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

QUESTIONS FROM CHAIRMAN GRASSLEY

1. As you know, the Senate is constitutionally obligated to fulfill its duty to provide advice and consent on the President's nominees. That process is always lengthy and involved, for good reason. It is of course especially important for the Senate to fulfill its responsibilities with care for Cabinet level positions, such as the Attorney General of the United States. Nonetheless, throughout this process, my primary concern is not only that your nomination was thoroughly vetted by the Senate, but also that throughout the process you were treated fairly and with respect. I have publicly outlined the process going forward in the Committee. Do you believe the United States Senate, and in particular the Senate Judiciary Committee, has treated you and your nomination in a fair and appropriate way?

RESPONSE: Yes, and I would like to thank you in particular for the respectful and courteous way that you chaired my confirmation hearing.

2. Starting in 2010, the Department of Justice filed complaints against Arizona, Alabama, South Carolina, and Utah because of their pro-enforcement immigration laws. If confirmed, would you continue this policy of filing complaints against states that have passed such laws?

RESPONSE: I support efforts to engage with state and local law enforcement partners to achieve consistent policies for the apprehension, detention, and removal of undocumented aliens. If I am confirmed as Attorney General, I will continue the Department's efforts to work closely with the Department of Homeland Security and state and local law enforcement partners to ensure that national security and public safety are our top priorities in the enforcement of our immigration laws. I will also evaluate state enactments on a case-by-case basis pursuant to the Supreme Court's recent decision addressing this issue.

3. While the Department of Justice filed lawsuits against states that enacted pro-enforcement immigration laws, other cities enacted policies that expressly prohibited law enforcement from cooperating with the federal government on undocumented immigrant issues.

    a. In your view, are sanctuary communities that ignore federal immigration detainers a threat to national security or public safety?
    b. What steps would you take to encourage sanctuary communities to reverse their ordinances?

RESPONSE: As noted above, I support efforts to engage with state and local law enforcement partners to achieve consistent policies for the apprehension, detention, and removal of undocumented aliens. If I am confirmed as Attorney General, I will continue the Department's efforts to work closely with the Department of Homeland Security and state and local law enforcement partners to ensure that national security and public safety are our top priorities in the enforcement of our immigration laws.

4. While sanctuary communities refuse to cooperate with the federal government, they continue to collect money from DOJ grant programs. Would you instruct the Department of Justice to withhold grant money for sanctuary communities that refuse to comply with our immigration laws?

RESPONSE: The Department of Justice provides grants to communities for a variety of reasons, ranging from law enforcement personnel, law enforcement technology and equipment, and many forms of assistance for victims and at-risk youth. Any penalty for a community's failure to enforce U.S. immigration law must be balanced against the purpose for which it is receiving funds from the Department of Justice. As such, if I am confirmed as Attorney General, I would consider all options on how to respond to sanctuary communities.

5. The administration has acknowledged that over 36,000 convicted criminals were released from ICE custody in fiscal year 2013. Many of these criminals were guilty of heinous crimes, including homicide, sexual assault, abduction, and aggravated assault. Yet, Immigration and Customs Enforcement used its discretion and released these criminals back into the community. Do you believe the government, unless ordered by a court, should release convicted criminal aliens guilty of dangerous crimes, homicide, sexual assault, abduction, and aggravated assault?

RESPONSE: I believe that the government's removal efforts should be targeted at the most dangerous of the undocumented immigrants in this country, particularly those involved in terrorist activity, violent crime, gang activity, and those with criminal records. In the Eastern District of New York, we have frequently pursued federal criminal prosecutions of dangerous undocumented immigrants, prioritizing prosecution of those with a violent criminal record and those engaged in gang activity. Regarding the specific exercise of discretion by Immigration and Customs Enforcement (ICE), I believe that question is best directed to the Department of Homeland Security, which administers the immigration detention system and is responsible for determining whether to release particular aliens from its custody.

6. DHS cited the 2001 Supreme Court decision *Zadvydas v. Davis*, 533 U.S. 678 (2001), as another reason so many illegal aliens with criminal records were released. In *Zadvydas*, the court held that immigrants admitted to the United States who are subsequently ordered removed could not be detained for more than six months. Four years later, the Court extended this decision to people here illegally in *Clark v. Martinez,* 543 U.S. 371

(2005). Since *Zadvydas*, Congress has tried to pass legislation to require DHS to detain criminal aliens beyond six months. Would you support such legislation?

RESPONSE: If confirmed as Attorney General, I would welcome the opportunity to work with your office and any members of the Committee on legislation that would help to fix the problems in America's broken immigration system. This would include legislation that is both consistent with constitutional limits and designed to address the issues created by *Zadvydas*, including protecting the public from terrorists and criminal aliens who pose a threat to public safety.

7. The Fourth Circuit Court of Appeals issued a decision in 2014 that provides a loophole for violent gang members who are here illegally to remain in the United States. In *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014), Martinez appealed a Board of Immigration Appeals decision that denied him "withholding of removal" relief because he was a former member of the violent MS-13 gang in El Salvador. The Fourth Circuit reversed the decision holding that Martinez's former gang membership was "immutable" and met the "particular social group" element of the statute.

    a. Do you agree that the Fourth Circuit decision creates a dangerous threat to national security?
    b. After the Fourth Circuit handed down its decision, concern was expressed over the effect this decision could have on national security and public safety. Chairman Goodlatte of the House Judiciary Committee along with Representative J. Randy Forbes wrote a letter to Attorney General Holder to express their concern with the holding and ask whether he would appeal or seek review of the decision. However, Attorney General Holder did not appeal or seek review of this dangerous decision.
        i. Would you agree that the DOJ, under Attorney General Holder, should have appealed the 4th circuit decision?
        ii. Because the decision was not appealed, what, in your view, is the remedy for this problem?

RESPONSE: In my role as the United States Attorney for the Eastern District of New York, I was not involved with this case. It is my understanding that many factors go into the decision whether to seek review of a court of appeals decision. It is my further understanding that the Department continues to litigate this issue in other cases. If I am confirmed as Attorney General, I will work to ensure that national security and public safety are our top priorities in the enforcement of our immigration laws.

8. The 287(g) program allows ICE to delegate some of its immigration enforcement authority to participating states. In 2012, ICE announced that it would no longer renew its 287(g) agreements stating, "other enforcement programs, including Secure Communities, are a more efficient use of resources." However, Secure Communities serves a completely different function. The 287(g) program trains local officers to determine whether a person is lawfully in the country, whereas Secure Communities only allows

local law enforcement to identify undocumented aliens after their incarceration. Secretary Johnson has announced that the Secure Communities program is being discontinued, and replaced by another program. Consequently, statutory authority exists for the administration to elicit state and local cooperation with the federal government; nevertheless, this administration refuses to use it.

a. Do you support the 287(g) program, and similar programs, that authorize the federal government to allow states to participate in enforcing federal law?

RESPONSE: In my position as the United States Attorney for the Eastern District of New York, I have had no role in addressing ICE's implementation of the 287(g) program. I look forward to learning more about the 287(g) program and other ICE programs directed at public safety, if I am fortunate enough to be confirmed as Attorney General.

b. In your opinion, should the 287(g) program be made available to local law enforcement agencies that want to protect their communities and participate in immigration enforcement?

