provides guidance, applicable to 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. In doing so, the guidance 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 further acknowledges the importance of examining the particular circumstances of each

case and the authority of the Department to pursue investigations and prosecutions that otherwise serve an important federal interest.

**13. Do you agree or disagree with the statement that it violates the Take Care Clause for the Administration to enforce marijuana laws only in states that have not legalized the use of marijuana in some way? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Please see my response to Part III, Question 12, above.

- Reports indicate that there are arguably significant banking irregularities among Colorado's legalized marijuana-related businesses, which raise the significant possibility that these businesses may be improperly avoiding the reporting of marijuana-related revenue in order to avoid paying federal income taxes.<sup>22</sup>

**14. Before you are confirmed to serve as the next Attorney General, can you commit or not commit to dedicating the resources of the Department of Justice to investigating the degree to which these Colorado-based marijuana-related businesses may be avoiding the payment of federal income taxes? If you will not commit to investigating the tax compliance of these businesses, please provide a detailed explanation as to why.**

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I am not currently privy to information about the tax compliance of businesses in Colorado, but I understand that pursuant to the Department's February 14, 2014 guidance, investigations and prosecutions of offenses related to financial transactions based upon marijuana-related activity are focused on using the Department's limited investigative and prosecutorial resources to address the most significant public health and public safety threats.

In all civil and criminal enforcement matters, including those involving violations of the federal tax laws, the Department of Justice uses its discretionary enforcement authority in a manner that seeks to focus limited investigative and prosecutorial resources to address the most significant violations and to maximize the effect of its enforcement actions.

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<sup>22</sup> Denver Post, *IRS fines unbanked pot shops for paying federal payroll tax in cash* (Jul. 2, 2014) (noting how marijuana-based businesses are frequently unable to use legitimate banks because of the illicit nature of their business).

## **Questions on DOJ Legal Positions and Practices**

### **IV. DOJ Refusal to Appoint Special Prosecutors for IRS Matters**

- In May 2013, the Treasury Inspector General for Tax Administration (“TIGTA”) confirmed that the IRS had used inappropriate criteria to identify potential political organizations applying for tax-exempt status under Section 501(c)(4).<sup>23</sup> In the months since, the President Obama has publicly discussed the severity of the situation,<sup>24</sup> and Attorney General Holder has asserted an intention to launch a criminal investigation into the above IRS abuses. To date, however, there are no outward signs of an active criminal investigation; the individual appointed to lead the internal Department of Justice investigation into the IRS had contributed heavily to President Obama and the Democratic Party;<sup>25</sup> and Attorney General Holder has refused requests to appoint a special prosecutor for an investigation into IRS.<sup>26</sup>

**1. Do you agree or disagree with Attorney General Holder’s decision to not appoint a special prosecutor? If you agree with his decision, please provide a detailed explanation as to why.**

**2. Before you are confirmed to serve as the next Attorney General, will you or will you not commit to appoint a special prosecutor for the purpose of conducting an investigation into the potential criminal wrongdoing in connection with the IRS’s above documented conduct? If you will not commit to appointing a special prosecutor, please provide a detailed explanation as to why.**

**RESPONSE:** I believe that it is critically important that all investigations by the Department of Justice are conducted in a fair, objective, professional, and impartial manner, without regard to politics or outside influence. We must follow the facts wherever they lead, and must always make our decisions regarding any potential charges based upon the facts and the law, and nothing more. That is what I have always done as a United States Attorney, and it is what I will do if I am confirmed as Attorney General.

In the many years that I have worked at the Department of Justice, I have developed tremendous faith in the ability of career prosecutors and professional law enforcement agents to conduct investigations in a fair, objective, professional, and impartial manner, without regard to politics or other outside influence. As the Attorney General and his predecessor have stated in memoranda directed to all Department employees during election years, “[s]imply put, politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges.” See Memorandum of The Attorney General to All Department Employees Regarding Election Year Sensitivities (March 9, 2012, and March 5, 2008). I am committed to those principles.

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<sup>23</sup> Treasury Inspector General For Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013).

<sup>24</sup> Press Release, *Statement by the President*, White House (May 14, 2013).

<sup>25</sup> Katie Pavelich, *BREAKING: New Emails Show Lois Lerner Was in Contact With DOJ About Prosecuting Tax Exempt Groups*, TownHall (Apr. 16, 2014).

<sup>26</sup> Letter from Principal Deputy Assistant Attorney General Peter J. Kadzik to Senator Ted Cruz (March 10, 2014).

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. Under those regulations, which I understand have been used very rarely, the Attorney General has the discretion to appoint a Special Counsel if an investigation or prosecution by the Department of Justice would present a conflict of interest, or in other extraordinary circumstances such that the public interest would be served by such an appointment. I have no reason to question the ability of our dedicated career prosecutors and law enforcement agents to conduct the IRS investigation fairly and professionally. At the same time, I assure the Committee that, if I am confirmed as Attorney General, I will apply the Special Counsel regulations faithfully and will exercise my discretion as Attorney General in an appropriate manner.

- There have also been allegations that the IRS has shared thousands of pages' worth of confidential taxpayer information with the White House.<sup>27</sup> Such sharing may have violated federal laws designed to protect the confidentiality of taxpayer information.
- 3. Before you are confirmed to serve as the next Attorney General, will you or will you not commit to appoint a special prosecutor for the purpose of conducting an investigation into any alleged sharing of confidential taxpayer information with the White House? If you will not commit to appointing a special prosecutor, please provide a detailed explanation as to why.**

**RESPONSE:** Please see response to Part IV, Questions 1 and 2, above.

### **Questions on DOJ Legal Positions and Practices**

#### **V. Operation Fast and Furious**

- On August 19, 2009, the Obama Administration created a new strategy (dubbed "Operation Fast and Furious") to ostensibly stem the flow of illegal weapons from the United States to Mexican drug cartels by putting an emphasis on identifying the trafficking networks rather than arresting straw purchasers of illegal weapons.<sup>28</sup> This, of course, required federal law enforcement to allow weapons to be illegally purchased and then trafficked. Unfortunately, the weapons were not tracked (or were not tracked successfully), which allowed many of these weapons to enter the stream of commerce

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<sup>27</sup> Robert W. Wood, *In 'Lost' Trove Of IRS Emails, 2,500 May Link White House To Confidential Taxpayer Data*, *Forbes* (Nov. 27, 2014).

<sup>28</sup> Office of National Drug Control Policy, *National Southwest Border Counternarcotics Strategy Implementation Update*, White House (Jan. 7, 2010).

and trafficking and be used in the commission of crimes, including violent crimes. The full extent of the damage done by Operation Fast and Furious may never be known.

**1. Do you agree or disagree that Operation Fast and Furious was effective in tracking and monitoring how Mexican drug cartels obtain firearms? If you agree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** In my position as a United States Attorney, I was not personally involved in either the underlying investigation of Operation Fast and Furious, or the Department's responses to Congress regarding it. I share the perspective of many, including the Department of Justice's Inspector General and Attorney General Holder, that this was a flawed operation.

