Nomination of Loretta E. Lynch to be Attorney General of the United States
Questions for the Record
Submitted February 18, 2015

<u>QUESTIONS 1-18 FROM CHAIRMAN GRASSLEY</u>

HSBC: As United States Attorney for the Eastern District of New York, you found that HSBC had laundered, "at least $881 million in drug trafficking proceeds – including proceeds of drug trafficking by the Sinaloa Cartel in Mexico and the Norte del Valle Cartel in Colombia."[1] Yet to date, you have not charged or fined a single HSBC employee. In your response to my questions for the record, you said that you "carefully considered whether there was sufficient admissible evidence to prosecute an individual and whether such a prosecution otherwise would have been consistent with the principles of federal prosecution contained in the United States Attorney's Manual."

1. In the course of your investigation, which individuals at HSBC do you believe were most culpable for this money laundering?

RESPONSE: As explained in the Statement of Facts attached to the Deferred Prosecution Agreement (DPA) filed with the Court on December 11, 2012, as a result of "concurrent [anti-money laundering] failures" at HSBC Bank USA and HSBC Mexico, at least $881 million in drug trafficking proceeds "were laundered through HSBC Bank USA without being detected." Note that we did not charge HSBC with money laundering. Rather, HSBC's failure to maintain an effective anti-money laundering program violated the Bank Secrecy Act by creating a corporate environment that failed to stop others from laundering money through HSBC. Although grand jury secrecy rules prevent me from discussing the facts involving any individual or entity against whom we decided not to bring charges, as I do in all cases in which I am involved, I and the dedicated career prosecutors handling the investigation carefully considered whether there was sufficient admissible evidence to prosecute individuals at HSBC and whether any such prosecution otherwise would have been consistent with the principles of federal prosecution contained in the United States Attorney's Manual.

2. What consequences or accountability, if any, were you able to impose on those individuals through the deferred prosecution agreement? If none, please explain why not.

RESPONSE: Our prosecution of HSBC resulted in a number of consequences to the individuals who oversaw HSBC's anti-money laundering and sanctions compliance programs during the relevant time period. As noted above, the weaknesses in these programs allowed others to launder money through HSBC. Virtually all of the senior executives who oversaw HSBC's flawed compliance programs were replaced. Furthermore, HSBC "clawed back" bonuses for senior executives who oversaw the anti-money laundering program. HSBC also took a number of steps to correct the lack of accountability over its anti-money laundering and sanctions

[1] Press Release, U.S. Department of Justice, Office of Public Affairs, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012).

compliance programs. These steps included: restructuring its executive bonus system so that any executive's bonus is dependent upon that executive meeting compliance and anti-money laundering standards; reorganizing its anti-money laundering department to elevate its status within the institution, including having the anti-money laundering director report directly to the Board of Directors and senior management; simplifying its control and reporting structures for the entire organization, which enables HSBC to better understand and address anti-money laundering and sanctions risks worldwide; and taking significant steps to promote the sharing of information within the organization. As described in detail below, through the DPA, the Department also secured from HSBC a commitment to U.S. compliance standards throughout the world.

3. Why do you believe that concluding an investigation into $881 million in money laundering without a single indictment or fine of an individual is a satisfactory result?

RESPONSE: As discussed in response to question 1, the HSBC investigation stemmed from the prosecution and conviction of several money launderers who took advantage of HSBC's lax controls and resulted in charges that HSBC violated the Bank Secrecy Act. That investigation revealed systemic flaws in the bank's anti-money laundering regime, which led to the Department's scrutiny of the bank. As the United States District Judge overseeing the case observed in his opinion approving the DPA, "the DPA imposes upon HSBC significant, and in some respect extraordinary, measures" and the "decision to approve the DPA is easy, for it accomplishes a great deal." For example, the anti-money laundering provisions of the Bank Secrecy Act apply only to domestic U.S. financial institutions. The DPA requires HSBC to engage in anti-money laundering and compliance efforts beyond the requirements of the Bank Secrecy Act, and it requires such efforts worldwide, and that HSBC follow the highest or most effective anti-money laundering standards available in any location in which it operates. That means, at a minimum, all of HSBC worldwide must adhere to U.S. anti-money laundering standards. We could not have accomplished this by obtaining a conviction at trial. This provision of the DPA represents a significant benchmark for future anti-money laundering compliance and enforcement. In addition, the other terms of the DPA are perhaps the most stringent ever imposed on a financial institution. The DPA has a five-year term, which is among the longest that has ever been imposed on a financial institution for anti-money laundering or sanctions violations. This term reflects the seriousness of HSBC's conduct and allows for an extended period during which the government will closely monitor HSBC. HSBC is also required to retain and pay for an independent monitor to ensure that remedial measures are implemented. The DPA also ensures that HSBC will continue to cooperate with the government in any criminal investigation for the term of the agreement and explicitly does not bind the Department's Tax Division or Fraud Section of the Criminal Division. Additionally, HSBC was required to forfeit $1.256 billion, which was the largest ever forfeiture in a bank prosecution to that point.

4. Did you communicate with any bank regulators regarding your investigation of HSBC? If so, who did you communicate with? Please describe the communications in detail and explain what actions, if any, you took as a result.

RESPONSE: I or other Department attorneys working on the case communicated with regulators at the Federal Reserve, the Office of the Comptroller of the Currency, the Department of the Treasury, the Federal Deposit Insurance Corporation, and appropriate foreign counterparts. In HSBC, as in many cases involving financial institutions, regulators were conducting parallel investigations, so there were communications between the regulators and the Department with regard to the facts of the investigations. In addition, in the HSBC case, as in many cases involving financial institutions, we conferred with regulators to test HSBC's arguments regarding regulatory and collateral consequences and to better understand the processes that regulators would follow in the wake of the case's resolution, including whether those processes were mandatory or discretionary. As I recall, the regulators provided us information regarding statutory requirements, but did not opine on how they might exercise their discretion, nor did the regulators provide any substantive opinions on the potential economic consequences of a criminal charge. We considered the responses we received from regulators in analyzing the nine factors in the Department's Principles of Federal Prosecution of Business Organizations. However, consideration of potential collateral consequences was but one factor among many we analyzed.