RESPONSE: As indicated above, the 287(g) program is not one that I have had any role in implementing. The question appears to involve matters within the purview of the Department of Homeland Security and I am not in a position to respond further. I am committed, however, to fostering public safety through the enforcement of federal immigration laws and to working with federal and state law enforcement partners in continuing efforts to secure our borders and protect our national security.

c. As states and local law enforcement approach you for help in enforcing federal law, will you find a way to work with them, or will you ignore them, as your predecessor has?

RESPONSE: I am committed to enhancing public safety through the enforcement of federal immigration laws and to working with federal and state law enforcement partners in continuing efforts to secure our borders and protect our national security.

9. In June 2014, DOJ announced its program Justice Americorp will issue $2 million in grants to lawyers to represent unaccompanied minors who crossed the borders illegally. Under current law, there is no right to a lawyer in a removal proceeding. The law provides only that an immigrant may obtain a lawyer, "at no expense to the government." Do you agree that the statutory language is clear: the government may not provide a lawyer to immigrants in a removal proceeding at the expense of the taxpayers?

RESPONSE: As the United States Attorney for the Eastern District of New York, I am not familiar with the particulars of the Justice AmeriCorps program or with the statutory provision to which your question refers. If I am confirmed as Attorney General, I look forward to learning more about this important issue.

10. By its very nature, Justice Americorps has due process and equal protection issues. The Department is treating similar people in similar situations differently. 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? Couldn't such a policy lead to the requirement of providing a lawyer to all immigrants in removal proceedings?

RESPONSE: As mentioned above, I am not personally familiar with any of the particulars of the Justice AmeriCorps program. If I am confirmed as Attorney General, however, I look forward to learning more about the program and the significant questions that you raise.

11. Immigration is a civil proceeding, and as a constitutional matter, the government is not required to provide counsel in civil proceedings. Are you concerned that if the government starts providing counsel to individuals in removal proceedings, the government could be required to provide counsel in other civil proceedings?

RESPONSE: I agree that the government does not have a constitutional obligation to provide counsel in this context. I am not personally familiar with programs or policies through which the government provides counsel in removal proceedings. If I am confirmed as Attorney General, I look forward to learning more about this important issue.

12. ICE has brought removal charges against only 143,000 of the 585,000 removable aliens encountered in fiscal year 2014. That's a mere 24 percent of removable aliens that ICE encountered in 2014. What's even more troubling is that nearly 900,000 aliens who have final removal orders still remain in the country. Now, however, all people with final removal orders are encouraged to seek deferred action and other relief made available through the President's recent executive action.

    a. Do you support the administration's catch-and-release actions?
    b. Do you agree that individuals whom a judge has ordered removed, should, in fact, be removed?

RESPONSE: As United States Attorney, I have worked to enforce our nation's immigration laws. If I am confirmed as Attorney General, I would do the same, understanding that limited prosecutorial resources are best used to focus on the removal of criminals and those who pose a threat to the safety of our nation.

13. Does the U.S. Constitution confer a right to abortion? If so, what clauses confer that right?

RESPONSE: The Supreme Court has recognized that the Constitution protects the right of a woman to choose to terminate her pregnancy before viability, and to do so without undue influence from the government; the Court located this right primarily in the Due Process Clause of the Fourteenth Amendment. After viability, the Court has held that a State may restrict or even proscribe abortion except where the procedure is necessary to preserve the mother's life or health.

a. Does the U.S. Constitution compel taxpayer funding of abortion? Why or why not?

RESPONSE: In my role as United States Attorney, I have not had occasion to become familiar with circumstances in which the Constitution could require taxpayer funding of abortion.

b. Do you believe that the U.S. Constitution permits taxpayer funding of abortion? If so, based on what clause?

RESPONSE: In my role as United States Attorney, I have not had occasion to become familiar with circumstances in which the Constitution would permit taxpayer funding of abortion.

c. Does the U.S. Constitution prohibit informed-consent and parental involvement provisions for abortion? Why or why not?

RESPONSE: In my role as United States Attorney, I have not had occasion to become familiar with the constitutionality of informed-consent and parental involvement provisions for abortion.

14. In your view, is diversity a valid institutional interest for a government entity, consistent with the Equal Protection Clause? What other compelling justifications exist for government to make racial distinctions?

RESPONSE: The Supreme Court has recognized that diversity can be one factor considered in certain governmental decision-making, such as academic admissions decisions. At the same time, the Department of Justice must use its enforcement authority to ensure that equal opportunities are available to all citizens without artificial barriers to those opportunities.

15. In *McCutcheon v. FEC*, Justice Breyer's dissenting opinion stated 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).

a. Do you agree that the First Amendment protects "collective" rights as well as individual rights?

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

RESPONSE: I understand Justice Breyer, in this excerpt, to be addressing the importance of an open and public forum in our representative democracy. I have not had the opportunity to delve into the academic debate about whether certain constitutional rights are individual or collective. There 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.

16. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that a right to assisted suicide was not protected by the Due Process Clause. The Court reasoned: "[W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a greater extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court." Do you agree with the Court's assessment of the importance of public debate and legislative action?

RESPONSE: I believe firmly in the importance and value of public debate concerning difficult and fundamental questions that may arise under our Constitution.

17. Do you believe that the Supreme Court's decision in *Morrison v. Olson*, which ruled that the independent-counsel statute did not violate the constitutional separation of powers, was correctly decided? Please explain.

RESPONSE: As the United States Attorney for the Eastern District of New York, I have not had occasion to reach a considered view on whether *Morrison v. Olson* was correctly decided. I support and follow the Supreme Court's binding decisions now as the law of the land, and if confirmed, I would continue to do so as Attorney General.

18. Do you believe that the Supreme Court's decision in *Boumediene v. Bush*, which conferred constitutional habeas rights to aliens detained as enemy combatants at Guantanamo, was correctly decided? If so, how does that square with *Johnson v. Eisentrager*, which Justice Scalia, in his *Boumediene* dissent, said "held—held beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign"?

RESPONSE: As the United States Attorney for the Eastern District of New York, I have not had occasion to reach a considered view on whether *Boumediene v. Bush* was correctly decided. I support and follow the Supreme Court's binding decisions now as the law of the land, and if confirmed, I would continue to do so as Attorney General.

19. What is your understanding 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?

RESPONSE: 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.

20. Do you believe that the Supreme Court's decision in *Zelman v. Simmons-Harris*, which held that school-choice programs that include religious schools do not violate the Establishment Clause, was correctly decided? Please explain.

RESPONSE: As the United States Attorney for the Eastern District of New York, I have not had occasion to reach a considered view on whether *Zelman v. Simmons-Harris* was correctly decided. I support and follow the Supreme Court's binding decisions now as the law of the land, and if confirmed, I would continue to do so as Attorney General.

21. The Supreme Court has held that the Federal Sentencing Guidelines are advisory and persuasive, but not binding. Do you believe *Booker* and *Fanfan* were correctly decided?

RESPONSE: As indicated above, I support and follow the Supreme Court's binding decisions now as the law of the land, and if confirmed, I would continue to do so as Attorney General.

22. The U.S. Supreme Court has repeatedly upheld obscenity laws against First Amendment challenges. To my knowledge, not one new adult obscenity case has been initiated against commercial distributors of hard core adult pornography during the Holder years. Research has linked the consumption of obscenity to sexual exploitation and violence against women, and to demand for sex trafficking and child pornography. If confirmed, what is your commitment to vigorously enforcing the federal adult obscenity laws?