**2. Do you agree or disagree that operations of this kind pose inherent risks to the safety and security of not only the American public, but also to American federal, state, and local law enforcement?**

**RESPONSE:** As noted previously, I share the perspective of many, including the Department of Justice's Inspector General and Attorney General Holder, that this was a flawed operation.

- The House of Representatives has tried for years to acquire information from the Department of Justice about Operation Fast and Furious. The Department's refusal to provide that information<sup>29</sup> on grounds of executive privilege led to the U.S. House of Representatives holding Attorney General Holder in contempt of Congress in 2012. This represented the first time in U.S. history that an Attorney General was held in contempt of Congress.<sup>30</sup> Because the Department refused to enforce the contempt citation, the Committee on Oversight and Government Reform (OGR) filed suit in federal district court. The court ordered the Department to begin producing documents by November 3, 2014.<sup>31</sup> Approximately 64,000 pages of documents were finally produced, although the Department continues to assert privilege over others.<sup>32</sup>

**3. Please provide your legal understanding of the origins, nature, and purpose of the doctrine of executive privilege.**

**RESPONSE:** 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. To preserve and protect the Executive Branch's proper functioning under the Constitution, some materials need to remain confidential. In some

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<sup>29</sup> Deputy Attorney General James Cole, *Letter to Chairman Issa*, Department of Justice (Jun. 20, 2012).

<sup>30</sup> Alan Silverleib, *House Holds Holder in Contempt*, CNN (Jun. 29, 2012).

<sup>31</sup> Josh Gerstein, *Judge won't allow Holder appeal now in contempt case*, Politico, Nov. 18, 2013; Jennifer Koons, *In Loss for Department of Justice, Judge Rules Fast and Furious Lawsuit Can Proceed*, MainJustice.com (Sept. 30, 2013).

<sup>32</sup> Susan Ferrechio, *Department of Justice Dumps 64,000 Pages Related to Fast and Furious*, Washington Times (Nov. 4, 2014).

instances, it becomes necessary for the President to assert Executive Privilege in order to preserve the separation of powers.

- 4. Do you agree or disagree that the doctrine was designed only to protect the confidentiality of a president's inner circle of advisors, rather than to provide a general right of the President's cabinet officers to withhold information from the public? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** As stated above, I have not had occasion as the United States Attorney for the Eastern District of New York 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, and that the Department of Justice has taken the position that Executive Privilege is necessary to protect the President's broad Article II functions, a position accepted by the district court.

- 5. Before you are confirmed to serve as the next Attorney General, will you or will you not commit to turning over to both chambers of Congress any and all remaining documents that Attorney General Holder has refused to provide during the prior congressional investigations into Operation Fast and Furious? If you will not commit to turning over any and all remaining Operation Fast and Furious documents, please provide a detailed explanation as to why.**

**RESPONSE:** If confirmed as Attorney General, I will 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.

- 6. Before you are confirmed to serve as the next Attorney General, will you or will you not 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 you will not commit to preserving unreleased Operation Fast and Furious documents for future review, please provide a detailed explanation as to why.**

**RESPONSE:** If confirmed as Attorney General, I will commit to ensuring that the Department complies with its preservation obligations.

### **Questions on DOJ Legal Positions and Practices**

### **VI. DOJ Interference with Freedom of the Press**

- Under Attorney General Holder, the Department of Justice obtained warrants to search the phone records of the Associated Press<sup>33</sup> and the personal e-mail account of Fox News Chief Washington Correspondent James Rosen<sup>34</sup> in connection with stories that they published containing classified information, all without informing the target of the search. In testimony before the House Judiciary Committee, Federal Bureau of Investigation Director Robert Mueller testified that investigations of “criminal co-conspirators,” as Rosen was labeled in the search warrant under which the surveillance was conducted, were used “quite often” without anticipating prosecution.<sup>35</sup>

**1. Do you agree or disagree that it is inappropriate for the Department of Justice to label a journalist as a “criminal co-conspirator” and then routinely conduct surveillance of that person without seeking to prosecute him or her, when there is no evidence that the journalist is doing anything other than engaging in well-accepted journalistic practices? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Because my Office was not involved in the investigations described above, I cannot address those specific matters. Given the essential role that members of the news media play in our society, I believe that federal investigators and prosecutors should view the use of certain law enforcement tools to obtain information from, or records of, non-consenting members of the news media as an extraordinary measure, not a standard investigatory practice. If confirmed as Attorney General, I would give careful consideration to, and closely scrutinize, any request for authorization to obtain information from, or records of, a member of the news media; or to investigate or prosecute a member of the news media. In my view, the revised media policies and practices both provide an appropriate framework with which to conduct this critical analysis, and strike the appropriate balance between law enforcement and free press interests.

## **Questions on DOJ Legal Positions and Practices**

### **VII. DOJ Foreign Corrupt Practices Act Abuses**

- In much the same way as civil forfeiture, critics of the FCPA note that the Department of Justice collects and retains for use (without further congressional approval or disbursal from the Treasury) fines paid in settlement of federal FCPA investigations. This ability to retain FCPA fines incentivizes not only a vigorous application of the FCPA, but also “creative” legal theories (which can lead to investigations of companies for potentially innocuous behavior). Critics of the FCPA, and the Department’s pursuit of FCPA investigations, point out that the combination of investigation and potential litigation expenses frequently drive what may be innocent companies to settle, which both cements the revenue source for the Department and prevents federal judges from having opportunities to interpret provisions of the FCPA.

<sup>33</sup> Mark Sherman, *Gov’t Obtains Wide AP Phone Records In Probe*, Associated Press (May 13, 2013).

<sup>34</sup> Ann E. Marimow, *A rare peek into a Department of Justice leak probe*, Washington Post (May 19, 2013).

<sup>35</sup> FBI Oversight Hearing Before the H. Comm. on the Judiciary, 113 Cong. (2013) (Statement of Dir. Mueller, Chairman).

**1. Do you agree or disagree with the claim that the ability of the Department of Justice to keep and use FCPA settlement fines incentivizes application of the FCPA? If you disagree with this claim, please provide a detailed explanation as to why.**

**RESPONSE:** I disagree with this claim, which I believe is built on a faulty premise regarding the process by which criminal fines and other financial penalties are paid and subsequently put to use. Fines for FCPA violations are not “kept” or “used” by the Department, and no such use incentivizes application of the FCPA. Rather, as with all cases, the Department considers 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 whether to bring an FCPA prosecution.

A company convicted of an FCPA violation pays any accompanying fine not to the Department but to the relevant U.S. district court clerk’s office. Those funds are then directed to the Crime Victim Fund, which is a U.S. Treasury fund created pursuant to Title 42, United States Code, Section 10601. Funds paid into the U.S. Treasury are not available for use by the Department except through the appropriations process or by statute.