5. Did you communicate with any economists regarding your investigation of HSBC? If so, who did you communicate with? Please describe the communications in detail and explain what actions, if any, you took as a result.

RESPONSE: I did not communicate with economists regarding the investigation of HSBC. I am not aware of anyone else within the Department communicating with economists regarding the investigation.

Whistleblower Documents: Recent news reports have referenced at least two sets of whistleblower documents relating to HSBC. According to the International Consortium of Investigative Journalists (ICIJ), the source of one set of documents is HSBC IT specialist Hervé Falciani.[2] The source for the other is reportedly former HSBC Vice President and Client Relationships Manager John Cruz.

Hervé Falciani: While at HSBC Private Bank (Suisse) in Geneva with access to a Customer Relationship Management (CRM) system for the bank, Falciani reportedly "gained access to and collected unencrypted bank data."[3] Falciani reportedly provided the data to French authorities, who "shared it with other governments in 2010, leading to

[2] Martha M. Hamilton, Whistleblower? Thief? Hero? Introducing the Source of the Data that Shook HSBC, International Consortium of Investigative Journalists (Feb. 8, 2015), *available at*: http://www.icij.org/project/swiss-leaks/whistleblower-thief-hero-introducing-source-data-shook-hsbc.

[3] Martha M. Hamilton, Whistleblower? Thief? Hero? Introducing the Source of the Data that Shook HSBC, International Consortium of Investigative Journalists (Feb. 8, 2015), *available at*: http://www.icij.org/project/swiss-leaks/whistleblower-thief-hero-introducing-source-data-shook-hsbc.

prosecutions or settlements with individuals for tax evasion in several countries."[4] According to the ICIJ, "Nations whose tax authorities received the French files include **the U.S.**, Spain, Italy, Greece, Germany, Britain, Ireland, India, Belgium and Argentina."[5]

John Cruz: A former Vice President and Client Relationships Manager for HSBC, Cruz spoke with IRS criminal investigators in Colorado in early 2012 and provided approximately one thousand pages of documents and 30 hours of audio recordings to the IRS and the Securities and Exchange Commission in whistleblower submissions in July 2012. He also provided the material to the Department of Justice in September 2012, more than two months before your office filed the deferred prosecution agreement on December 11, 2012.

6. According to public reporting about the Falciani documents, they indicate that HSBC did not merely launder money for drug cartels, it also helped launder money for dictators, arms dealers who sold mortars to child soldiers, and traffickers in blood diamonds. Descriptions of the Cruz documents also suggest that the extent of HSBC's criminal conduct may not have been fully described in the Statement of Facts associated with the DPA reached with the government. If HSBC did not inform the government about the ongoing criminal conduct allegedly demonstrated by the Falciani and Cruz documents:

    a. Did HSBC provide any of the Falciani or Cruz documents to the Department?

RESPONSE: To the best of my knowledge, HSBC did not provide any of the Falciani documents to my Office. I understand that investigators spoke with and received documents from Mr. Cruz, and after speaking with Mr. Cruz, required information from HSBC; I am not aware at this time whether HSBC then supplied documents identical to those that Mr. Cruz had supplied.

    b. If HSBC did provide these documents to the Department, why was the conduct evidenced in them not charged in the Information, included in the Statement of Facts, or otherwise brought to the attention of the court?

RESPONSE: With respect to the Falciani documents, as stated in response to question 6a, to my knowledge, HSBC did not provide them to my Office. Investigators considered the information and documents provided by Mr. Cruz, and took appropriate additional investigative steps. We believe that through the DPA, we ultimately reached the most favorable resolution based on the sufficiency of the admissible evidence and application of the Department's Principles of Federal Prosecution of Business Organizations. I should reiterate, however, that the DPA reached with HSBC in 2012 addressed only the charges filed in the criminal information, which are limited to violations of the Bank Secrecy Act for failure to maintain an adequate anti-

[4] Gerard Ryle et al., Banking Giant HSBC Sheltered Murky Cash Linked to Dictators and Arms Dealers, International Consortium of Investigative Journalists (Feb. 8, 2015), *available at*: http://www.icij.org/project/swiss-leaks/banking-giant-hsbc-sheltered-murky-cash-linked-dictators-and-arms-dealers.

[5] *Id.* (emphasis added).

money laundering program and sanctions violations. The DPA explicitly does not provide any protection to HSBC against prosecution for conduct beyond what was described in the Statement of Facts. Furthermore, I should note the DPA explicitly mentions that the agreement does not bind the Department's Tax Division or the Fraud Section of the Criminal Division.

c. Paragraph 6 of HSBC's DPA requires it to fully cooperate with the Department in its investigation of HSBC and related parties. If HSBC failed to provide the Falciani or Cruz documents to the Department, isn't that a violation of HSBC's obligation to fully cooperate with the Department?

RESPONSE: As you note, the DPA requires HSBC to cooperate fully with the Department on an ongoing basis. This requirement applies not only to Bank Secrecy Act and sanctions violations, but also any related investigations. In the event of a failure to comply with the DPA—including the requirement to cooperate—we would take appropriate remedial action.

d. Paragraph 16 of HSBC's DPA permits the Department to declare that HSBC has breached the agreement, which would then allow it to prosecute HSBC for the conduct set forth in the related Statement of Facts. If HSBC failed to provide the Falciani or Cruz documents to the Department, isn't that a breach of the DPA? If so, why shouldn't the Department seek to prosecute HSBC for the conduct set forth in the Statement of Facts?

RESPONSE: As stated in response to question 6c, in the event of a failure to comply with the DPA—including the requirement to cooperate—we would take appropriate remedial action.

e. Is there an ongoing investigation by any component of the Department into the conduct evidenced in the Faciani or Cruz documents? If so, when was that investigation initiated?