RESPONSE: I agree that obscenity is not protected by the First Amendment. My understanding is that the Department has brought significant obscenity prosecutions in recent years, and I look forward to ensuring that the Department remains committed to bringing obscenity cases where appropriate.

23. Do you think that it is constitutional for a university to have racially exclusive internships or scholarships or summer programs, as some have in the past? My question goes not go to racially preferential programs, but ones in which a person cannot even apply based on their color. The Supreme Court held in the *Grutter* and *Gratz* cases that schools cannot use race mechanically, but must give "individualized consideration" to students. How can a racially exclusive program provide students with individualized considerations?

RESPONSE: In *Grutter*, the Supreme Court ruled that a university has a compelling interest in achieving diversity and can take steps to lawfully pursue that interest. Scholarship and other support programs can play an important role in promoting and sustaining a diverse student body, by helping to retain students who may need financial assistance or additional assistance in academic or other areas to succeed. I am not in a position to comment generally on the steps that a university may take to achieve diversity; as the Supreme Court noted in *Grutter*, context matters. However, I share your concern that all university programs, including scholarship and other support programs, be administered in a manner consistent with the Constitution and the laws of our nation.

24. Do you believe racial profiling in the context of the War on Terrorism is unconstitutional?

RESPONSE: National security is of utmost importance to the Department, the nation, and to me. Federal law enforcement has used, and will continue to use, every legitimate tool to keep the nation safe. The Constitution guides the Department's activities in the use of all of its tools and protects individuals against the invidious use of irrelevant individual characteristics.

25. In his opening statement at the confirmation hearing of Alberto Gonzalez to be Attorney General, Senator Leahy remarked, "The Attorney General is about being a forceful, independent voice in our continuing quest for justice and in defense of the constitutional rights of every single American."

    a. Do you believe the Attorney General should be a forceful, independent voice for justice and in defense of the constitutional rights of all Americans? If so, how do you intend to accomplish this?

RESPONSE: I agree that the Attorney General must be a forceful, independent voice of justice and a fierce defender of the constitutional rights of all Americans. I have devoted my professional life to the pursuit of justice and the defense of the ideals and principles set forth in the Constitution of the United States of America. If I am confirmed as Attorney General, I pledge to Congress and the American people that the Constitution—the bedrock of our system of justice—will be my lodestar as I exercise the power and responsibility of that position. I will never forget that I serve the American people from every walk of life.

    b. Can you provide examples of how you have been an independent voice during your government service? Are there any examples from your private practice?

RESPONSE: As the United States Attorney for the Eastern District of New York, I have been entrusted with a profound duty to bring independence and integrity to every investigation and prosecution and exercise the significant authority of the office completely free of bias, fear, or favor. My record demonstrates my unwavering commitment to fulfilling that duty. In the field of public corruption, for example, my Office has never hesitated to pursue investigations and prosecutions of corrupt public officials, no matter how powerful they might be. Under my leadership, the Office has pursued corruption taking place in offices and backrooms in New York's City Hall, the Nassau County legislature, the Capitol building in Albany, and even Washington, DC. Our prosecutions have resulted in convictions of Democrats and Republicans alike, including a sitting United States Congressman, the New York State Senate's Majority and Minority leaders, and officials from every level of government. If I am fortunate enough to be confirmed, I will bring that same steadfast commitment to independence and integrity to the position of Attorney General.

You also asked me about any examples from my time in the private sector where I was able to provide an independent voice. In 2005, I was appointed Special Counsel in the Office of the Prosecutor for the International Criminal Tribunal for Rwanda (ICTR), for the express purpose of conducting an independent, sensitive investigation into allegations of witness interference and perjury in one of their cases. I interviewed numerous genocide survivors who witnessed and managed to live through unimaginable atrocities as part of my investigation in order to make impartial recommendations to the ICTR Prosecutor. This opportunity to provide independent scrutiny necessary to ensure the rule of law and the integrity of the court system was one of the most meaningful experiences of my professional life.

26. The Affordable Care Act states that the employer mandate applied "after December 31, 2013." Notwithstanding this clear statutory command, the President postponed the employer mandate. Furthermore, according to the Wall Street Journal, the President has delayed aspects of the law some 38 times.

    Under our Constitution, the President must take care that the laws are faithfully executed. He can decide how to enforce the laws, but not whether to enforce them. What are the outer limits of the President's authority to suspend, alter or otherwise change statutory language? What's the limiting principle?

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

27. The President offered no legal support when he delayed the employer mandate despite the law. It is not clear if the Office of Legal Counsel did not review his action or could not offer legal support for it. In the Justice Department under Attorney General Holder, the Office of Legal Counsel has lost its former role as a guarantor that presidential acts are legal. Either it is not consulted, or the President takes action without seeking its approval, or the Office will not say "no" to illegal actions, or it issues cursory approvals like it did with an email when the President unilaterally released 5 terrorists from Guantanamo. Any of these possibilities is a threat to the rule of law.

What will you do to ensure that office objectively and thoroughly evaluates proposed presidential actions before they occur so the President conforms to the laws and the Constitution?

RESPONSE: If confirmed as Attorney General, it is my intention to meet regularly with the Office of Legal Counsel. In the course of those meetings, I would make clear my expectation that the Office provide soundly reasoned, candid, and objective assessments of the law.

28. In 2008, the Justice Department brought suit against the New Black Panther Party and two of its members for voter intimidation. The defendants did not contest the claims. But when the Obama Administration took over, they would not allow career litigators to move for a default judgment. The career litigators have stated that political appointees would not allow a case to be brought against Black citizens for intimidation of White voters. Internal investigations of misconduct have led nowhere after all these years. The Civil Rights Commission has criticized the Department for not cooperating with its investigation into the matter.

    a. If confirmed, will you conduct a thorough and fair investigation of this matter and apply any appropriate disciplinary action?

RESPONSE: I am not personally familiar with the details of this case. My general understanding is that there have been extensive internal Department reviews of this case, but I am not personally familiar with those reviews or their outcome. If I am confirmed as Attorney General, I will ensure there has been a fair and impartial consideration of the results of those internal reviews, and will take any appropriate action based on that consideration.

    b. Is it your position that the Voting Rights Act applies in a race neutral way to voter intimidation?

RESPONSE: If I am confirmed as Attorney General, I am committed to enforcing all the federal laws within the Department's jurisdiction, including the Voting Rights Act, according to their specific terms and applicable case law, in an even-handed manner.

29. The President remarked in his State of the Union address that voting should be as easy as possible. But fraud exists and it will get worse if the only response is denial. Not long ago, the Pew Center on the States issued a report that found there are 24 million voter registrations in this country that are no longer valid or are inaccurate. It concluded that there are almost 3 million individuals who are registered to vote in multiple states. Tens of thousands are registered to vote in three or more states.

    The study also identified close to 2 million dead people on the voter rolls. NBC News found 25,000 names of likely deceased voters on the California rolls. Some voted years after they died. One woman who died in 2004 voted in 2008 and 2012. A man who died in 2001 has voted eight times since 2005. The New York Times has written that in Florida, "absentee ballot scandals seem to arrive like clockwork…."

Do you agree that voter fraud is a significant problem? Do you agree that the states should be allowed to take actions, such as requiring voters to show photo identification, especially when there is no charge for obtaining that identification, to ensure the integrity of the voting process without running afoul of the Justice Department's Civil Rights Division?

