

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

QUESTIONS FROM SENATOR GRAHAM

On National Security

1. At your confirmation hearing, I asked you if you thought the U.S. is at war. You responded: "We are at war, Senator." I have two follow up questions:
 - a. Do you believe the U.S. is at war with radical Islam?
 - b. What makes up the battlefield in this war?

RESPONSE: It is my understanding that the United States is in an armed conflict with al-Qaida, the Taliban and associated forces. Although I have not had occasion as a United States Attorney to address the question, it is my understanding that pursuant to the 2001 AUMF, as informed by the laws of war, the United States has used military force against such organizations in areas of active hostilities, such as Afghanistan, and outside such areas in certain circumstances, consistent with other applicable domestic and international law.

2. Do you believe that, based on certain actions, a U.S. citizen can become an enemy combatant under the law of war?

RESPONSE: Although I have not had occasion to address the question in my role as a United States Attorney, my understanding is that whether an individual is an enemy combatant under the law of war depends on the particular circumstances. It is also my understanding that there are circumstances in which a U.S. citizen can become an enemy combatant under the law of war.

3. If a U.S. citizen joins an enemy force, does the U.S. have the legal authority to detain that citizen as an enemy combatant under the law of war?

RESPONSE: Although I have not had occasion to address that question in my role as a United States Attorney, my understanding is that whether an individual may be detained as an enemy combatant under the law of war depends on the particular circumstances. Based on my review of applicable Supreme Court precedent, the United States would have legal authority, in certain circumstances, to detain a U.S. citizen who has joined an enemy force as an enemy combatant under the law of war.

4. If a U.S. citizen joins an enemy force, does the U.S. have the legal authority to use lethal force against that citizen?

RESPONSE: Although I have not had occasion to address that question in my role as a United States Attorney, my understanding is that whether the United States has legal authority to use lethal force against a U.S. citizen who has joined an enemy force depends on the particular circumstances. I have seen the public version of the July 2010 memorandum in which the Office of Legal Counsel advised that, where certain conditions are met, the United States would have legal authority to use lethal force against a U.S. citizen who is a leader of Al Qaeda or associated forces—terrorist groups actively plotting against the United States and with which we are at war—and who poses an imminent threat of violent attack against the United States. Thus, in certain circumstances, the United States would have legal authority to use lethal force against a U.S. citizen who joins an enemy force.

5. Do you think that the Military Commissions system is a viable forum to prosecute non-U.S. citizen unlawful enemy belligerents captured on the battlefield?

RESPONSE: Yes, in certain circumstances a military commission could be a viable forum to prosecute such individuals. Should I be confirmed as Attorney General, I look forward to working with the military and the others in the executive branch to make the best determination about where each case should be brought. As I stated at the hearing, if terrorists threaten Americans here or abroad, they will face American justice. Should I be confirmed as Attorney General, I would continue to support the Executive Branch's strong practice of utilizing all of the tools in our arsenal. And that includes the military commission process.

6. Prior to this current conflict, can you give me a case in U.S. history where an unlawful enemy belligerent, caught on a foreign battlefield, was tried in U.S. civilian court?

RESPONSE: I am unaware of such cases, but have not had occasion to examine whether such a case has been brought.

7. Do you think that non-U.S. citizen unlawful enemy belligerents captured on foreign battlefields should be afforded the same constitutional protections as common criminals apprehended in the U.S.?

RESPONSE: It is my understanding that, in many circumstances, a non-U.S. citizen unlawful enemy belligerent captured on a foreign battlefield would not be entitled to constitutional protections. But as stated above and as I stated at the hearing, I would continue the strong practice of utilizing all of the tools in our arsenal to ensure that we effectively respond to terrorist threats and vindicate justice. Based on a careful analysis of options, the appropriate tool in a particular case could be a criminal prosecution by a United States Attorney's Office like the one I now proudly lead, which would be subject to certain constitutional protections. Or the

appropriate option could be a military commission trial, which I understand Congress crafted to satisfy the constitutional protections that might apply in that context.

On Online Gambling

1. On December 23, 2011, the Department's Office of Legal Counsel released an opinion holding that the Wire Act only prohibits online gambling as it relates to sporting events or contests, reversing the DOJ's long-held position that the Wire Act extends to all forms of gambling. Do you agree with this OLC opinion?

RESPONSE: If confirmed as Attorney General, I will review the Office of Legal Counsel opinion, which considered whether interstate transmissions of wire communications that do not relate to a sporting event or contest fall within the scope of the Wire Act. It is my understanding, however, that OLC opinions are rarely reconsidered. If confirmed, I will read the opinion and if it articulates a reasonable interpretation of the law, I would welcome the opportunity to work with you and other Members of Congress to address concerns about online gambling through legislation.

2. Do you believe the law is clear that the Wire Act extends only to sports bets or wagers?

RESPONSE: OLC concluded that the Wire Act does not extend to interstate transmissions of wire communications that do not relate to a sporting event or contest. As noted in my response to question 1, above, if confirmed I will review the opinion and determine whether I find OLC's interpretation of the statute to be reasonable.