RESPONSE: As described above, the DPA reached with HSBC in 2012 explicitly does not provide any protection against prosecution for conduct outside of that described in the Statement of Facts, and does not bind the Department's Tax Division or the Fraud Section of the Criminal Division. I appreciate your understanding that in accordance with Department policy and applicable law, as a general matter, the Department can neither confirm nor deny any particular investigation, nor comment about inquiries of an investigative nature.

7. The Falciani and Cruz documents reportedly support allegations that, among other things:
    a. HSBC engaged in sophisticated tax evasion;
    b. HSBC had laundered money and helped evade taxes for associates of Haitian dictator Jean Claude "Baby Doc" Duvalier and Syrian dictator Bashar al Assad;
    c. HSBC laundered money and helped evade taxes for Katex Mines Guinee, a company which helped supply arms to child soldiers in Liberia;

d. HSBC laundered money and helped evade taxes for Emmanuel Shallop, who has since been convicted of dealing in blood diamonds;
e. HSBC created codenames for tax evasion clients, for example Australian financier Charles Goode was referred to as "Mr. Shaw;"
f. an HSBC manager specifically advised Keith Humphreys, a British client, on how to evade taxes by making "withdrawals from 'cash points' when they are outside the UK."[6]

Did your office have access to the Falciani or Cruz documents prior to the execution of the DPA? If not, please explain why not.

RESPONSE: To my knowledge, my Office did not have access to the Falciani documents prior to execution of the DPA. I am not aware of whether or how the information was conveyed to the Department, nor do I have information about why my office did not have access to it. I understand that investigators did speak with and receive information and documents from Mr. Cruz. I should note that the DPA reached with HSBC addresses only Bank Secrecy Act and sanctions violations and explicitly provides no protection from prosecution for conduct outside of the Statement of Facts.

8. Regardless of how you may have known, if you did know about the information in the Falciani or Cruz documents before the DPA was executed, why did you think that justice was served by not charging HSBC with that conduct or otherwise bringing it to the court's attention in connection with the prosecution?

RESPONSE: I do not recall reviewing or being aware of the information in the Falciani documents before the DPA was executed. With respect to the documents and information provided by Mr. Cruz, they were reviewed during the course of the investigation.

9. Regardless of how you may have known, if you did know about the information in the Falciani or Cruz documents before the DPA was executed, what effect if any did this have on your decision to approve the agreement? If not, would this have affected your decision to approve the agreement had you know the information? Please explain.

RESPONSE: As I previously stated, I do not recall reviewing or being aware of the information in the Falciani documents before the DPA was executed, and cannot now speculate as to whether or how receiving them then may have affected our investigation. We did consider documents and information provided by Mr. Cruz.

[6] David Leigh et al., Catalogue of malpractice endorsed by bankers laid bare in HSBC files, The Guardian (Feb. 8, 2015).

10. The DOJ's deferred prosecution agreement allowed HSBC to retain its American banking charter. Please explain why you believe that was appropriate.

RESPONSE: The Department does not decide whether or not any institution is allowed to retain its banking charter. Those decisions are made by the institution's regulators. In the case of HSBC in the United States, it is my understanding that the lead regulator is the Office of the Comptroller of the Currency.

11. Were you aware of Mr. Falciani submissions to French authorities, which were reportedly shared with the United States prior to the execution of the DPA? If so, what actions if any did you take to investigate the information provided? If not, please explain why not.

RESPONSE: As described above, I do not recall reviewing or being aware of the information in Mr. Falciani's submission to French authorities prior to the execution of the DPA.

12. Were you aware of Mr. Cruz's whistleblower submissions to the IRS, SEC, and Justice Department prior to the execution of the DPA? If so, what actions if any did you take to investigate the documents he provided? If not, please explain why not.

RESPONSE: As stated above, investigators did speak with and receive documents and information from Mr. Cruz. Based on the information he provided, we took appropriate additional investigative steps, including requiring additional information from HSBC. Investigators carefully considered the information he provided as we considered whether there was sufficient admissible evidence to prosecute violations at HSBC and whether any such prosecution otherwise would have been consistent with the principles of federal prosecution contained in the United States Attorney's Manual. Ultimately, HSBC entered into a DPA that required remarkable reforms based on Bank Secrecy Act and sanctions violations, and that explicitly provides no protection from prosecution for conduct outside of the Statement of Facts.

HSBC Forfeiture: In deciding to pursue a forfeiture DPA with HSBC, rather than a criminal prosecution, you stated that your office "carefully considered whether there was sufficient admissible evidence to prosecute an individual and whether such a prosecution otherwise would have been consistent with the principles of federal prosecution contained in the United States Attorney's Manual". As you are aware, the Department's Equitable Sharing program would allow the HSBC forfeiture proceeds to be directly shared with the participating investigative agencies involved, including, for example, the New York County District Attorney's Office.

13. Please list the state and local law enforcement agencies involved in the HSBC investigation and/or the negotiations that resulted in the DPA.

RESPONSE: The Bank Secrecy Act portion of the HSBC investigation was conducted by Homeland Security Investigations' El Dorado Task Force and included agents and investigators from Homeland Security Investigations, Internal Revenue Service – Criminal Investigation, and the Queens County District Attorney's Office. The sanctions portion of the HSBC investigation was conducted in partnership with the New York County District Attorney's Office and investigated by agents from the Federal Bureau of Investigation.

14. Which of these agencies, if any, have submitted requests for Equitable Sharing?

RESPONSE: As I understand it, the $881 million related to the Bank Secrecy Act case was forfeited by Homeland Security Investigations within the Department of Homeland Security. The Department of the Treasury would have handled any requests for equitable sharing with regards to those funds. The $375 million related to the sanctions case was forfeited by the Federal Bureau of Investigation. The New York County District Attorney's Office submitted a request for equitable sharing to the Department of Justice and received approximately $168 million.