A company that settles an FCPA investigation through a non-prosecution or deferred prosecution agreement pays any accompanying financial penalty not to the Department but to the U.S. Treasury. Pursuant to Congressional authorization and strict Departmental oversight, a small percentage of these funds may be made available to the Department. More specifically, in 1993 Congress authorized the creation of a 3% working capital fund (“3% Fund”) for the Department. *See* Public Law 113-234, 28 C.F.R. Section 527. Three percent of penalties associated with certain financial recoveries, including through non-prosecution and deferred prosecution agreements, are paid into the 3% working capital fund. After rigorous review by the Collection Resources Allocation Board, overseen by the Justice Management Division, the Department may award funds from the 3% Fund to support certain litigation, data administration, and personnel costs.

**2. Has your office actually tried any FCPA cases to a verdict in federal court? If the answer is yes, please provide details about these cases.**

**RESPONSE:** The Eastern District of New York has participated in a number of significant FCPA investigations with the Fraud Section of the Criminal Division of the Department, and it continues to do so. To date, these investigations have resulted in two corporate resolutions: (1) *In re Ralph Lauren*, NPA, \$882,000 penalty, press release at: <http://www.justice.gov/opa/pr/ralph-lauren-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay>; and (2) *In re Comverse Technology, Inc.*, NPA, \$1.2 million penalty, press release: <http://www.justice.gov/opa/pr/comverse-technology-inc-agrees-pay-12-million-penalty-resolve-violations-foreign-corrupt>); and one guilty plea by Garth Peterson of Morgan Stanley (and a declination against Morgan Stanley) (press release: <http://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required>). While the Department has conducted FCPA trials in many

districts, the United States Attorney's Office for the Eastern District of New York has not had an FCPA trial to date.

- As you know, the Criminal Division's Fraud Section is charged with investigating and enforcing the criminal provisions of the FCPA. Recently, Andrew Weissmann was selected to be the Chief of the Fraud Section. Mr. Weissmann is a former prosecutor and FBI general counsel. In private practice, however, Mr. Weissmann has been an outspoken critic of DOJ's FCPA program. Specifically, in a report<sup>36</sup> Mr. Weissmann drafted for the U.S. Chamber of Commerce's Institute for Legal Reform, he has recommended that: (1) a compliance defense to the FCPA should be added; (2) a company's liability should be limited for the prior actions of a company it has acquired; (3) a "willfulness" element should be added for corporate criminal liability; (4) a company's liability should be limited for the actions of a subsidiary; and (5) the definition of "foreign official" under the FCPA should be changed.

**3. Do you agree with any, some, or all of Weissmann's proposals for reforming the FCPA?**

**RESPONSE:** It is my understanding that Mr. Weissmann made these comments while in private practice and in connection with his representation of the U.S. Chamber Institute for Legal Reform ("Chamber"). It is also my understanding that, in the intervening time period, the Department has met with the Chamber, as well as other stakeholders, to engage in a healthy and productive dialogue regarding the Department's interpretation and application of the FCPA. If confirmed as Attorney General, I would continue to foster dialogue with the Chamber and other stakeholders regarding our FCPA program.

**4. Which of these changes (if any) do you think could be done administratively, as opposed to legislatively?**

**RESPONSE:** I do not support the proposed changes. Several of them would be a significant departure from general principles of corporate criminal law, effectively creating unique exceptions for FCPA cases that are unwarranted, are contrary to Congress's intent in enacting the FCPA, and would impose often insurmountable obstacles to effective enforcement of the FCPA.

- In 2004, then-Deputy Attorney General (and current director of the Federal Bureau of Investigation) James Comey stated that "[the Department of Justice wants] real time enforcement, so that the public and potential white collar criminals see that misdeeds are swiftly punished." Despite this statement, the 2014 OECD Foreign Bribery Report noted that "the average time taken (in years) to conclude foreign bribery cases has steadily increased over time, [from an average of 1.3 years in 2004] peaking at an average of 7.3

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<sup>36</sup> U.S. Chamber Institute for Legal Reform, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act* (Oct. 26, 2010).

years taken to conclude the 42 cases in 2013.”<sup>37</sup> Lengthy federal investigations not only place a tremendous financial burden on the targeted corporations and their shareholders, but also on taxpayers who shoulder the agency’s expenses for conducting the investigation.

- 5. Do you agree or disagree with Director Comey’s statement regarding the value of real-time law enforcement? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** I agree that law enforcement must move swiftly and responsibly in investigating both white collar and other criminal activity. I also agree that, for deterrence purposes, it is important to move quickly and bring charges against those individuals and companies that have engaged in criminal behavior.

While the Department has been working diligently to find meaningful and reasonable ways to reduce the time white collar FCPA investigations take, the question’s reliance on the OECD Foreign Bribery Report is misplaced. As I understand it, the referenced statistic is based on an aggregate of all the OECD Working Group members’ cases, rather than isolating the time taken by the United States in its cases. Also, this statistic does not measure the length of the criminal investigation. Rather, it measures the time between the last criminal act and the sanction, increasing substantially the time measured, since the Department (or foreign law enforcement) might not learn about a potential violation until years after the last criminal act has occurred.

- 6. Given that the FCPA Unit within the Department’s Fraud Section has expanded its personnel from 2004 to today, and given that the Department receives even more international cooperation today than it did in 2004, do you agree or disagree that the Department should be witnessing reduced investigative timelines for FCPA investigations rather than increased timelines? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Additional resources and cooperation are greatly appreciated and can often be key factors in expediting criminal investigations. However, they are only two of many factors that can influence the time it takes to conduct a successful investigation of any kind. Compared to other white collar investigations, the challenges associated with FCPA investigations can be much greater. Because of the nature of the offense, most of the evidence in these cases is typically located overseas. While international cooperation efforts have expanded significantly over the past ten years, the process for obtaining evidence from overseas is still time-consuming.

- 7. Before you are confirmed to serve as the next Attorney General, will you or will you not commit to dramatically reducing the timeline of FCPA-related Fraud Unit investigations, in order to reduce the financial burden on potentially innocent corporations and reduce investigation-related taxpayer expenses? If**

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<sup>37</sup> Organization for Economic Cooperation and Development, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (Dec. 2, 2014).

**you will not commit to reducing these investigative timelines, please provide a detailed explanation as to why.**

**RESPONSE:** Under my leadership, the Eastern District of New York has been committed to increasing the speed of its white collar investigations, including its FCPA investigations. As a result of the particular challenges of corporate and overseas investigations, however, the investigations can take a significant amount of time. While improvements in this area can be made, irresponsibly or artificially expediting an investigation solely for the sake of speed can harm the investigation and the pursuit of justice, as well as create greater harms to the targets, subjects, and witnesses in our investigations. If I am confirmed as Attorney General, you can be assured that the Department will continue to review each case on its merits and will move as expeditiously and responsibly as possible.