RESPONSE: I am not personally familiar with the specifics of any studies regarding these issues, nor do I 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 state 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 laws and facts in the jurisdiction.

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.

30. Voter fraud also includes the registration to vote and illegal voting by people who are ineligible to vote. That means that the right to vote is being diluted by illegal votes canceling legal ones. In Iowa, a state investigation from 2012 to 2014 identified 117 illegal votes that were cast. The Secretary of State's investigation of these cases resulted in 27 criminal charges against suspected fraudulent voters and six criminal convictions. The three categories of illegal votes cast were from non-citizens, felons whose right to vote had not been restored, and miscellaneous offenses. Investigators were careful and determined that about half of the suspected non-citizen voters were actually citizens. But

88 cases were turned over to county attorneys and at least 10 of these cases have resulted in charges. The evidence of care in the investigation was demonstrated in the 16 cases brought against felons whose right to vote had not been restored, while 20 felons were identified whose rights should have been restored but had been denied when trying to vote. And there were 100 instances in which voters in Iowa also cast ballots in the same election in another state.

There is much voter fraud if only election and law enforcement officials will actually seek it. That many prosecutors do not search for it does not mean it does not exist. The public needs confidence in the integrity of its elections, and that only eligible voters actually vote.

If you are confirmed, what would you plan to do to stop voter fraud?

RESPONSE: As noted above, one of the important responsibilities of the Department of Justice is to investigate and prosecute violations of the federal criminal laws, including those federal laws that criminalize various types of election fraud. 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 regarding election fraud, according to their terms, in a fair and even-handed manner.

31. The Obama Administration has sought to ban the importation of shotguns and ammunition. The Administration has even argued that shotguns lack any sporting purpose.

    a. Do you agree that shotguns do not have any sporting purpose and that their importation should be banned?

RESPONSE: I am not aware of any statement that "shotguns lack any sporting purpose." Shotguns have long been used in shooting and hunting sports, and my understanding is that numerous shotguns may be lawfully imported under federal law.

    b. Federal law requires the attorney general to determine whether or not certain types of firearms have a "sporting purpose" before they can be lawfully imported or sold. How is this consistent with the core purpose of the Second Amendment, which, according to the U.S. Supreme Court, is self-defense?

RESPONSE: The Supreme Court has made clear that the Second Amendment protects the individual right of law-abiding citizens to keep and bear arms for self-defense in the home. To my knowledge, the Court has not opined on the constitutionality of the federal law with regard to firearm importation. If confirmed, I will ensure that the actions of the Department of Justice are consistent with the Constitution, including the Second Amendment.

32. The Justice Department is tasked with maintaining two important criminal databases. One is used when a Brady Act criminal background check is conducted on a prospective gun purchaser. The other is used by employers to check the criminal history of job applicants they intend to hire. These databases depend on records provided by the states that reflect criminal cases. Both databases have inaccuracies that cause serious problems. For instance, people convicted of domestic violence aren't allowed to purchase firearms. But many states have submitted none or very few records of such convictions. A background check for someone from these states won't keep a convicted domestic abuser from buying a gun.

    Similarly, states have done a poor job with the records that are used for employment checks. Today, 32% of adult Americans have a criminal record, either a conviction or an arrest. The database contains many arrests that never led to any conviction. But when a search is done, those arrests come up, and the person may be denied a job as a result. If confirmed, what will you do to improve the accuracy of the records in these databases?

RESPONSE: I agree that it is important for databases that contain criminal records to be accurate for purposes of conducting background checks. Although in my capacity as the United States Attorney for the Eastern District of New York I have not studied this issue in detail, if confirmed as Attorney General, I would support efforts to improve and ensure accuracy of criminal records, particularly those records used in background checks by employers and for firearms purchases.

33. One of the bills proposed in Congress and in a number of states would expand existing background check requirements that currently pertain to licensed retail sales of firearms to all firearm transfers. If such a bill were enacted, how would DOJ enforce it in the majority of states where firearms are not licensed or registered to specific individuals?

RESPONSE: I am not familiar with the details of the proposed legislation you reference, but if confirmed I would work to enforce all legislation passed by Congress, consistent with the authorities provided by that legislation and the Department's resources.

34. Do you believe the Supreme Court correctly decided *District of Columbia v. Heller*? Do you believe the individual right to keep and bear arms is a fundamental right?

RESPONSE: The Supreme Court has made clear that the Second Amendment protects the individual right of law-abiding citizens to keep and bear arms for self-defense in the home. If I am confirmed as Attorney General, I will ensure that the actions of the Department of Justice are consistent with the Constitution, including the Second Amendment.

35. The Supreme Court held in *Heller* that the Second Amendment protects an individual's right to possess a firearm, regardless of their participation in a "well regulated militia." In 2009, the U.S. Supreme Court expanded that right in *McDonald v. Chicago* by finding that the Due Process Clause of the Fourteenth Amendment incorporated the Second

Amendment. What is your personal opinion of the rights afforded by the Second Amendment?

RESPONSE: As noted above, the Supreme Court has made clear that the Second Amendment protects the individual right of law-abiding citizens to keep and bear arms for self-defense in the home. If I am confirmed as Attorney General, I will ensure that the actions of the Department of Justice are consistent with the Constitution, including the Second Amendment.

36. A bipartisan consensus is growing in Congress that civil asset forfeiture has increased incentives for abuse. In that process, law enforcement can seize property without any finding that the person has committed a crime. And financial incentives exist for law enforcement to pursue asset forfeiture aggressively—maybe too aggressively.

    Recently, Attorney General Holder accepted the proposal that I and several members of Congress asked of him: to eliminate adoptive seizures and equitable sharing. Under those procedures, state and local law enforcement had incentives to pursue seizures to keep the money for their own use. However, Attorney General Holder's order still permits equitable sharing when state and local authorities work with federal law enforcement in a joint task force, and in joint federal-state operations.

    I do not read these exceptions as narrowly as you characterized them at the hearing. For instance, I am not aware that an actual case must be filed for them to apply.

    a. Haven't a large number of investigations in your office been conducted through a joint task force or joint federal-state operation? And doesn't the exception for equitable sharing for these operations swallow this rule? What would happen if a state law enforcement officer saw a car that it suspected had cash obtained from drug trafficking and called a DEA agent, asking whether the local agency and DOJ jointly combated drugs?
    b. Are further reforms necessary for asset forfeiture, and will you commit to working to supporting legislation to prevent injustice and enhance procedural rights in this area?

RESPONSE: I understand that following the issuance of the Attorney General Holder's January 16, 2015, policy generally prohibiting the practice of federal adoptions of assets seized by state and local law enforcement, the Department has been engaged in extensive communication with both federal and state and local law enforcement about implementation of the new policy. I expect that if the Department determines that further guidance is necessary, including to clarify circumstances that constitute joint investigations or joint task forces, it will respond accordingly.

The adoption order came as a result of the Department's comprehensive review of all aspects of the Asset Forfeiture Program. The goal of this review, as I understand it, is to ensure that federal asset forfeiture authorities are used effectively and appropriately to take the profit out of crime and return assets to victims, while safeguarding civil liberties and the rule of law. If confirmed as Attorney General, I look forward to ensuring that this review is thoughtfully and thoroughly undertaken and to working with Congress on these issues.