15. How much money has been requested by each of these agencies through Equitable Sharing?

RESPONSE: As stated in response to question 14, my understanding is that the Justice Department handled equitable sharing requests for the $375 million related to the sanctions case. The New York County District Attorney's Office was the only requestor for that portion of the case and received approximately $168 million.

16. How much money, if any, has been disbursed to each of these agencies?

RESPONSE: As stated in response to question 14, my understanding is that the Justice Department handled equitable sharing requests for the $375 million related to the sanctions case. The New York County District Attorney's Office was the only requestor for that portion of the case and received approximately $168 million.

17. Can you confirm that these state and local law enforcement agencies were not incentivized to pursue a forfeiture DPA, in lieu of criminal prosecution, due to the prospect of winning a multimillion dollar Equitable Sharing disbursement?

RESPONSE: The ability to pursue equitable sharing of forfeited funds is the same whether funds are forfeited pursuant to a DPA or as a result of a criminal conviction.

18. While U.S. Attorney for the Eastern District of New York, did your office approve any settlement agreements that contemplated that the defendant pay money to any outside interest or advocacy groups either in addition to or in lieu of a civil penalty payable to the United States? If so, please provide the case names, the names of the outside groups, and

the amounts paid to each group, and the amount by which any civil penalty was offset by such penalty.

RESPONSE: The HSBC case did not involve the payment of money to any outside interest or advocacy groups. I am aware of two matters in EDNY that did, as described below.

The EDNY, together with another district, investigated claims against Citigroup concerning its securitization of mortgage backed securities. This investigation resulted in a $7 billion settlement announced in July of 2014. In addition to payment of $4 billion, which was at the time a record civil penalty, and payment of $500 million to the Federal Deposit Insurance Corporation (FDIC) and five states, Citigroup agreed to provide $2.5 billion in consumer relief. Of the $2.5 billion in consumer relief, Citigroup agreed to make a minimum of $10 million in payments to any housing counseling agency on a pre-existing list of certified organizations created by the Department of Housing and Urban Development (HUD).

In August of 2014, the Department announced a $16.65 billion global settlement with Bank of America that resolved investigations and claims made against the bank by five United States Attorney's Offices, the FDIC, the Securities and Exchange Commission (SEC) and six states. The settlement required Bank of America to make monetary payments totaling $9.65 billion, including $800 million in connection with an investigation by the EDNY into the bank's origination of loans insured by the Federal Housing Administration. In addition to the $9.65 billion in monetary payments, Bank of America agreed to provide $7 billion in consumer relief. Of that amount, the bank agreed to make a minimum of $20 million in payments to any housing counseling agency on the noted HUD list of certified organizations.

The settlements with Citigroup and Bank of America also provided for the appointment of monitors to evaluate the defendants' compliance with their obligations. According to the monitors' reports issued to date, neither Citigroup nor Bank of America has made donations to housing counseling agencies pursuant to the respective settlements.

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QUESTIONS 19-41 FROM CHAIRMAN GRASSLEY

NOTE: Ms. Lynch submitted responses to Questions 1-18 on February 18, 2015.

19. **Follow-up to Question 4**: In response to my question whether you would continue to reward grant funding to sanctuary communities, you responded that you would need to balance the punishment of a community for not cooperating with the federal government with the purpose for which the grant is being rewarded. What do you mean by this statement? Please explain.

RESPONSE: As I understand it, the purpose of Department of Justice grant programs is to provide criminal justice funding to state, local and tribal governments to reduce crime, address significant gaps in local funding, and respond to emerging criminal justice issues. Withholding grant funding can have a significant impact on important criminal justice programs at the local level. It is also worth noting that many Department of Justice grant funds are formula-based, with the eligibility criteria (and related penalties, if any) set firmly by statute. Accordingly, the Department must carefully consider whether suspending funding, when it has discretion to do so, would be in the best interest of public safety and national security. The Department's preference, wherever possible, is to work with states and localities to find out why they are not complying with a particular federal law or policy and work together to find solutions that can be supported by all. Penalties should be imposed by the federal government only as a last resort.

20. **Follow-up to Question 2:** I asked you whether you would continue the Department's policy of filing complaints against States for passing pro-enforcement immigration laws. You answered that you would "continue the Department's efforts to work closely with . . . state and local law enforcement partners to ensure the national security and public safety are our top priorities." The problem is the Department's policy is the exact opposite. The Department has not made efforts to work with state or local law enforcement or jurisdictions, but on the contrary, it has punished states for passing pro-enforcement immigration laws, and rewarded states and communities for not cooperating with ICE. So, given your previous answer, it appears you support the department's lack of effort in working with local law enforcement and communities. Or, will you discontinue the practice of suing states who pass pro-enforcement immigration laws?

RESPONSE: Each individual situation would have to be reviewed on a case-by-case basis. If confirmed as Attorney General, I would continue to support the federal government's primary role in developing immigration policy. I would attempt, however, to support negotiations with states and localities in the first instance, rather than litigation, if it appears that a conflict may emerge.

21. **Follow-up to Question 3(a):** You did not answer my questions regarding sanctuary communities. I asked for your view on whether sanctuary communities that release criminal aliens back into the streets, rather than holding them until ICE can take custody of them, are a threat to national security and public safety. Your response was a general support of Department policy, not an answer to that question. In your view, is the release of criminal aliens by sanctuary communities a threat to national security and public safety?

RESPONSE: I believe that all efforts should be undertaken to support state and local law enforcement authorities to notify Immigration and Customs Enforcement (ICE) of pending releases of criminal aliens during the time that these individuals are otherwise in custody under state or local authority so that the individuals can be taken into ICE custody for removal. I believe this is a valid and important law enforcement objective to protect public safety.