- Often, many of the countries with corrupt officials are the same countries that harbor terrorists, that seek to undermine U.S. foreign policy, and that have rampant bid rigging and illegal cartel conduct. On the opposite side of the equation, there are an increasing number of countries that have passed new anti-bribery statutes in the hope of curbing their own internal corruption problems and spurring legitimate economic growth.

**8. How will you marshal the criminal justice resources of the Department of Justice to enforce the FCPA in a way that helps in the fight against terrorism, cartel conduct, and international money laundering? Please provide a detailed explanation, based on your current experience as United States Attorney for the Eastern District of New York, of how you intend to tackle the problem.**

**RESPONSE:** As the United States Attorney for the Eastern District of New York, I am well aware of the link between corruption, corrupt regimes, and transnational crime, including economic crime, human trafficking, narcotics trafficking, money laundering, and even terrorism. In addition to prosecuting foreign corruption, narcotics trafficking, money laundering, and terrorism cases, the Department works closely with its counterparts throughout the U.S. government to devise and implement robust anticorruption strategies. For example, my Office has worked closely with the intelligence community on terrorism and corruption-related matters. The Department further participates, along with colleagues in other agencies in the U.S. government, in developing anticorruption policies through various international organizations and anticorruption conventions, including the Organization for Economic Cooperation and Development's Working Group on Bribery, the G-7, the G-20, and the U.N. Convention Against Corruption. The Department also consults with civil society organizations involved in the battle against corruption.

If confirmed as the Attorney General, I would continue to ensure that fighting corruption overseas, as well as domestically, remains a top priority for the Department. I would ensure that resources are appropriately directed to enforcing U.S. laws targeting foreign corruption, recovery of assets stolen by kleptocrats, and corrupt regimes.

**9. Given that more and more countries are enacting and enforcing anti-bribery statutes, would you agree or disagree that the FCPA ought to be amended to restrict FCPA jurisdiction to countries that do not have a prima facie anti-corruption infrastructure? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Such an exception would be unique under federal law. I disagree with this approach, as I believe it would do harm to the Department's anticorruption efforts. The Department works closely with countries that are developing their own anticorruption infrastructures, and we are well aware that it can take years of persistent effort to create an effective and holistic response to corruption of domestic and foreign officials.

As a recent OECD Report on Foreign Bribery noted, enforcement of existing anticorruption statutes, particularly those targeting foreign bribery, is improving but has a long way to go to see consistent and effective enforcement even among top economies in the world.

- The Department of Justice generally emphasizes the benefit of voluntary self-disclosure to, and voluntary cooperation with, FCPA investigations. Corporations are increasingly questioning the benefit, however, of rushing toward self-disclosure without demonstration of some sort of legal or cost benefit for doing so. To address this, some practitioners have suggested that the FCPA should contain a "safe harbor" from criminal prosecution for corporations that (1) have robust compliance programs, (2) self-disclose potential FCPA violations, and (3) cooperate fully with the Department's investigation, akin to what the Antitrust Division has for cartel enforcement.<sup>38</sup> (The Department would, of course, be able to continue to obtain non-criminal penalties for violations.)

**10. Do you agree or disagree with the statement that there should be an FCPA "safe harbor provision" to help corporations that are trying to do the right thing? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** I do not believe a "safe harbor provision" is necessary or desirable. Both the U.S. Sentencing Guidelines and the Department of Justice already provide significant benefits for companies that have robust compliance programs, self-disclose potential FCPA violations, and cooperate fully with the Department's investigation. Indeed, in a recent FCPA matter, the Criminal Division and the Eastern District of New York declined to prosecute Morgan Stanley based on many of those factors, among others, despite the fact that one of its Managing Directors bribed a foreign official to obtain business for and on behalf of Morgan Stanley.

**11. If you agree with the concept of an FCPA safe harbor provision, please describe what the structure or contours of such a safe harbor provision should be, and how you would implement that provision. Please provide a detailed explanation,**

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<sup>38</sup> Christopher M. Matthews, *Terwilliger to Propose New Rules for FCPA Disclosure*, Just Anti-Corruption (Jun. 22, 2010).

**based on your current experience as United States Attorney for the Eastern District of New York, of how you would write and implement such a provision.**

**RESPONSE:** The factors outlined in your question are important considerations in all FCPA cases, but I do not believe that a “safe harbor provision” is necessary or desirable.

- Members of the business community, practitioners, commentators, and even members of Congress have expressed frustration with the Department of Justice’s failure to publicize declined FCPA prosecutions, even where there is public knowledge that a particular corporation is under investigation. This practice may have several negative effects, including preventing corporations from having clarity about what type of conduct is considered acceptable. Given the Department’s financial incentive to ensure robust application of the FCPA, there is concern that this refusal to publish decline-to-prosecute information is intended to protect the FCPA fine-based revenue source for the Department.

**12. Would you agree or disagree with the statement that FCPA decline-to-prosecute decisions should be made available to the public? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** I agree that the Department should continue to explore ways by which it can responsibly share information while protecting the many sensitive interests that federal, criminal investigations implicate. The Department has a longstanding general practice of refraining from discussing non-public information on matters it has declined to prosecute. This practice is designed to protect ongoing investigations, privacy rights and other interests of uncharged parties, and sensitive, internal law enforcement deliberations. This practice and these considerations apply across the enforcement of all federal criminal laws.

Nevertheless, I must emphasize that the Department does pursue means by which declinations and other information about the decision to prosecute can be responsibly shared with entities or individuals under investigation, the business community, practitioners, commentators, and members of Congress. The United States Attorney’s Manual (USAM) describes situations in which a United States Attorney can exercise discretion to provide notice that an investigation is being closed. *See* USAM § 9-11.155.

Further, in the last two years, the Department has made great efforts to provide more information and transparency in the area of the FCPA, including the publication of A Resource Guide to the U.S. Foreign Corrupt Practices Act (the “Resource Guide”). The Resource Guide, which was written by the Department and the U.S. Securities and Exchange Commission (SEC), provides the public with extensive information about the Department’s FCPA enforcement approach and priorities. It contains a section on declinations and sets out criteria prosecutors consider in declining to bring a prosecution under the FCPA. In addition, the Department responds to opinion requests concerning its enforcement intent about actions that may be perceived as violating the anti-bribery provisions of the FCPA. *See* Title 15, United States Code, Sections 78dd-1(e) and 78dd-2(f). These opinion letters provide significant additional insight into the

Department's enforcement views, as well as transparency for companies, individuals, and practitioners as to what is acceptable or not.

**13. Before you are confirmed to serve as the next Attorney General, will you or will you not commit to publishing information about the FCPA cases that the Department has decided not to pursue or prosecute? If you will not commit to publishing this information, please provide a detailed explanation as to why.**

**RESPONSE:** I will 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. As detailed in my answer to the preceding question, the United States Attorney's Manual already provides a mechanism to provide notice that an investigation is being closed. I also commit to continuing the Department's recent efforts to provide more information and transparency, as it did by publishing the Resource Guide.