37. The Justice Department did not, in the words of the New York Times, “prosecute a single prominent banker or firm in connection with the subprime mortgage crisis that nearly destroyed the economy.” I am concerned that this will happen again if DOJ does not hold the perpetrators responsible. Many people were prosecuted in connection with the failed savings and loan scandals of the 1990s.

    a. Why did the Department of Justice fail in bringing these criminals to Justice? Do you believe this impedes its ability to credibly deter others from committing similar crimes in the future?
    b. If confirmed, what will you do to pursue prosecution for any of these crimes that are still within the statute of limitations?

RESPONSE: If confirmed, I intend to vigorously pursue perpetrators of fraud and financial abuse, including, where appropriate, by prosecuting crimes related to the 2008 financial crisis. It is important to note, however, that criminal prosecution is not the only available means to seek redress for financial improprieties. Not every case can, or should, be resolved through criminal prosecution, as, for example, in cases where the evidence does not meet the high burden of proving criminality beyond a reasonable doubt. In these instances, the Department may be able to pursue civil remedies, as it has in multiple cases involving fraud in the sale of residential mortgage backed securities, reaching record settlements that, among other provisions, have extended consumer relief to those hurt most by the financial crisis.

I know from experience that making full use of civil remedies, including redress under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), is an effective means of tackling financial abuses. For example, my office led the investigation into Bank of America that resulted in a historic settlement which included the payment of $16.65 billion for financial fraud leading up to and during the financial crisis. That was the largest civil settlement with a single entity in American history and resolved federal and state claims against Bank of America and its former and current subsidiaries, including Countrywide Financial Corporation and Merrill Lynch. In addition to a record penalty, Bank of America agreed to provide billions of dollars of relief to struggling homeowners, including funds that will help defray tax liability as a result of mortgage modification, forbearance or forgiveness. The settlement did not release individuals from civil charges, nor did it absolve Bank of America, its current or former subsidiaries and affiliates or any individuals from potential criminal prosecution.

As another example, my office also participated in an investigation that resulted in a $7 billion global settlement with Citigroup for misleading investors about residential mortgage backed securities containing toxic mortgages. That settlement included a $4 billion civil penalty—at the time, the largest penalty at the time under FIRREA. The resolution also required Citigroup to provide relief to underwater homeowners, distressed borrowers, and affected communities through a variety of means including financing affordable rental housing developments for low-income families in high-cost areas. The settlement did not absolve Citigroup or its employees from facing any possible criminal charges, nor did it release any individuals from civil liability.

In short, I am committed to using all of the Department's enforcement tools, whether civil or criminal, and to working with all of our partners, whether federal, state, local, tribal, territorial, or foreign, to combat fraud and financial abuse. I am confident that we will succeed in restoring the integrity of our markets, preserving taxpayers' resources, and protecting the vast majority of hardworking Americans, investors, and businesses who play by the rules and adhere to the law.

38. As United States Attorney for the Eastern District of New York, you helped secure nearly $2 billion from HSBC over its failure to establish proper procedures to prevent money laundering by drug cartels and terrorists. You were quoted in a DOJ press release saying, "HSBC's blatant failure to implement proper anti-money laundering controls facilitated the laundering of at least $881 million in drug proceeds through the U.S. financial system."

    You stated that the bank's "willful flouting of U.S. sanctions laws and regulations resulted in the processing of hundreds of millions of dollars in [Office of Foreign Assets Control]-prohibited transactions." Still, no criminal penalties have been assessed for any executive who may have been involved.

    a. Did you make any decision or recommendation on charging any individual with a crime?
        i. If so, please describe any and all decisions or recommendations you made.
        ii. Please explain why such decisions or recommendations were made.
    b. If you did not make any decision or recommendation on charging any individual with a crime, who made the decision not to prosecute?

RESPONSE: On December 11, 2012, the Department filed an information charging HSBC Bank USA with violations of the Bank Secrecy Act and HSBC Holdings with violating U.S. economic sanctions (the two entities are collectively referred to as "HSBC"). Pursuant to a deferred prosecution agreement ("DPA"), HSBC admitted its wrongdoing, agreed to forfeit $1.256 billion, and agreed to implement significant remedial measures, including, among other things, to follow the highest global anti-money laundering standards in all jurisdictions in which it operates. As the United States District Judge who approved the deferred prosecution found, "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." Although grand jury secrecy rules prevent me from discussing the facts involving any individual or entity against whom we decided not to bring criminal 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 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.

I want to reiterate, particularly in the context of recent media reports regarding the release of HSBC files pertaining to its tax clients, that the Deferred Prosecution Agreement reached with HSBC addresses only the charges filed in the criminal information, which are limited to violations of the Bank Secrecy Act for failures to maintain an adequate anti-money laundering program and for sanctions violations. The DPA explicitly does not provide any protection 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, nor the Fraud Section of the Criminal Division.

39. Recent press reports have tracked the disturbingly large numbers of witnesses in federal criminal cases who have been murdered to prevent their testimony. It is often difficult to get witnesses to testify against dangerous criminals. They rightly fear for their safety and the Justice Department has to ensure they are protected.

    I know that sometimes witnesses decline protection. And sometimes protected witnesses ignore sound advice to stay away from their former residences to avoid the defendant and others. But it is clear that the Department is not offering protection to quite a few witnesses who need it.

    And I am particularly incensed that on several occasions, when the Department has confidentially informed defense counsel in advance of trial who a witness will be, defense counsel have tipped off their client, who then appear to arrange for the witness to be murdered.

    If confirmed, what will you do as Attorney General to make sure that witnesses who need protection receive it? Will you ensure that federal prosecutors seek protective orders to relieve them of the obligation of disclosing the names of vulnerable witnesses to defense counsel?

RESPONSE: As United States Attorney for the Eastern District of New York, I am deeply familiar with the challenges associated with ensuring both the cooperation and safety of witnesses in federal prosecutions—particularly prosecutions of violent offenders and organized crime defendants. I also am familiar with the various tools that the Department may use, including but not limited to participation in the Witness Security Program or other relocation assistance, to ensure the safety of witnesses and their family members. Effective use of those tools has been a critical component in my Office's historic and groundbreaking convictions of the leaders of the five La Cosa Nostra families in New York City and numerous ultra-violent gangs. If confirmed as Attorney General, I will support the continued use of these tools. I also will work with federal prosecutors to ensure that the Department both meets its discovery obligations and protects witnesses from retaliation by seeking protective orders to safeguard the identities of witnesses, where appropriate.

40. Increasingly, law enforcement is using drones for domestic law enforcement purposes. Drones enable more surveillance of citizens to occur. They are more mobile. They are cheaper to pay than police officers. And they can hover over homes and peer through windows, observing what humans cannot.

I am concerned that as law enforcement employs more drones, the security of the people in their persons, papers, and effects could be compromised. Meanwhile, despite a hearing the Judiciary Committee held, the Justice Department has not issued any guidelines on how the Fourth Amendment's prohibition on unreasonable searches and seizures, and its warrant requirement, apply to drones.

If confirmed, will you commit that the Department of Justice will issue specific guidelines on how the Fourth Amendment restricts law enforcement's domestic use of drones?

RESPONSE: I understand that the Department currently uses unmanned aircraft systems (UAS) in limited circumstances and only when there is a specific operational need. If confirmed, I will ensure that when the Department uses unmanned aircraft, its use will continue to be guided by all applicable constitutional, statutory, and regulatory provisions—including privacy and civil rights and civil liberties protections.