22. **Follow-up to Question 5:** I want to know *your* opinion, not ICE's position, on whether aliens convicted of heinous crimes should be released outside a court order. Please provide me your opinion as to whether criminal aliens convicted of heinous crimes, such as homicide, sexual assault, abduction, and aggravated assault should be released for any reason besides a court order.

RESPONSE: As I noted in response to Question 5, ICE administers the immigration detention system and is responsible for determining whether to release particular aliens from its custody. It is my view as a prosecutor, however, that any custodial decisions must be made within the confines of the law, determined on a case-by-case basis, and account for any risks to public safety.

23. **Follow-up to Question 7:** I understand that you were not part of the decision making process on whether to appeal *Martinez*. I was not asking you why it was not appealed. I want to know, in your opinion, should *Martinez* have been appealed?

RESPONSE: As I stated in my previous response, many factors go into the decision whether to seek review of a court of appeals decision, and I was not involved in the decision making process in this case. Going forward, I can assure you that, if I am confirmed as Attorney General, national security and public safety will be the basis for making decisions on how to handle these types of cases.

24. **Follow-up to Question 8(a):** I understand you were not part of implementing the 287(g) program. Again, my questions are aimed at understanding you, and your thoughts and position on these programs. Please tell me whether you personally support the 287(g) program and similar programs that authorize the federal government to delegate limited authority to state and locals who wish to participate in enforcing federal law.

RESPONSE: I believe that cooperation between federal, state, and local law enforcement agencies is essential to secure our borders and protect our national security. If confirmed, I will evaluate and support those programs that most effectively serve these critically important goals.

25. **Follow-up to Question 8(b):** Do you personally believe that the 287(g) programs should be made available to state and local law enforcement agencies that want to protect their communities and cooperate with the federal government with regard to immigration enforcement?

RESPONSE: Please see the answer to Question 24 above.

26. **Follow-up to Question 9:** Please answer the following questions regarding Justice Americorps and 8 USC §1362:

    a. Do you agree that § 1362 is clear: the government may not provide a lawyer to immigrants in a removal proceeding at the expense of the taxpayers?

    b. Do you agree that Justice Americorps by its very nature has due process and equal protection issues?

    c. How can the administration avoid due process and equal protection issues if it provides lawyers to some immigrants in removal proceedings, but not to others?

    d. Couldn't such a policy lead to the requirement of providing a lawyer to all immigrants in removal proceedings?

RESPONSE: Although I was not involved in the development or implementation of this program, I understand that it is designed to provide funding for legal representation to certain unaccompanied alien children in immigration proceedings in order to increase the efficient and effective adjudication of those proceedings.

I do not read 8 U.S.C. § 1362, which provides that an alien's right to counsel in immigration proceedings does not include a right of representation at the government's expense, to bar the government from exercising its discretion to fund legal representation in certain of those proceedings.

I do not see any due process or equal protection issues with the program, as I understand that aliens in removal proceedings have only the right to a full and fair hearing— a guarantee that does not require the appointment of taxpayer-funded counsel in those proceedings.

27. **Follow-up to Question 12:** In response to my question on whether you support the catch-and-release actions of the administration, you responded that you would enforce the immigration laws "understanding the limited prosecutorial resources are best used to focus on the removal of criminals and those who pose a threat to safety of our nation." Does this mean that you do support the catch-and-release actions of the administration? Please explain.

RESPONSE: I support the principles that limited prosecutorial resources are best used to focus on the removal of criminals and those who pose a threat to the safety and security of our nation, and that custodial decisions must be made within the confines of the law, determined on a case-by-case basis, and account for any risks to public safety or national security.

28. **Follow-up to Question 43:**

    43(a): In your response you mentioned that the doctrine of Executive Privilege is constitutionally-based. It is well established that the *presidential communications* privileged is constitutionally based. It is equally well established that *deliberative process* materials may be privileged in limited circumstances, but that this privilege is one of judge-made common law.[1] The Department, however, has attempted to conflate the two, and withheld documents from this committee based on an overbroad notion of "executive privilege" that includes both presidential communications and deliberative materials, created by low-level department employees, that are both *post-decisional* and *purely factual*. Please answer this straight forward question: do you believe that the *constitution* shields these deliberative materials from a congressional subpoena?

RESPONSE: It is my understanding that constitutional principles support the application of Executive Privilege over these materials. That position has been explained more fully in the briefs filed by the Department on this subject in ongoing litigation. I would refer you to those briefs for additional information about the position taken by the Executive Branch.

43(b): In your response you stated that, in your understanding, 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. The district court did *not* accept the position the Department took in the Fast and Furious litigation that 64,000 documents were categorically shielded from a congressional subpoena because of "executive privilege," due to separation of powers or otherwise. Rather, the court outlined the requirements for establishing a *deliberative process* privilege, noted that it was

[1] *In re sealed case*, 121 F.3d 729, 745 (D.C. Cir. 1997).

"*qualified*," and stressed that the showing of need for those materials is subject to "a *lower threshold*."[2] Moreover, the Attorney General stated that the Department had withheld materials that were *not privileged*.[3] With that in mind, what authority does the Department have to withhold documents in response to a congressional subpoena that are *not privileged*, and from where does that authority derive?

RESPONSE: My understanding is that the Department and the Executive Branch have complied with the district court's order and, as a result, have turned over more than ten thousand documents, either in full or in part. The litigation continues over several remaining issues.

43(c): Your response simply states an aspiration to avoid subpoenas. While I share your hope that improved DOJ cooperation with Congressional requests would eliminate the need for subpoenas, please provide an answer that is responsive to the question. Congressional subpoenas are a tool used by this committee and others in exercise of this branch's oversight responsibilities, and your position on the scope of privilege with respect to congressional subpoenas is of key interest to me and to this committee. Moreover, given that your predecessor was held in contempt of Congress for failure to comply with a subpoena, and that the Department is still in litigation with the House of Representatives over that subpoena, it seems reasonable to expect you would have given some thought to the questions at issue in that litigation. Accordingly, with respect to the deliberative process privilege, do you believe that a congressional subpoena is entitled to more weight than a Freedom of Information Act request?