**Questions on DOJ Legal Positions and Practices**

**VIII. DOJ Civil Asset Forfeiture Abuses**

- There has been recent congressional concern about the Department of Justice's use of civil asset forfeiture, which has historically allowed federal prosecutors to seize cash and property from an individual before that individual is charged with a crime (and, in many circumstances, in the absence of any criminal charges or due process hearings).<sup>39</sup> It is also our understanding that you have been an aggressive user of civil asset forfeiture as United States Attorney for the Eastern District of New York, with your office receiving more than \$113 million in civil forfeiture proceeds from 123 cases between 2011 and 2013.<sup>40</sup>

**1. Please confirm the above number of civil asset forfeiture actions and the sum of civil asset forfeiture revenue taken in by your office during your recent tenure as United States Attorney (and, if these figures are incorrect, please provide the correct or updated figures).**

**RESPONSE:** During the period between May 1, 2010 and January 21, 2015, my Office filed approximately 196 civil asset forfeiture cases. While some of those cases remain pending, the completed cases resulted in the forfeiture of approximately \$95 million in civil forfeiture proceeds.

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<sup>39</sup> *Loretta Lynch's Money Pot*, Wall Street Journal (Nov. 21, 2014).

<sup>40</sup> *Id.*

- 2. Of the total number of civil asset forfeiture actions that have occurred in the Eastern District of New York during your recent tenure as United States Attorney, how many of those actions resulted in formal criminal charges:**
- a. against the person from whom the assets were originally seized?**
  - b. against another person (such as an accomplice in criminal activity)?**

**RESPONSE:** The Department of Justice does not maintain statistical information that would enable my Office to respond to this request. The Department's system for tracking and monitoring forfeiture matters is an asset tracking system, not a case tracking system. As such, the system contains only limited information on criminal cases that include forfeiture allegations for specific assets. Data is not recorded for every criminal case that may have been brought against a person involved in a civil asset forfeiture matter. Accordingly, it is not possible to provide accurate statistics regarding the number of criminal cases that were brought against a person involved in a civil asset forfeiture matter.

Nevertheless, I am aware of recent cases in which my Office has achieved great success through civil forfeiture actions against assets either in the absence of criminal charges or where assets cannot be forfeited in connection with a criminal case. In these cases, civil asset forfeiture functioned as an important tool—and in some instances, the only tool—for taking the profit out of crime and preserving the availability of assets for return to crime victims.

For example, in *United States v. All Funds on Deposit at Citigroup Smith Barney, et al.*, Kobi Alexander, a criminal defendant and former CEO of Comverse Technology, Inc. ("Comverse"), forfeited over \$46 million to the United States. The civil forfeiture action that led to this recovery was filed after Alexander fought extradition to the United States from Namibia in connection with pending charges of conspiracy, mail, wire and securities fraud and other offenses stemming from his scheme to backdate employee option grants. After defeating a number of challenges to the forfeiture by Alexander and his wife, the government entered into an agreement in which Alexander agreed to forfeit the seized funds in order to return the forfeited funds to Comverse, the victim of the charged crimes. In turn, Comverse agreed to use the monies to settle shareholder litigation arising from the backdating scandal. Because Alexander was out of the country and would not return to the United States, the remission of this money to victims could not have been achieved through criminal forfeiture, which requires a criminal conviction.

Similarly, in *United States v. Tai*, my Office used civil forfeiture to recover proceeds of crime where, again, a conviction could not be obtained. In that case, Tai passed away before his trial. By commencing a civil forfeiture action, the government was able to preserve approximately \$7 million in assets that represented proceeds of health care fraud, and which are now available for return to Medicare, Medicaid and private insurance company victims. Due to the Tai's untimely death, there could be no criminal conviction, and this result could not have been achieved through criminal forfeiture.

My Office also achieved the preservation of tens of millions of dollars in tainted assets through the use of civil forfeiture in connection with the prosecution of defendants Brian Callahan and Adam Manson. In the related criminal case, both defendants pled guilty to securities and wire fraud in connection with a large Ponzi scheme, misappropriating approximately \$96 million from their victims. Callahan diverted millions of the fraudulently-obtained funds to defendant

Manson's real estate project, a 117-unit beachfront luxury resort and resident development in Montauk known as the Panoramic View. Before the criminal investigation began, in April 2012, my Office initiated a civil forfeiture action against Callahan's residence and the unsold units of the Panoramic View, which is worth at least approximately \$60 million. Fifteen months later, in July 2013, the grand jury returned a criminal indictment. The filing of the civil forfeiture action served to restrain and prevent the dissipation of valuable assets while the criminal investigation was pending, thereby preserving property for potential return to victims of the defendants' scheme. If the property instead was sought to be forfeited through criminal forfeiture, it would have been at risk of being sold or otherwise dissipated prior to the grand jury's indictment.

- On Friday, January 16, 2015, Attorney General Holder issued an order restricting the practice whereby the federal government "adopts" state and local law enforcement seizures of property that might otherwise violate state civil asset forfeiture laws. Under the stated policy, this practice would be limited to state and local seizures of only "firearms, ammunition, explosives, and property associated with child pornography."<sup>41</sup> While the order appears to be a step in the right direction, it also appears to be very limited in scope. For one, the order does not restrict in any way the federal government's ability to engage in unlimited civil asset forfeiture. Nor does it restrict any joint federal-state civil asset forfeiture.

**3. Do you agree or disagree that the federal government's ability to engage in civil asset forfeiture presents due process concerns? If you disagree, please provide a detailed explanation as to why.**

**RESPONSE:** Asset forfeiture is a critical law enforcement tool intended to deprive criminals of the proceeds and instrumentalities of their crime and to compensate victims of crime. The civil asset forfeiture regime includes extensive safeguards to protect due process and property rights. Because civil asset forfeiture is a proceeding against property and not against an individual, it does not require an accompanying criminal conviction. Rather, the government must prove by a preponderance of the evidence that the property at issue is linked to criminal activity. Civil forfeiture law further provides protection for any innocent owner of property who is unaware of its link to criminal activity. As a result of civil forfeiture, the Department has been able to return billions of dollars to the victims of crime.

**4. Before you are confirmed to serve as the next Attorney General, will you or will you not commit to reducing the Department of Justice's use of civil asset forfeiture in the absence of formal criminal charges? If you will not commit to reducing civil asset forfeiture in the absence of formal criminal charges, please provide a detailed explanation as to why.**

**RESPONSE:** Please see response to VIII, Question 3, above.

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<sup>41</sup> Eric Holder, *Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies*, Department of Justice (Jan. 16, 2015).

- Critics of civil asset forfeiture have highlighted the Department of Justice's ability under current law to collect in an offsetting account and use (without further congressional approval or disbursal from the Treasury) revenue derived from civil asset forfeiture proceeds for Department activities. Because the Department has the freedom to keep and use this revenue without additional steps, critics maintain that the Department has every incentive to continue, and even expand, its use of civil asset forfeiture (and, for all intents and purposes, can self-fund certain agency functions, outside of the normal appropriations framework). One proposed solution for eliminating the incentive to engage in civil asset forfeiture is to change federal law to require that any proceeds collected as a result of civil asset forfeiture be deposited directly into the general fund of the Treasury.