The Department of Justice Inspector General recommended that the Department come up with a uniform system of rules and regulations to control how these devices are used. I understand there is a Department of Justice Working Group, which includes privacy, policy, legal, law enforcement, and grant-making components, to identify and address policy and legal issues pertaining to the use of UAS. The Department is also participating in an interagency process that is considering UAS-related policy issues that are shared across departments and agencies. If confirmed, I look forward to carefully examining the Department's efforts in this area.

41. The House Oversight and Government Reform Committee issued a report last year finding that a banking enforcement program involving DOJ is in fact aimed at depriving legal but politically-disfavored business sectors of access to the financial services businesses need to survive in the modern economy. The name of the program is Operation Choke Point. You were asked about Operation Choke Point at your hearing, but you seemed unfamiliar with the fact that the program's targets include legal sellers of firearms and ammunition, among other industries. Internal investigators at both DOJ and FDIC are conducting formal inquiries into the program and the officials and employees involved.

    a. Would you agree that DOJ should not use its authority to discourage legal enterprises from operating, even if some administration officials consider them "morally unacceptable"?

RESPONSE: I understand that the purpose of Operation Chokepoint is to target financial institutions that are involved in perpetrating frauds upon consumers—where, for example, a financial institution is facilitating the looting of consumer bank accounts.

The role of the Department of Justice is to enforce the law and as a career prosecutor and the United States Attorney for the Eastern District of New York, I can assure you that I, and my fellow prosecutors and law enforcement partners, take this role seriously. Our job is to investigate specific evidence of unlawful conduct and enforce the law.

The Department works every day to uphold the law and protect the American people. To ensure that our efforts are effective, the Department also must make sure to prevent any potential misunderstanding of its efforts that could be detrimental to lawful businesses. Thus, if confirmed as Attorney General, I will make clear that it is imperative that we inform financial institutions that any investigations are based on specific evidence that a financial institution is breaking the law, and not on the institution's relationships with lawful industries or companies.

b. Would you support appointment of a special counsel to hold accountable any DOJ official who is found to have abused his or her authority under this program to close down lawful businesses?

RESPONSE: If I am confirmed as Attorney General, I can commit to you that I will take seriously every allegation of abuse of power brought to my attention. And in conjunction with career prosecutors and Congress where appropriate, I will make the best decision about how to handle such an investigation. If a member of the Department of Justice is found to have crossed the line, that individual must be dealt with swiftly and according to law.

42. On Election Day last year—3 years after the House subpoena was issued and 2 years after the contempt vote—Attorney General Holder finally delivered 64,000 pages of documents to the House. Those documents were only provided to the House. The Justice Department failed to deliver them to this Committee, despite the agreement I made with Attorney General Holder to release my hold on Deputy Attorney General Cole's nomination. The Senate Judiciary Committee was supposed to receive all the same Fast and Furious documents delivered to the House throughout the investigation. The subpoena is still being litigated, so the court may order more documents to be provided in the future.

    Will you commit that, if confirmed, you will ensure that this committee receives any future Fast and Furious documents provided in the litigation with the House?

RESPONSE: If I am confirmed as Attorney General, I will ensure that any future documents provided to the U.S. House of Representatives in this litigation are also provided to the Senate Judiciary Committee.

43. The Department has argued in the Fast and Furious litigation that executive privilege is more than just a Presidential privilege, but that it also establishes a constitutional shield for the "deliberative process" of lower level agency officials. However, the deliberative process privilege is traditionally a common law doctrine and one of the exemptions in the Freedom of Information Act—not a constitutional privilege of equal standing with the inherent Constitutional power of Congress to conduct oversight inquiries. Deliberative

process also traditionally applies only to content that is deliberative and pre-decisional.[1] It does not shield material created after a decision is made, or that is purely factual.

Moreover, the Attorney General has sought to use this exceedingly broad notion of privilege to justify withholding documents that he has stated *are not privileged*. On November 15, 2013, the Attorney General acknowledged in the Fast and Furious litigation that he was withholding documents responsive to the House subpoena that "do not . . . contain material that would be considered deliberative under common law or statutory standards."[2] Furthermore, the OLC opinion on the President's assertion of executive privilege suggests that the privilege applies "*regardless* of whether a given document contains deliberative material."[3]

Yet, the Department *did* produce deliberative, pre-decisional material prior to the Feb. 4, 2011 gunwalking denial letter to me, despite its claim now that such material is privileged. The Department conceded that Congress had a clear interest in finding out whether officials knew before it was sent that the Feb. 4th letter was false. It provided pre-Feb. 4th material—even though it was pre-decisional and deliberative. However, the Department still refuses to concede that Congress has an interest in discovering how officials learned that the letter was false *after it was sent*. It refused to provide <u>post</u>-Feb. 4th material—even though it is <u>post</u>-decisional and <u>factual</u> in nature. The Department categorically withheld *all* records from after the Feb. 4th letter until Election Day 2014. Only then, after a court order, did it finally produce to the House Committee post-Feb. 4th documents that contained purely factual, <u>post</u>-decisional material.

a. What is the scope of executive privilege, particularly over agency documents unrelated to the President?

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

b. Does the President have an executive privilege to withhold documents subpoenaed by Congress that have nothing to do with advice or communications involving the White House? If so, what is the legal basis for that claim?

RESPONSE: As noted above, 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

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[1] *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997).
[2] 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).
[3] 36 Op. O.L.C. 1, 3 (June 19, 2012) (emphasis added).

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.

c. Congress created a statutory deliberative process exemption for documents subject to Freedom of Information Act requests. Do you believe a similar exception applies to congressional subpoenas, or are requests from Congress entitled to more weight?

RESPONSE: I commit that, if I am confirmed as Attorney General, I would work closely with Congress to accommodate its legislative interests. I would hope that these efforts would eliminate the need for a congressional subpoena.

d. Are deliberative documents just as immune from Congressional scrutiny as they are from FOIA requestors?

RESPONSE: It is my understanding that the President's assertion of Executive Privilege is at issue in the ongoing Fast and Furious litigation. If I am confirmed as Attorney General, I will work to accommodate Congress's legislative and oversight interests.

e. Can the President assert executive privilege over deliberative material, as the Office of Legal Counsel opinion suggested, "regardless of whether a given document contains deliberative content," and even where the material is post-decisional?

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. It is my understanding, however, that Executive Privilege may be appropriately asserted over a wide variety of information, and that the exact scope of the privilege is the subject of ongoing litigation. If I am confirmed as Attorney General, I will work to accommodate Congress's legislative and oversight interests.

f. The OLC opinion also claims that providing Congress with non-deliberative or purely factual agency documents would raise "significant separation of powers concerns." Do you agree, and if so, why?

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

g. Given that non-deliberative, purely factual agency documents are clearly not considered part of any protected "deliberative process" under common law or statute, what is the legal justification for withholding such documents under Congressional subpoena?

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. It is my understanding, however, that Executive Privilege may be appropriately asserted over a wide variety of information, and that the exact scope of the privilege is the subject of ongoing litigation.