RESPONSE: I believe that different considerations would apply to a subpoena from a Committee of Congress to the Executive Branch, as significant constitutional issues, including the separation of powers, are at play. I would refer you to the Department's brief on these issues in the ongoing litigation for more information.

43(d): In working to accommodate Congress's legislative and oversight interests, are you willing to provide deliberative, pre-decisional documents as your predecessor did when he produced drafts of the February 4, 2011 letter to me and emails about the drafting of that letter?

RESPONSE: I would be sincerely interested in working with Congress to accommodate its legitimate oversight interests on any matter.

43(e): In working to accommodate Congress's legislative and oversight interests, would you argue (as your predecessor did) for withholding an entire category of documents

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[2] Order at 3, *Committee on Oversight and Government Reform, U.S. House of Representatives v. Holder,* 1:12-cv-1332 (D.D.C. Nov. 15, 2013) (emphasis added).

[3] Def.'s Mot. For Certification of Sept. 30, 2013 Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) at 8-9, *Committee on Oversight and Government Reform, U.S. House of Representatives v. Holder*, 1:12-cv-1332 (D.D.C. Nov. 15, 2013).

based on a general assertion of “executive privilege” even when individual documents within that category—according to precedent and the admission of the Department itself—are *not in fact privileged*?

RESPONSE: It would be my hope that I would not need to request an assertion of Executive Privilege on any category of documents or, indeed, any individual document if I am confirmed as Attorney General. I would prefer, instead, to negotiate with Congress in order to accommodate its interests.

43(f): In your response you stated that in some instances, it becomes necessary for the President to assert Executive Privilege in order to preserve the separation of powers. Do you believe it is necessary for the President to assert executive privilege in order to preserve the separation of powers over non-deliberative or purely factual agency documents unrelated to communications with the White House?

RESPONSE: It is my understanding that these issues are among the issues being considered in the ongoing litigation. I would refer you to the Department’s briefs for additional information.

43(g): As the Department itself has admitted, it asserted privilege over materials it does not deem to be protected under the traditional common law deliberative process doctrine. You state that you believe that “executive privilege,” broadly, is “constitutionally based.” Please explain how the constitution could protect agency documents that do not meet the qualifications for a common law deliberative process privilege.

RESPONSE: That issue has been briefed extensively in ongoing litigation between the Executive Branch and the House Committee on Oversight and Government Reform. I would refer you to the Department’s briefs on this issue for additional information.

29. **Follow-up to Question 44:** I appreciate your willingness to work with Congress to accommodate our “legitimate oversight interests.” However, as I stated in my initial set of questions, the experience in the Fast and Furious controversy seems to suggest that the congressional authority to pursue civil litigation is not sufficient to enforce its congressional subpoenas in a timely way, and that the Department’s policy and actions pursuant to 2 U.S.C. § 194 undermine congressional oversight activities and responsibilities. Given that you are familiar enough with the issues to cite the 1984 OLC opinion, please provide specific answers to the specific questions that I posed on the issue of contempt. Additionally, do you disagree that the experience in the Fast and Furious litigation demonstrates the insufficiency of the criminal and civil contempt procedures to vindicate congressional interests in a timely way? If so, please explain why, given that the litigation is still ongoing three years later.

RESPONSE: As I stated in my earlier response, I have not had occasion as the United States Attorney for the Eastern District of New York to acquaint myself with this dispute in depth. If I am confirmed as Attorney General, I look forward to learning more concerning the Department's position with respect to 2 U.S.C. § 194. As I also stated before, I am committed to working with Congress to accommodate its legitimate oversight interests.

30. **Follow-up to Question 47(b):** Your response did not unequivocally condemn the use of DOJ and White House coordinated "leaks" against a Committee Chairman conducting oversight as an inappropriate use of the Department's Office of Public Affairs. While you may not have been previously familiar with the incident described in my question, the emails referenced are publicly available and have been written about in the press. Without regard to that incident, however, do you reject as improper any use of Justice Department resources or personnel to target Senators or Members of Congress with "leaks"? If no, please explain why not?

RESPONSE: Having reviewed the web article in the footnote of your original question to gain context, I am not certain that I understand the question's reference to leaks. If confirmed as Attorney General, I would not condone efforts to target Senators or Members of Congress in any form, leaked or otherwise. As I previously stated, I believe the Office of Public Affairs must interact with all journalists courteously and professionally at all times, and should focus on communicating information related to the Department's core law enforcement responsibilities and legal casework.

31. **Follow-up to Question 49:**

    49(a): The DOJ OIG report regarding its investigation of Ms. Attkisson's complaint determined that it was unable to substantiate Ms. Attkisson's allegations with respect to her *personal* computer, but not with respect to her *work* computer.[4] Moreover, CBS News has issued a public statement that Ms. Attkisson's work computer was compromised.[5] The cyber-attacks on Sony and other U.S. companies have prompted the administration to launch a brand new agency.[6] It would seem that the hack of a major news outlet would warrant similar concern. Moreover, the OIG has neither the resources nor the jurisdiction to investigate a hack of unknown origin into CBS News systems. In light of this information, do you believe the FBI has any responsibility to investigate and determine whether Ms. Attkisson's CBS computers were hacked and by whom? If not, please explain why not.

RESPONSE: As I stated before, I share your concerns about cybersecurity and the need to be vigilant against computer hacking. In this case, I understand that the Department's Office of Inspector General conducted an investigation into Ms. Attkisson's allegations, and concluded that it could not substantiate the allegations that her computers were subject to remote intrusion by the FBI, any other government personnel, or otherwise. According to the Inspector General's

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[4] T. Becket Adams, Sharyl Attkisson: What was left out of reports on hacking, Washington Examiner (Feb. 3, 2015).
[5] See E. Wemple, CBS News confirms multiple breaches of Sharyl Attkisson's computer, Washington Post Blog (June 14 2013).
[6] Obama administration announces new cybersecurity agency, Fox News (Feb. 10, 2015).

report, that investigation did not cover Ms. Attkisson's work computers because CBS News declined to allow the Inspector General's investigators to forensically examine the CBS News computers that Ms. Attkisson used during her employment. It is my understanding that the Department has stated that it did not perform a broader investigation of this matter when the allegations were initially publicized because neither CBS News nor Ms. Attkisson followed up with the Bureau for assistance with these alleged incidents.

