

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

QUESTIONS FROM SENATOR FLAKE

1. As I mentioned in the hearing, I have concerns regarding the U.S. Attorney's Office for Arizona's recent order that pulls back on Operation Streamline's successful "zero tolerance" policy. I have a few follow up questions.

RESPONSE: I appreciate that this is an important matter of great concern to you, as you articulated in my courtesy visit with you and in a subsequent letter to me. I commit to you that if I am confirmed, I will learn more about Operation Streamline and will carefully consider the concerns you have shared with me.

- a. Do you believe that pulling back on a "zero tolerance" policy with regard to Operation Streamline will result in an increase or decrease in the number of illegal border crossers in the future?

RESPONSE: Public safety must be the paramount consideration in making prosecutorial decisions as they relate to the prosecution of undocumented aliens. As the United States Attorney for the Eastern District of New York, I have not stood in the shoes of the Southwestern Border United States Attorneys as they have set their priorities. While I have great confidence in those United States Attorneys, if confirmed as Attorney General, I will personally take a close look at the policies governing prosecution of illegal border crossers to ensure that those policies are best protecting the security of the United States and its citizens. If confirmed as Attorney General, I will work to ensure effective deportation and removal consequences for immigration violations.

- b. What do you believe will be the consequences of it becoming widely known that certain categories of offenders, such as first time border crossers without criminal histories, are not being prosecuted?

RESPONSE: If confirmed as Attorney General, I will prioritize public safety in the enforcement of federal immigration laws, including criminal immigration laws. The security of the United States and its citizens will always be my top priority. It is my understanding that the new removal priorities established by the Department of Homeland Security include recent border crossers and visa overstays who are ineligible for deferred action. As a result, it would not appear to be in anyone's interests to attempt to cross the border illegally at this time, as they would be a priority for removal. If confirmed as Attorney General, I will work to ensure effective deportation and removal consequences for immigration violations.

- c. Given your experience as a U.S. Attorney, do you believe that rolling back Operation Streamline and reducing prosecutions in the Yuma Sector, an area that

has shown a significant decrease in border crossings since the implementation of Operation Streamline, is prudent?

RESPONSE: I support effective deportation and removal consequences for immigration violations. I can assure you that if confirmed as Attorney General, I will take a close look at Operation Streamline, to ensure that the Department of Justice is pursuing effective policies that promote public safety in the enforcement of federal immigration laws, including criminal immigration laws. Public safety must be the paramount consideration in making prosecutorial decisions as it relates to the prosecution of undocumented aliens.

- d. In your testimony, you mentioned budget constraints as one reason for possibly pulling back on Operation Streamline's "zero tolerance" policy. Do you commit to notify me of budgetary issues related to Operation Streamline, if that appears to be an impediment to continuing the "zero tolerance" policy?

RESPONSE: The security of the United States and its citizens will always be my top priority if I am confirmed as Attorney General. I share your concern that public safety not be jeopardized by budget challenges. If confirmed, I am committed to working closely with the Committee on budgetary issues related to the enforcement of immigration laws and other federal laws within the jurisdiction of the Department of Justice.

- e. If you are confirmed, do you commit to provide specifics of the new Operation Streamline policy as well as any historical analysis done of the appropriateness of these changes given Operation Streamline's impact on recidivism?

RESPONSE: With regard to the prosecution of Improper Entry by Alien offenses, like other federal criminal cases, the USAOs formulate and implement district guidelines in the exercise of investigative and prosecutorial discretion, consistent with the Principles of Federal Prosecution. See United States Attorneys' Manual 9-27.000., http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.001. I look forward to working with you, this Committee, and the United States Congress to provide the information you need regarding this policy to perform your critical oversight responsibilities, subject to the Department's long-standing law enforcement responsibilities.

- f. In addition, if confirmed as Attorney General, will you support restoring Operation Streamline under a "zero tolerance" approach and removing the prohibition on prosecuting first time border crossers absent specific circumstances?

RESPONSE: As noted above, I support effective deportation and removal consequences for immigration violations. I can assure you that if confirmed as Attorney General, I will be committed to public safety in the enforcement of federal immigration laws, including criminal immigration laws. The security of the United States and its citizens will always be my top

priority. If confirmed, I will take a close look at the policies governing prosecution of illegal border crossers to ensure that they are best protecting the security of the United States and its citizens. I look forward to working with you and this Committee to ensure that we are effectively pursuing our shared goal of protecting the American people.

2. In your testimony, you stated that you are “not aware of how the [Department of Homeland Security] will actually go forward and implement by regulation [President Obama’s executive action].” Can you explain whether you believe, regardless of its constitutionality, that President Obama’s executive action must be implemented through the regulatory process? And, if so, what are the legal implications of not following that process?

RESPONSE: It is my understanding that the Department of Homeland Security has followed, or will follow, any applicable regulatory procedures with respect to the memoranda issued by the Secretary in November 2014.