**5. Do you agree or disagree that the Department's ability to keep and use proceeds from civil asset forfeitures incentivizes the Department's use of civil asset forfeiture? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Federally forfeited assets are deposited into the Assets Forfeiture Fund. These funds are in turn used to compensate victims of crime, pay administrative costs, and provide critical resources to state and local law enforcement. The Department has extensive procedures in place to ensure that forfeited assets are used appropriately, including a prohibition that they be used to fund employee salaries. As a result of forfeiture, the Department has been able to return billions of dollars to the victims of crime. If forfeited assets were deposited into the General Treasury instead of the Assets Forfeiture Fund, they would no longer be available for victims of crime.

**6. Do you agree or disagree that it would be more appropriate for the Department's proceeds from civil asset forfeiture to be deposited directly into the general fund of the Treasury? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Please see response to VIII (5) above.

- Frequent deposits beneath the \$10,000 threshold can trigger federal scrutiny on suspicion the depositors are seeking to evade federal oversight for crimes like money laundering or drug trafficking. On occasion, such deposits are seized using the Department of Justice's civil asset forfeiture capacity. Frequent, small deposits, however, are a common habit of legitimate small businesses, which rely on small injections of revenue and adequate account levels to ensure smooth bill payment and operations.

**7. Do you agree or disagree that the Department should exercise greater care when it attempts to seize bank accounts of individuals and entities that could be sole proprietors or legitimate small businesses? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** The structuring laws enacted by Congress are intended to prevent individuals from structuring financial transactions to avoid reporting requirements under the Bank Secrecy Act. Frequently, structured cash deposits are designed to conceal crimes such as narcotics offenses, money laundering and tax evasion. The currency reporting requirements have been an effective tool in assisting law enforcement in its detection of such criminal conduct. Structuring deprives law enforcement of this critical information, which is why Congress made it a criminal offense.

- 8. Do you agree or disagree that there should be a “loser pays” policy in which the federal government would pay for the legal expenses of individuals whose property is ultimately determined by a federal court to have been seized inappropriately (or if there is some other demonstrable failure of due process)? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** With respect to a “loser pays” policy, I understand that the law currently provides that a prevailing claimant in a civil forfeiture proceeding is entitled to have their attorneys’ fees paid by the government.

## **Questions on National Security Issues**

### **I. Obama Administration’s Criminal Justice Approach to Terrorism**

- The Department of Justice recently announced the prosecution of two separate cases in the Eastern District of New York involving attacks by terrorists on U.S. troops in overseas theaters of operation.

The first case, announced on January 20, 2015, charged two Yemeni nationals who are members of al Qaeda, Saddiq Al-Abbadi and Ali Alvi, with conspiring to murder U.S. nationals abroad and providing material support to al Qaeda. The complaint alleges that the two men engaged in attacks against U.S. forces in Afghanistan, in which an Army Ranger was killed and several others were seriously wounded. One of the defendants also engaged in attacks against U.S. forces in Iraq. The complaint states that the alleged conduct occurred between 2003 and 2008. The defendants were arrested in Saudi Arabia and then extradited to the United States.<sup>42</sup>

The second case, announced on January 23, 2015, charged the defendant Faruq Khalil Muhammed ‘Isa, who is identified as a member of a multinational terrorist network, with conspiring to kill U.S. nationals abroad and providing material support to a terrorist conspiracy to kill U.S. nationals abroad. The complaint alleges that the defendant

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<sup>42</sup> Press Release, *Two Yemeni Nationals Charged with Conspiring to Murder United States Nationals Abroad and Providing Material Support to al Qaeda*, U.S. Department of Justice (Jan. 20, 2015).

assisted in orchestrating a suicide attack that killed five U.S. soldiers. The defendant was extradited from Canada.<sup>43</sup>

- 1. Do you agree or disagree with the Obama Administration's decision to bring to the United States terrorist fighters who engaged in combat against our troops overseas and to try them as civilian criminals entitled to all the procedural protections of our criminal justice system? If you agree with this decision, please provide a detailed explanation as to why.**

**RESPONSE:** I believe strongly that the United States government must use every available tool, including detention of unlawful enemy combatants and military commission trials, as well as Article III prosecutions, to protect the American people. In any particular case, representatives of the agencies who are tasked with protecting the American people, including the Department of Defense, the Department of Homeland Security, the Department of Justice and agencies in the Intelligence Community, work together to determine the most effective tools to apply in that case, based on the particular facts and applicable law. As the United States Attorney for the Eastern District of New York, my role to date has been limited to determining whether or not there was a prosecutable federal case, not which was the appropriate tool to employ.

Because the cases to which you refer are ongoing prosecutions, I cannot comment on the specific facts or decision-making processes in those matters, other than to indicate that the process described above was observed.

- 2. Do you agree or disagree that these fighters should be treated as unlawful enemy combatants subject to indefinite detention and trial by military commission for violations of the laws of war? If you disagree with this decision, please provide a detailed explanation as to why.**

**RESPONSE:** Please see response to Question 1, above.

- 3. Are you concerned that by bringing terrorists to the United States for trial, Administration policy might draw terrorists here and expose the public to danger?**

**RESPONSE:** Although I cannot comment on these particular ongoing cases, I can say that appropriate steps have always been taken to ensure the security of terrorism-related proceedings in my district, as well as to ensure that terrorists detained in our prisons are held securely and do not pose a threat to our citizens. From my firsthand experience as a United States Attorney, I can attest that the criminal justice system has proven in hundreds of terrorism cases since before 9/11 to be a swift, secure, and effective option, among others, to incapacitate terrorists, gain valuable intelligence, and ensure that justice is served. While we must remain vigilant to the persistent

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<sup>43</sup> Press Release, *Alleged Terrorist, Charged With Murder of Five American Soldiers, Extradited to United States*, U.S. Department of Justice (Jan. 23, 2015).

risk of terrorist attacks and use all lawful tools of national power, I am confident that we can continue to prosecute terrorists in our courts and detain them in our prisons safely and securely.

## **Questions on National Security Issues**

### **II. Obama Administration's Guantanamo Bay Detention Facility Policy**

- It has been reported that, of the 620 detainees released from U.S. military's Guantanamo Bay Detention Facility (GTMO), at least 180 of these detainees have returned (or are suspected of having returned) to the battlefield to fight against U.S. forces and allies. According to U.S. officials, of those 180 confirmed or suspected recidivists, 20 to 30 have either joined ISIS or other militant groups in Syria.<sup>44</sup> There are now only 122 detainees at GTMO.<sup>45</sup>

**1. Do you agree or disagree with the President's decision to close GTMO? If you agree, please provide a detailed explanation as to why.**

**RESPONSE:** I support the President's policy. Although it is generally lawful to detain enemy combatants consistent with the laws of war for the duration of a conflict, I am concerned about the adverse effect of Guantanamo on our national security interests and cooperation with our allies, as identified by the President and the Department of Defense. As a United States Attorney, I am aware of concerns Guantanamo raises in the context of trying to secure the cooperation of foreign governments in terrorism cases.