> 49(b): In your response you mentioned that it is your understanding that the Department's Office of Inspector General has conducted an independent investigation of this matter. Yet, given that the OIG's investigation could not include any examination of CBS computers, what steps will you take to ensure that there is a more complete and thorough investigation of the CBS hack while ensuring independent oversight in the event that evidence is uncovered of any potential government agency or contractor involvement?

RESPONSE: According to the Inspector General's report, that investigation did not cover Ms. Attkisson's work computers because CBS News declined to allow the Inspector General's investigators to forensically examine the CBS News computers that Ms. Attkisson used during her employment. If CBS News were to request the FBI's assistance with this matter, I would, if confirmed as Attorney General, ensure that the FBI appropriately considers any new evidence brought to its attention.

> 49(c): In light of the fact that the DOJ OIG was not able to fully investigate the CBS hack, please provide a specific response to my question in subsection c.

RESPONSE: Throughout my tenure as a career prosecutor and as a United States Attorney, I have gained a great respect for the career law enforcement agents at the FBI who work tirelessly to hold accountable those who violate our federal laws. I have complete confidence that these career law enforcement agents will fully consider any credible evidence of criminal misconduct, without any regard for the topic of litigation matters being handled by other components of the Department.

32. **Follow-up to Question 52(a):** In your response to my question about whether you would report your travel on FBI jets as required under OMB Circular A-126, you responded with "As the United States Attorney for the Eastern District of New York, I have not had the occasion to study this issue and am not familiar with the specific reporting requirement for the official travel on government aircraft." Regardless of your familiarity with the reporting requirement (footnoted below)[7], do you pledge— in the

[7] OMB Circular No. A-126, *Improving the Management and Use of Government Aircraft* (May 22, 1992). Agencies that use government aircraft shall report semi-annually to GSA each use of such aircraft for non-mission travel by senior Federal officials, members of the families of such officials, and any non-Federal travelers. Such reports shall be in a format specified by GSA and shall list all such travel conducted during the preceding six month period. The report shall include: (i) the name of each such traveler, (ii) the official purpose of the trip, (iii) destination(s)…

spirit of transparency— to report your non-mission travel to the General Service Administration semiannually? If not, please explain why not.

RESPONSE: It is my understanding that the Department manages Attorneys General travel in full compliance with OMB Circular A-126. Further, the Department has a well-established practice of releasing Attorneys General travel records upon request, including travel on government aircraft. If confirmed as Attorney General, I commit to doing the same. Further, if GSA clarifies its Property Management Regulations pertaining to unclassified travel on government aircraft, I understand the Department has no objections to reporting its data to GSA.

33. **Follow-up to Question 53:**

53(a-c): In your response, you noted that “administrative leave is appropriate in some circumstances.” Please describe the circumstances in which you believe administrative leave is appropriate.

RESPONSE: As noted in my initial response, in my experience as the United States Attorney for the Eastern District of New York, I am aware that the applicable regulation provides that administrative leave may be appropriate where there are allegations of misconduct or performance issues likely to lead to formal adverse actions against an employee. If the underlying allegations involve potentially criminal conduct and may present a risk to the safety of staff and/or the public, administrative leave during the investigative and personnel process may be necessary to keep the employee away from the workplace pending the investigation and potential administrative action. It is also my understanding that the Department’s policies and procedures governing the justification, review and approval process for paid administrative leave, including leave beyond 10 days, provide safeguards against abuse and ensure reasonable and responsible use of Department resources.

53(b): Given that the Department had 1,849 plus employees on administrative leave for more than 30 days from fiscal years 2011-2013— in spite of policy that limits it to 10 working days[8]—do you believe it should be used less frequently? If not, please explain why not. Will you pledge to review the use of administrative leave at the Department and work to ensure that exceptions to the Department’s 10-day limit are granted less frequently than they currently are? If not, please explain why not.

RESPONSE: If confirmed as Attorney General, I commit to reviewing the cited October 2014 Government Accountability Office (GAO) report and examining the implementation of the Department’s existing policies and procedures on administrative leave to ensure that they are being administered appropriately.

34. **Follow-up to Question 54(b):** Your response to this and several other questions about the Inspector General’s right of access to Department records indicated your willingness

[8] GAO, *Use of Paid Administrative Leave*, GAO-15-79 (Washington, D.C : October 2014).

to provide documents “necessary for him to complete his reviews.” However, the law gives him access to all records of the Department without regard to any determination by the Attorney General about whether they are necessary for him to complete his reviews. When you say you are committed to providing the Inspector General everything necessary to complete his reviews, do you mean everything that is necessary in your judgment or everything that is necessary in the Inspector General’s independent judgment?

RESPONSE: I believe the Inspector General should receive all documents and information he believes are necessary for him to complete his reviews, consistent with the Inspector General Act.

35. **Follow-up to Question 55(g):** As justification for excluding attorney misconduct from the OIG’s jurisdiction, you cite the historical expertise of OPR in dealing with attorney misconduct allegations. However, the examples I cited in the other subparts of Question 55 illustrate that the lack of transparency, lack of statutory independence, and lack of consistency can lead to a diminished public trust in OPR’s ability to impose accountability. If confirmed, will you pledge to personally review the cases I cited that give rise to this concern? If not, please explain why not.

RESPONSE: If confirmed, I commit to you that I will be briefed on the matters you have cited.