44. In the Fast and Furious litigation, the Department has relied on an extremely broad notion of executive privilege in its refusal to produce non-deliberative, post-decisional documents that would help Congress understand when and how the Department came to know that its Feb. 4, 2011 letter to me denying gunwalking was false. Specifically, the Department categorically refused, until Election Day last year, to produce *64,000 documents*—even though the Attorney General recognized that at least some of those documents "[did] not . . . contain material that would be considered deliberative under common law or statutory standards."[4] The OLC opinion on the matter suggests that assertion of privilege is proper "regardless of whether a given document contains deliberative material."[5]

    The Department relied on this overbroad view of executive privilege when it declined to bring the congressional contempt citation of Attorney General Holder before a grand jury.[6] The Department sent this denial letter to the Speaker of the House before the contempt citation even reached the U.S. Attorney.[7] The U.S. Attorney failed to answer my questions seeking an explanation of the facts and circumstances sufficient for Congress to determine whether he made an independent judgment regarding the refusal to present the citation.[8]

    The law states that it is the "*duty*" of the U.S. Attorney "to bring the matter before the grand jury for its action."[9]

    a. What does it mean for the U.S. Attorney to have a "duty" to present a congressional contempt citation to a grand jury?

[4] 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).
[5] 36 Op. O.L.C. 1, 3 (Jun 19, 2012).
[6] Letter from Senator Charles E. Grassley to U.S. Attorney Ronald Machen (June 29, 2012), at 2.
[7] *Id.* at 1.
[8] *Id.* at 1-2.
[9] 2 U.S.C. § 194 (emphasis added).

b. If the U.S. Attorney has any discretion in cases where there is a claim of Executive Privilege, does he also have an obligation to make an independent evaluation of such a claim? If not, please explain why not.

c. Under the Department's interpretation of the statute, what is left of the Congressional contempt power against any agency able to convince the President to assert executive privilege?

d. Under the Department's interpretation of the statute, what safeguards against a President's improper claims of executive privilege if not the independent legal judgment of the U.S. Attorney charged by statute with presenting the contempt citation to a grand jury?

e. The Department relies on its own OLC opinions, which claim, among other things, that the Department should not prosecute officials for contempt at least in part because Congress can resort to civil litigation to enforce its subpoenas. However, it is clear from the delays in the Fast and Furious litigation that this enforcement tool is insufficient to ensure that Congress has adequate access to information to carry out its oversight responsibilities. The House Committee has had to re-issue the subpoena twice to avoid the case being mooted at the beginning of each new Congress. This gives the impression that the Department is delaying the process in hopes that political events may allow it to avoid a judicial resolution. What steps would you take to counter that appearance and resolve the dispute in a more timely way?

RESPONSE: I have not had occasion as the United States Attorney for the Eastern District of New York to acquaint myself with this dispute. My understanding is that a 1984 opinion signed by Theodore Olson, the head of the Office of Legal Counsel under President Reagan, sets forth the longstanding Department of Justice position with respect to 2 U.S.C. § 194. That said, I believe it is important for the Executive Branch to work with Congress to accommodate its legitimate oversight interests, and if confirmed as Attorney General, I will work to invigorate this tradition of collaboration.

45. If confirmed, will you pledge to personally re-evaluate the Department's litigation strategy in the fast and furious matter, the merits of its positions, and refusal to settle the case up to this point—and provide your conclusions to this Committee?

RESPONSE: As United States Attorney, I am not personally familiar with the Department's litigation strategy in the Fast and Furious matter or the particulars of the ongoing litigation. If I am confirmed as Attorney General, I look forward to learning the status of this litigation.

46. Josephine Terry sent a letter to you dated January 26, 2015, informing you that Department of Justice officials had lied to her regarding the source of the weapons found at her son's murder scene and withheld key information from the lead FBI investigator on the case. In spite of the findings and recommendations by the DOJ OIG and the ATF

Professional Review Board, many of the officials involved remain employed by the Department or ATF. Ms. Terry asks that you review the conduct and performance of those officials and examine whether the ATF obstructed the FBI's investigation of her son's murder.

As Ms. Terry asks:

a. Will you "review the conduct and performance of the Justice Department and ATF . . . to determine whether the discipline or other administrative action with regard to each employee was appropriate"?
b. "[I]f ATF's Professional Review Board did in fact recommend certain discipline such as termination for certain employees, [will you] determine why this has not occurred"?
c. Ms. Terry also asks about evidence that officials may have initially concealed from the FBI agent investigating her son's murder the fact that the weapons found at the scene traced back to Fast and Furious. Do you agree with Ms. Terry that, if this is true, these officials may have hindered and obstructed a federal criminal investigation? If so, and if confirmed, will you look into it? If not, please explain why not.

RESPONSE: If I am confirmed as Attorney General, I look forward to educating myself on these important questions and will take appropriate actions.

47. In November 2014, the Department delivered to the House 64,000 pages of documents related to Fast and Furious that it had withheld for three years, even though the Attorney General admitted that they were not all privileged. One of the documents is an email that shows that the Justice Department and the White House press offices attempted to stop CBS News from reporting on Fast and Furious.

    In an email dated October 4, 2011, the Attorney General's top press aide, Tracy Schmaler, claimed that CBS News reporter Sharyl Attkisson was "out of control."[10] The Attorney General's press aide also told White House Deputy Press Secretary Eric Schultz that she planned on calling CBS News anchor Bob Schieffer to pressure the network to block Ms. Attkisson's Fast and Furious reporting. The White House Deputy Press Secretary replied, "Good. Her piece was really bad for the AG."

    The White House Deputy Press Secretary also told Attorney General Holder's press aide that he was working with reporter Susan Davis to target Rep. Darrell Issa. In the same email chain, the White House Deputy Press Secretary tells Attorney General Holder's press aide that he would provide Susan Davis with "leaks." Ms. Davis wrote a critical piece on Representative Issa a few weeks later.

[10] E. Schulz and T. Schmaler e-mail chain (Oct. 4, 2011), *available at* http://www.judicialwatch.org/document-archive/control/; *see also* K. Pavlich, Document Dump Shows DOJ Worked With White House To Target 'Out of Control' Sharyl Attkisson For Fast and Furious Coverage, Townhall.com (Nov. 21, 2014).

Ms. Attkisson also testified before the Committee that the Department physically barred her from attending a Fast and Furious briefing in a public building, while handpicking other reporters who were allowed to get past building security for the briefing.

a. Do you believe the job of the taxpayer-funded press office at the Department of Justice should include pressuring networks not to run news stories that the Attorney General does not like?

RESPONSE: If confirmed as Attorney General, I will work to ensure the Department conducts its work as transparently as possible. The Department's Office of Public Affairs (OPA) plays a critical role in fulfilling this goal by communicating information about the Department's overall mission and daily activities to the public. In doing this, I believe OPA should strive to provide journalists covering the Department with the most information possible on any given issue so that the Department's work can be reported accurately and fairly. Moreover, I believe that OPA must interact with all journalists courteously and professionally at all times, even if there is disagreement about the accuracy of a story that has been published.

b. Is it appropriate for that press office to coordinate with the White House on "leaks" of negative information about a Committee Chairman conducting aggressive oversight of the Justice Department?

RESPONSE: I am not familiar with the incident you mention. In general, I would expect the work of OPA to be focused on communicating information related to the Department's core law enforcement responsibilities and legal casework, as opposed to anything else.

c. If confirmed, what would you do to curb this kind of activity in your press office?

RESPONSE: As noted above, if I am confirmed as Attorney General, my approach will be to ensure that OPA is focused on advancing the Department's overall mission by communicating the facts of its law enforcement work to the American people. In its dealings with journalists, I would expect OPA to provide as much information as possible to ensure timely and accurate reporting, and to maintain a professional and courteous approach at all times. To the extent that I observe that OPA is in any way deviating from these standards, I would not hesitate to address the situation swiftly.