**2. If you agree, please provide your view on what to do with the remaining 122 detainees.**

**RESPONSE:** The President has made clear that we will not transfer anyone from Guantanamo unless the threat the detainee may pose has been sufficiently mitigated and the transfer would be consistent with national security and our humane treatment policy. It is my understanding that each Guantanamo detainee has been evaluated based on a thorough interagency process, that 54 detainees have been approved for transfer unanimously by relevant Departments and Agencies, and that reviews for certain categories of detainees not currently approved for transfer are continuing by Periodic Review Boards according to criteria set forth in an executive order and statute. I support efforts to ensure that detainees are thoroughly evaluated to assess any threat they may pose and to transfer them to other countries only after satisfying the criteria for transfers established by law. Other detainees at Guantanamo are being prosecuted in military commissions, and I fully support that process.

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<sup>44</sup> Justin Fishel & Jenner Griffin, *Sources: Former Guantanamo detainees suspected of joining ISIS, other groups in Syria*, Fox News (Oct. 30, 2014).

<sup>45</sup> Fact Sheet, *Guantanamo by the Numbers*, Human Rights First (Jan. 15, 2015). Of the 242 detainees at the start of the Obama presidency, 116 have been transferred, repatriated, or resettled. *Id.*

**3. Is it illegal for the United States government to detain terrorists indefinitely at GTMO?**

**RESPONSE:** It is lawful for the United States to detain enemy combatants at Guantanamo for the duration of the conflict, consistent with the 2001 AUMF as informed by the law of war, and subject to review of their detention by the courts.

**4. Is it illegal for the United States government to detain terrorists indefinitely at any other facility?**

**RESPONSE:** The location of a particular detention facility would not alter the government's detention authority, although the laws of war would inform in what circumstances such individuals could be detained.

**5. Do you or do you not have concerns about what seems to be the Obama Administration's policy of transferring GTMO detainees to other governments' custody, regardless of whether these governments are willing or able to demonstrate their intent or capacity to continue to detain the transferred individuals?**

**RESPONSE:** The President has made clear that we will not transfer anyone from Guantanamo unless the threat the detainee may pose has been sufficiently mitigated and the transfer would be consistent with national security and our humane treatment policy. It is my understanding that the security measures provided by the receiving country are thoroughly evaluated before any transfer decision is made. If I am confirmed as Attorney General, I would support the Administration's efforts to ensure that detainees are thoroughly evaluated to assess threat they may pose and to transfer them only where we can do so consistent with our national security and with the criteria for transfers established by law.

**6. If it is illegal for the United States government to detain terrorists indefinitely at GTMO or any other facility, why is it legal or permissible for the United States government to transfer detainees to another government for indefinite detention?**

**RESPONSE:** I am unaware of any practice or policy to this effect.

**7. Will you or will you not commit to reviewing the Administration's policy of transferring detainees to foreign governments in light of the evidence of recidivism of transferees? If you will not commit to reviewing this policy, please provide a detailed explanation as to why.**

**RESPONSE:** The President has made clear that we will not transfer anyone from Guantanamo unless the threat the detainee may pose has been sufficiently mitigated and the transfer is

consistent with national security and our humane treatment policy, and that security measures provided by the receiving country are thoroughly evaluated before any transfer decision is made. If I am confirmed as Attorney General, I would support the Administration's efforts to ensure that detainees are thoroughly evaluated to assess any threat they may pose and to transfer them only where we can do so consistent with our national security and with the criteria for transfers established by law. It is my understanding that the most recent public report released by the Office of the Director of National Intelligence found that over 90% of the detainees transferred by the current Administration are neither confirmed nor suspected of having reengaged in terrorist or insurgent activity. Past instances of recidivism are and should be an important consideration.

### **Questions on National Security Issues**

#### **III. Obama Administration's U.S. Citizen Domestic Drone Strike Policy**

- In February 2013, a "White Paper" from the Department of Justice was released explaining that the government has the authority to kill U.S. citizens in a foreign country, outside the area of hostilities, if they are senior operational leaders of al Qaeda, provided that certain conditions are met, including that they present an "imminent" threat.<sup>46</sup>
- 1. Do you agree or disagree that it would violate the Due Process Clause of the United States Constitution if the President ordered the killing of a U.S. citizen on U.S. soil without judicial process if that U.S. citizen does not present an imminent (meaning immediate) threat of death or serious bodily injury to others? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** In a letter to Senator Rand Paul addressing this issue, Attorney General Eric Holder stated that the President does not have "the authority to use a weaponized drone to kill an American not engaged in combat on American soil." Although I have not had occasion in my role as a United States Attorney to consider the question in depth, I agree with Attorney General Holder's response.

- The Administration's 2013 White Paper, which applied only to targeted killings of Americans overseas, explained that an "imminent" threat "does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future."<sup>47</sup>
- 2. Do you agree or disagree with this White Paper's definition of "imminent"? If you agree, please provide a detailed explanation as to why.**

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<sup>46</sup> Office of Legal Counsel, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Organizational Leader of Al Qaeda or an Associated Force*, Department of Justice.

<sup>47</sup> *Id.*

**RESPONSE:** The Administration has stated that, in the counterterrorism context, the imminence determination incorporates consideration of at least the following factors: the relevant window of opportunity to act against the individual posing the threat; the possible harm that missing that window would cause to civilians; and the likelihood of heading off future disastrous attacks against the United States. I have not had occasion in my role as a United States Attorney to consider such questions in depth, but the Administration’s statement accords with my understanding that the meaning of “imminence” depends on the context and that the determination whether a threat is imminent should take into account all relevant facts and circumstances, and may be difficult to evaluate in the abstract.

## **Questions on Voting Rights**

### **I. The Voting Rights Act’s Preclearance Requirement**

- In *Shelby County v. Holder*, 133 S. Ct. 2612 (June 25, 2013), the Supreme Court invalidated Section 4 of the Voting Rights Act, which had established the formula for determining which states and localities must obtain preclearance from the Department of Justice before implementing any changes to their respective election laws.

1. **Do you agree or disagree with the Supreme Court’s holding in *Shelby County* that the Voting Rights Act formula based on social conditions in 1965 no longer accurately reflected today’s social conditions? If you disagree with the Court’s holding, please provide a detailed explanation as to why.**

**RESPONSE:** The decisions of the Supreme Court represent the law of the land. I note that the *Shelby County* case itself remains as pending litigation in which the Department is a defendant, and for that reason, I cannot comment further.

2. **Do you agree or disagree with the view 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? If you disagree with this view, please provide a detailed explanation as to why.**

**RESPONSE:** This question relates to whether to impose a new preclearance requirement in some circumstances, and that question is at issue in various pending litigation in which the Department is participating. As a result, I cannot comment.