36. **Follow-up to Question 75(c):** It is your understanding that the Department continues to monitor qui tam cases and may, in appropriate circumstances, further investigate, seek to intervene for good cause, and/or attempt to negotiate a settlement. Are there any circumstances in which it would be appropriate for the Justice Department to negotiate settlement of a non-intervened FCA case without qui tam counsel’s involvement? Did the Eastern District of New York, under your leadership, ever pursue settlement negotiations in a qui tam case, and did you consult with qui tam counsel?

RESPONSE: The Eastern District of New York consults and coordinates with relator counsel throughout the course of its investigation of qui tam claims. This includes settlement, where we seek a consensus position with relators on material terms, including the amount of settlement and relator share.

More broadly, it is my understanding that in the great majority of cases in which the United States declines to intervene and the relator pursues the litigation, the United States and the relator will work together to achieve an appropriate resolution. However, it remains the responsibility of attorneys for the Department of Justice to ensure that the best interests of the taxpayers are represented in all FCA matters, including those in which the United States has declined to intervene. Accordingly, in rare circumstances, where the facts and/or law warrant it, it is my understanding that the Department of Justice may pursue a settlement with a defendant in a declined case for either more or less than the amount sought by the relator. However, pursuant to the statute, 31 U.S.C. § 3730(c)(2)(B), the relator may object to a proposed settlement and obtain a hearing on his or her objection.

37. **Follow-up to Question 78(a-f):** Please answer subparts (b), (c), and (e), which were not addressed in your response. Regarding subpart (d), you indicated that sometimes the USAO with a nexus to the matter is recused and another USAO investigates instead. Was another USAO recused from investigating in this instance? Was it the District of Arizona? If so, why was this matter not transferred to the Southern District of California, as the other Fast and Furious-related matters were, in light of the conflicts in the District of Arizona? Please describe in detail the process by which the matter came to your office and any communications you may have had about whether your office was appropriate one to take on the responsibility and why.

RESPONSE: Regarding subparts (b), (c), and (e), as I noted in my previous answer, the Department does not disclose information about investigations that do not result in charges because doing so would not be fair to those who may have been investigated. With respect to your questions above, the matter was brought to my office by the Department's Inspector General who, in coordination with the Office of the Deputy Attorney General, requested that the EDNY take the case, from which another United States Attorney's Office had been recused. My recollection is that we were not provided information as to which Office had been recused from the specific matter.

38. **Follow-up to Question 79(b-c):** Your response failed to address subparts (b) and (c). Please answer those specific questions about what steps you would take if confirmed to determine the extent to which ATF is photocopying or photographing form 4473s *en masse* during annual inspections and whether such a practice is appropriate or should be sanctioned by the Department.

RESPONSE: With respect to subparts (b) and (c), if confirmed, I would review ATF's handling of forms 4473 during annual inspections to ensure that current practice is appropriate.

39. **Follow-up to Question 15:** I asked you a question concerning Justice Breyer's dissenting opinion in *McCutcheon v. FEC*, in which he wrote that "the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*" (emphasis in original). You stated that you "ha[d] not had the opportunity to delve into the academic debate about whether certain constitutional rights are individual or collective." You also stated in response to what other rights were collective that "[t]here undoubtedly are certain rights that are fundamental to our democracy that can only be meaningfully exercised with other people, such as the right to assemble and other associational rights."

    a. Is there any actual "academic debate about whether certain constitutional rights are individual or collective"? Do you believe there is any serious debate to be had on this subject? Has any Supreme Court decision ever found any right in the Bill of Rights to be collective?

RESPONSE: It is not clear to me that the abstract categorization of "individual" versus "collective" rights would be particularly useful in analyzing how our constitutionally guaranteed rights apply in any concrete circumstance. Instead, if I am confirmed as Attorney General, I would be guided and bound by existing Supreme Court precedent. I am not aware of any existing Supreme Court precedent that characterizes a right under the Constitution as "collective."

b. Regardless of whether you ever considered the question as United States Attorney, does the First Amendment protect "collective" rights?

RESPONSE: It is not clear to me that the abstract categorization of "individual" versus "collective" rights would be particularly useful in analyzing how our constitutionally guaranteed rights apply in any concrete circumstance. I do believe that there are some constitutional rights, including those enshrined in the First Amendment, that are sometimes most meaningful when exercised in connection with other people. These would include, by way of example only, the right to peacefully assemble.

c. If so, what other collective rights does the Bill of Rights protect?

RESPONSE: Please see the answer to Question 39(b) above.

40. **Follow-up to Question 19:** When I asked for your view of the constitutional duty of the Executive "to take Care that the Laws be faithfully executed" as contained in Article II, sec. 3 of the U.S. Constitution, you replied, "The President has the constitutional obligation to take care that the Constitution and laws of the United States are faithfully executed by the Executive Branch." Respectfully, I asked for your view of the constitutional text, not its repetition. Please provide a detailed answer that reflects your view of the Executive's obligations under the Take Care Clause.

RESPONSE: Under our system of separated powers, it is the President's obligation to take care that the laws are faithfully executed, and he cannot abdicate his responsibility to enforce duly-enacted laws. Nor can he, consistent with the Constitution and its allocation of powers between the branches, attempt to, in effect, legislate or to rewrite laws under the pretense of exercising his enforcement discretion.

41. Will you appeal the federal district court's ruling in *Mance v. Holder*, which held unconstitutional a federal ban on the direct sale of handguns for Federally Licensed Dealers to out of state residents?

RESPONSE: It is my understanding that the district court's decision in *Mance* v. *Holder* was issued on February 11, 2015, and the Department has 60 days from the date of decision in which to decide whether to appeal. Consistent with the usual practice in the event of an adverse district court decision, the Solicitor General is overseeing a process to determine whether appeal would be appropriate. I understand that that process includes soliciting recommendations from the affected components of the Executive Branch and the relevant components of the Department of Justice, and that no final decision on appeal has been made as of this time.