3. I appreciate your commitment to ensure that Crime Victims Funds only be used to assist victims of crimes. In the January 13, 2015 memorandum that your office sent following up on your committee testimony, it is noted in the last paragraph the Department is “working on guidance that will minimize [the new law’s] impact.” It has been reported that the Department of Justice and the Office of Victims of Crime is considering a “pro-rata” solution that will partially shift the payment for victim advocates to non-Crime Victims Fund revenues. This would necessarily result in diminishing the services that are being provided to crime victims.

- a. Will you commit to directing that victim advocates and supervisors be confined to serving the needs of crime victims?

RESPONSE: Although I am not in a position to comment upon any proposed guidance, I am committed to the implementation of the requirement in the Victims of Crime Act of 1984, as amended by the Victims of Child Abuse Act Reauthorization Act of 2013, as to the permissible use of the Crime Victims Fund.

4. Two weeks ago, the Department of Justice announced the criminal prosecution of three foreign terrorists who were charged for conspiring to kill U.S. soldiers who were fighting in Afghanistan and Iraq and providing material support to al-Qaeda. There are number of concerns with prosecuting these terrorists in Article 3 courts, including the safety of the proceedings, introduction and sharing of classified intelligence with these terrorists’ lawyers, and, if convicted, sending terrorists into U.S. prisons where they can recruit disaffected prisoners to their cause. Given your involvement in these cases as U.S. Attorney for the Eastern District of New York, where these cases are being prosecuted, I assume you have dealt with these issues.

- a. As the current U.S. Attorney for the Eastern District what did you do to mitigate these risks, and if confirmed as Attorney General, how do you plan on mitigating these risks in the future?

RESPONSE: While I cannot comment on the ongoing prosecution, I can say that appropriate steps are taken to ensure the security of the proceedings in my district, as well as to ensure that terrorists detained in our prisons are held securely and will not pose a threat to our citizens. From my firsthand experience as a United States Attorney, I can attest to the ability of our criminal justice system to serve as one effective tool, among many, to address the threat posed by terrorists and to gather valuable intelligence that aids in the disruption of terrorist organizations. The criminal justice system has proven in hundreds of terrorism cases since before 9/11 to be a swift, secure, and effective option to incapacitate terrorists, gain valuable intelligence, and ensure justice is served. The Classified Information Procedures Act (CIPA) has proven to be a valuable and effective tool to protect classified intelligence in Article III proceedings. While we must remain vigilant to the persistent risk of terrorist attack, I am confident that we can continue to prosecute terrorists in our courts and detain them in our prisons safely and securely.

5. Last Congress, a Constitutional amendment was proposed to enable government to limit funds contributed to candidates and funds spent by or in support of candidate's ability to influence elections. The text of the amendment reads as follows:

'Section 1. To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.'

'Section 2. Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.'

'Section 3. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.'

- a. Do you have any concerns with this amendment as drafted?

RESPONSE: Amendment of the United States Constitution is a very serious matter and requires very careful consideration of all of the potential effects that such an amendment could have, both now and in the future. An amendment that relates to political activity and speech, in particular, should be undertaken only after careful consideration of the potential effect on fundamental First Amendment freedoms of our citizens and the press.

I understand that the specific amendment proposed here is intended to advance important policy concerns regarding transparency in our campaign finance system and the prevention of corruption and the appearance of corruption. These concerns regarding the integrity of our

elections have long been validated by the Supreme Court, and any amendment of the Constitution requires careful and thorough consideration and balancing of these important interests.

- b. Would you agree with the ACLU, who has stated that “this and similar constitutional amendments would fundamentally break the Constitution and endanger civil rights and civil liberties for generations.”

RESPONSE: As described above, a Constitutional amendment that relates to political activity and speech, in particular, should be undertaken only after careful consideration of the potential effect on fundamental First Amendment freedoms of our citizens and the press.

- 6. The President made the unilateral decision to delay the Affordable Care Act’s employer mandate for one year despite clear statutory language instructing that the penalties associated with the mandate “shall apply 2 months beginning after December 31, 2013.” This is just one example of the President unilaterally making changes to the law. One report says that the President has made 28 unilateral changes to the Affordable Care Act.
 - a. Do you believe that President Obama had the authority to delay the Affordable Care Act’s employer mandate?

RESPONSE: I have not had an opportunity to review this issue in my position as a United States Attorney. It is my understanding that the Department of the Treasury has explained the legal basis for its determinations on this issue to Congress.

- 7. Exactly one year ago today, on February 5th, 2014, I submitted written question to Attorney General Holder following up on the Department of Justice oversight hearing that was held on January 29th, 2014. In order for Congress to effectively perform its oversight role, I believe there needs to be more timely responses to follow-up questions.
 - a. If you are confirmed as Attorney General, do you commit to respond to Congressional questions in a timelier manner?

RESPONSE: Yes. As I described in my testimony, I am committed to fostering a new and improved relationship with this Committee and Congress. If confirmed, I will ask my staff to review the Department’s processes for responding to congressional inquiries and questions for the record and to improve the Department’s response time.