3. In 2013, your office filed a civil forfeiture action which included as a predicate offense, the operation of gambling websites offering "casino games and sports betting" – websites your office claimed violate "multiple federal criminal statutes, including ... [the Wire Act] (making it unlawful to use a wire in connection with placing a bet or wager)"? *U.S. v. Two Million Eighty Thousand Dollars, et.al.*, CV 13-2077 (E.D.N.Y. April 9, 2013).
 - a. If the law is clear that the Wire Act extends only to sports betting, why did your office not limit it to sports betting in its complaint, as quoted above?
 - b. On the other hand, if the law is not clear, was it appropriate for DOJ to overturn the law without consulting Congress, or seeking guidance from the courts?

RESPONSE: As alleged in the amended complaint, the civil forfeiture action, *United States v. Two Million Eighty Thousand Dollars, et al.*, CV 13-2077 (E.D.N.Y. April 9, 2013), arose from a joint state and federal investigation into an illegal sports bookmaking and money laundering enterprise with operations in Queens County, New York, and elsewhere. The criminal enterprise used bookmakers located in the United States to solicit and accept sports wagers for the placement of bets on off-shore Internet gambling websites. The proceeds seized in connection with the civil forfeiture action were exclusively the proceeds of sports gambling. The reference in the civil forfeiture complaint to "'real money' casino games and sports betting" was taken

from one of the website's own description of the activities that it facilitated and was not a description of the predicate offense that the government asserted as the basis for the forfeiture.

The amended complaint alleged multiple bases for the forfeiture of the sports betting proceeds. In addition to the Wire Act offenses, the government alleged violations of 18 U.S.C. § 1955(a) (illegal gambling business) and 18 U.S.C. § 1956 (money laundering). Notably, all of the funds forfeited thus far in this matter have been forfeited exclusively under 18 U.S.C. § 1955(d), which authorizes the forfeiture of property used in violation of the provisions of 18 U.S.C. § 1955(a).

4. The OLC lawyer who authored the opinion subsequently stated that "it is just that – an opinion." Does the opinion carry the force of law?

RESPONSE: It is my understanding that OLC opinions customarily are treated as authoritative by executive agencies. I am not aware of any statute or regulation that gives OLC opinions the force of law.

5. Do you think it was appropriate for OLC to effectively open the door for states to offer Internet gaming without the involvement of Congress, the public, law enforcement, and state and local officials?

RESPONSE: Pursuant to delegation, OLC exercises the Attorney General's authority to provide the President and executive agencies with advice on questions of law. Because OLC helps the President fulfill his constitutional obligation to take care that the law be faithfully executed, it is my understanding that the Office strives to provide an objective assessment of the law using traditional tools of statutory interpretation. These tools would not include seeking the views of Congress, the public, law enforcement, or state and local officials on a question of statutory interpretation.

6. At your confirmation hearing, you agreed that online gambling could be used as a way to finance terrorist organizations. If confirmed, would you suspend or revoke the OLC opinion to give you a chance to review it, and give you and Congress time to work together to clarify the law?

RESPONSE: As noted in my response to question 1, above, I will review the OLC opinion if confirmed as Attorney General. Unless in the course of my review I conclude that OLC's interpretation of the Wire Act is unreasonable, I do not intend to take any action to suspend or revoke the opinion. I would, of course, welcome the opportunity to work with you and other Members of Congress to address concerns about online gambling through legislation.

On Office of Justice Programs

DOJ's Office of Justice Programs (OJP) has consistently offered a competitive program for national organizations mentoring youth across America. This program defines national organization as those serving youth in at least 45 states.

- a. Does DOJ intend to change the criteria it currently uses under the Mentoring Program?
- b. If so, what impact would this change have on national organizations the Mentoring Program has helped fund to date?

RESPONSE: I am not aware whether OJP plans to make changes to the Mentoring Program. However, if confirmed as Attorney General, I look forward to working with OJP on any plans they may have to improve their programs, including changes to the eligibility criteria for the Mentoring Program. I understand that this program provides critical support to mentoring organizations and the youth they serve.

On Obscenity Laws

1. Do you believe the distribution and production of obscene material damages our communities?

RESPONSE: Obscenity is not protected by the First Amendment. I know that the Department focuses its limited investigative and prosecutorial resources on egregious cases that inflict the most damage on our communities, particularly those that facilitate child exploitation and cases involving the sexual abuse of children, including obscene depictions of child rape. For that reason, the significant majority of the federal obscenity cases the Department prosecutes involve the exploitation of children.

2. The federal obscenity laws, 18 U.S.C. §§ 1460-1470, have been largely unenforced under the Holder DOJ. These laws prohibit the distribution and production of obscene material, and provide heightened penalties for the distribution and production of obscene material related to minors. If confirmed, do you intend to enforce these laws?

RESPONSE: I understand that the Department has brought significant obscenity prosecutions in recent years, and remains committed to bringing obscenity cases where appropriate. As indicated above, the Department focuses its limited investigative and prosecutorial resources on egregious cases that inflict the most damage on our communities, particularly those that facilitate child exploitation and cases involving the sexual abuse of children, including obscene depictions of child rape.