3. **Do you agree or disagree with the view that the preclearance requirement of the Voting Rights Act is obsolete in modern America? If you disagree with this view, please provide a detailed explanation as to why.**

**RESPONSE:** Because this necessarily relates to the question of whether to impose a new preclearance requirement in some circumstances, which is at issue in various pending litigation in which the Department is participating, I cannot comment.

## Questions on Voting Rights

### II. Voter Identification Laws and Legislation

- In November 2014 – after President Obama nominated you to serve as Attorney General – you were recorded in a video<sup>48</sup> speaking to an audience in Long Beach, California. You were highly critical of states’ voter identification laws. In the course of giving this speech, you made the following comments:
  - o “Fifty years after the march on Washington, 50 years after the Civil Rights Movement, we stand in this country at a time when we see people trying to take back so much of what Dr. King fought for. ... People try and take over the State House and reverse the goals that have been made in voting in this country.”
  - o “But I’m proud to tell you that the Department of Justice has looked at these laws, and looked at what’s happening in the Deep South, and in my home state of North Carolina [that] has brought lawsuits against those voting rights changes that seek to limit our ability to stand up and exercise our rights as citizens. And those lawsuits will continue.”
  - o “There’s still more work to do. People tell us the ‘dream’ is not realized because dreams never are. [Nelson] Mandela and [Martin Luther] King knew we had to continue working, and I’d be remiss if I didn’t tell you, that under this president and under this attorney general, that the Department of Justice is committed to following through with those dreams.”
  - o Your comments during this video mirror the comments of Attorney General Holder, who has used the Department of Justice’s resources to block state voter identification laws or state efforts to pass new voter identification laws. Attorney General Holder has openly used his authority to pursue an “aggressive” assault of states’ laws or efforts to pass laws, claiming that these laws or efforts are attempts “disenfranchise American citizens of their most precious rights.”<sup>49</sup>
- 1. **Do you agree or disagree that states voter identification laws have legitimate, franchise-protecting purposes and are not aimed at disenfranchising U.S. citizens? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** I do not have any categorical views on these issues in the abstract. My general understanding is that the Department considers questions of the validity of voting practices, such as voter identification laws, based on the particular requirements of the federal law being enforced, based on the particular facts of the practice being investigated, and based on the particular facts in the jurisdiction.

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<sup>48</sup> Drew MacKenzie, *Loretta Lynch Attacks Voter ID Laws in Video*, Newsmax (Nov. 10, 2014).

<sup>49</sup> Sari Horwitz, *Eric Holder vows to aggressively challenge voter ID laws*, Washington Post (Jul. 10, 2012).

As the Supreme Court held in *Crawford v. Marion County Election Board*, voter identification laws are not per se unconstitutional. Nor do they necessarily violate the Voting Rights Act. I understand that before the *Shelby County* decision, the Department did preclear some voter identification laws, such as in Virginia and New Hampshire.

The analysis of a voter ID law is very specific to the particular law, the particular jurisdiction, and a wide range of factors that Congress has identified as relevant to determining whether a particular voting practice comports with the Voting Rights Act. As such, it is difficult for me to comment on the merits of any law (or in the abstract) without a full understanding of how the law actually operates in a particular jurisdiction.

I would also note that the Department of Justice has a number of important law enforcement responsibilities in this area. These responsibilities include investigating and prosecuting violations of the federal criminal laws (such as election frauds that violate the federal criminal statutes). These responsibilities also include investigating and bringing suit to prevent violations of the federal voting rights laws. If I am confirmed as Attorney General, I am committed to enforcing all of the federal laws within the Department's jurisdiction, including the federal criminal laws that criminalize various types of election fraud, and the federal voting rights laws such as the Voting Rights Act, according to their terms, in a fair and even-handed manner.

- 2. Do you agree or disagree that states have a legitimate right to prevent non-citizens from voting in their respective elections? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Please see my response to Question 1, Part II, above.

- 3. Do you agree or disagree that states have a legitimate, constitutionally sound interest in preventing fraudulent votes from being cast in their respective elections? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Please see my response to Question 1, Part II, above.

- 4. Do you agree or disagree that the millions of people who support voter identification laws have no racial animus whatsoever? If you disagree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Please see my response to Question 1, Part II, above.

- 5. Do you agree or disagree that state efforts to pass voter identification laws are an assault on the goals and achievements of the Civil Rights Movement? If you agree with this statement, please provide a detailed explanation as to why.**

**RESPONSE:** Please see my response to Question 1, Part II, above.

### **Questions on Voting Rights**

#### **III. Selective Voting Rights Enforcement**

- There is concern that the Department of Justice under Attorney General Holder has embraced the view that federal voting rights laws should not be enforced in a race-neutral manner but should only be enforced to protect the rights of minority voters. Reports produced by the U.S. Commission on Civil Rights, in addition to feedback from the Commission's membership, indicate that the Department has incorporated this view into its policy and strategy.<sup>50</sup>

1. **Do you agree or disagree that federal voting rights laws are intended to protect—and that the Department of Justice should protect—the rights of all voters regardless of race? If you disagree with this view, please provide a detailed explanation as to why.**

**RESPONSE:** I am not personally familiar with the specifics of each one of the civil and criminal provisions of the federal laws regarding voting rights, nor am I familiar with the specifics of their interpretation by the Department or the federal courts. My general understanding is that in some provisions of the federal civil and criminal laws regarding voting, Congress has sought to protect all voters in all elections, while other provisions are more specific; for example, in some provisions Congress has sought to protect voters in particular types of elections (e.g., voters in elections for federal office), while in other provisions Congress has sought to protect voters it has identified as having particular challenges with regard to voting (e.g., voters away from their place of residence due to service in the uniformed services and American citizens living overseas, or voters who suffer from blindness, disabilities or an inability to read or write). If I am confirmed as Attorney General, I am committed to enforcing all the federal laws within the Department's jurisdiction, including the federal voting rights laws, according to their specific terms, in a fair and even-handed manner. As a general matter, I agree that the right of every eligible American citizen to vote and have that vote counted in our elections is fundamental to our democracy and should be protected.

2. **Will you commit or not commit to reaffirming that it is the policy of the Department of Justice to pursue voting rights cases on behalf of all voters, regardless of their color, ethnicity, religion, or any other factor? If you will not commit to this specific step, please provide a detailed explanation as to why.**

**RESPONSE:** Please see response to Question 1, in Part III, above.

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<sup>50</sup> See U.S. Commission on Civil Rights, Letter from Commissioner Peter Kirsanow to Chairman Charles Grassley, 1-4 (Feb. 3, 2015) (detailing Department conduct, including that of former Deputy Attorney General Julie Fernandes, with respect to the Civil Rights Division's removal of cases involving white voters from Civil Rights Division consideration and citing specific Commission reports that explore this subject in depth).