48. If confirmed, what steps would you take to ensure that reporters are not barred form briefings simply because they report on stories unfavorable to the Attorney General?

RESPONSE: During my time as the United States Attorney for the Eastern District of New York, we routinely invited all interested media to our press conferences, and sought to respond to all media inquiries, regardless of the particular outlet that was posing the question. If I am confirmed as Attorney General, I will strive to ensure that OPA adheres to this same approach.

49. On December 30, 2014, former CBS News reporter Sharyl Attkisson — who reported on Operation Fast and Furious and Benghazi — filed a complaint in court alleging that the government had conducted "unauthorized and illegal surveillance" of her computers and telephones.[11] It is unclear so far whether the surveillance was conducted by the government, but it does seem clear that there was a hack of her CBS computers. CBS News issued a press release confirming that there was a hack.[12]

Ms. Attkisson's complaint alleges that her forensics experts found that propriety federal government software had been used to accomplish an intrusion on her work computer, though that is unconfirmed.[13] In addition, both her work and personal computers allegedly showed evidence of attacks that were coordinated and highly-skilled.[14] Ms. Attkisson filed a complaint with DOJ-OIG *and* the FBI regarding this matter, but the FBI never even interviewed her about her claim.[15] In a letter to Sen. Coburn, DOJ sought to blame Ms. Attkisson for failing to "follow up" with the FBI regarding her complaint.[16] Ms. Attkisson also has filed a FOIA request with the FBI, and received only a few pages in response so far. The documents indicate knowledge of the hack, but it is unclear what, if any, investigative steps the FBI took to pursue a case.

a. Given the growing importance of cybersecurity as a priority for the Department and the chilling effects that politically motivated hacking could have on the First Amendment activities of news organizations, do you believe the FBI should find out who hacked into CBS News, regardless of who is responsible?

RESPONSE: I share your concerns about cybersecurity and the need to be vigilant against hacking, politically motivated or otherwise. It is my understanding 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.

b. In light of the allegation that a government agency or a contractor for a government agency may be responsible, if confirmed, what steps would you take to ensure that there is a thorough and independent investigation of the CBS hack?

RESPONSE: If confirmed, I will ensure that the Department carefully considers credible allegations of wrongdoing that are brought to our attention. With respect to the particular matter you have described, it is my understanding that the Department's Office of Inspector General has conducted an independent investigation of this matter.

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[11] Complaint at ¶ 1, *Attkisson v. Holder*, 2014-CA-8321 (D.C. Super. Ct. Dec. 30, 2014).
[12] See E. Wemple, CBS News confirms multiple breaches of Sharyl Attkisson's computer, Washington Post Blog (June 14 2013).
[13] Compl. ¶ 44.
[14] *Id*. ¶ 45.
[15] *Id.* ¶¶ 47, 54; L. Grove, Ex-CBS Reporter Sharyl Attkisson's Battle Royale With the Feds, The Daily Beast (Jan. 9, 2015).
[16] Letter from P. Kadzik to T. Coburn (Dec. 12, 2013), at 2.

c. If confirmed, how would you deal with the inherent conflict in the Department's interest in both defending itself against litigation alleging some government liability and its interest in ensuring that there is a thorough and independent inquiry to find out who was responsible for the CBS hack?

RESPONSE: I understand that in this case, the Department of Justice Inspector General performed an investigation of Ms. Attkisson's allegations, and I have confidence in the Inspector General's ability to conduct thorough and independent inquiries.

d. The Department also has allegedly failed to respond to related FOIA requests in a timely and appropriate way. If confirmed, will you pledge to re-evaluate the Department's FOIA responses on this matter to date and seek to avoid costly FOIA litigation by being as transparent as possible? If not, please explain why not.

RESPONSE: The Freedom of Information Act (FOIA) is a vital part of our democracy, and if confirmed, I commit to working with the FBI, as well as the rest of the Department and Executive Branch, to ensure an appropriate response to this and other FOIA requests.

e. If confirmed, will you cooperate fully with this committee's inquiry into the Department's response to the CBS hack— including providing internal documents about efforts to find out who was responsible? If not, please explain why not.

RESPONSE: If confirmed, I commit to working with this Committee as it exercises its duty to conduct oversight of the Department. I believe that we will be able to work together to ensure the Committee has the documents and information it needs to conduct oversight while also protecting the Department's law enforcement and confidentiality interests.

50. The FBI is exempt from the normal protections that apply to other law enforcement agencies under the Whistleblower Protection Act.[17] Operating outside of the traditional whistleblower protection framework, the Department's record of actually guarding whistleblowers from retaliation is historically weak.

    For example, regulations designate specific individuals to whom FBI employees may make protected disclosures.[18] Those individuals include

    > the Department of Justice's (Department's) Office of Professional Responsibility (OPR), the Department's Office of Inspector General (OIG), the FBI Office of Professional Responsibility (FBI OPR), the FBI Inspection Division (FBI-INSD) Internal Investigations Section (collectively, Receiving Offices), the Attorney General, the Deputy

[17] 28 C.F.R. Part 27.
[18] 28 C.F.R. § 27.1(a).

> Attorney General, the Director of the FBI, the Deputy Director of the FBI, or to the highest ranking official in any FBI field office . . . .[19]

The regulations do *not* protect whistleblowers from retaliation when they make initial disclosures of wrongdoing to their direct or immediate supervisors.

In 2012, the President tasked the Attorney General to report on the effectiveness of the FBI whistleblower regulations.[20] The Department submitted its report a year late.[21]

In that report, the Department noted that of 89 reviewed cases of whistleblower complaints, 69 were found to be "non-cognizable." Further, a "significant portion" of those deemed "non-cognizable" involved disclosures that were "not made to the proper individual or office under 28 C.F.R. § 27.1(a)."[22]

The Department recommended expanding the number of designated officials to whom whistleblowers may make a protected disclosure, but only to include the second-in-command of a field office, such as the Assistant Special Agent in Charge of a smaller field office or the Special Agent in Charge of a larger field office.[23] The Department declined to expand the category of designated officials to include an employee's direct or immediate supervisor, even though, as the Department noted, "OSC believes that to deny protection unless the disclosure is made to the high-ranked supervisors in the office would undermine a central purpose of whistleblower protection laws."[24]

Notably, PPD-19 specifically defined a "protected disclosure" within the intelligence community, of which the FBI forms a part, as "a disclosure of information by the employee to a supervisor in the employee's direct chain of command *up to and including* the head of the employing agency . . . ."[25] The FBI thus remains the *only agency* in the Executive Branch that does not protect disclosures made by employees to their direct or immediate supervisor.

Unfortunately, this inadequate regulatory framework is not the sole culprit for the weak protections afforded to FBI whistleblowers. I have personally spoken to current and former FBI employees whose cases languished anywhere between *nine and eleven years* before those employees won relief for retaliatory acts and practices committed against them for reporting waste, fraud, and abuse in the FBI.

a. Why shouldn't whistleblowers in the FBI who report waste, fraud, and abuse to their direct supervisors be protected?

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[19] *Id.*
[20] The White House, Presidential Policy Directive/PPD-19 (Oct. 10, 2012), at 5 ["PPD-19"].
[21] Department of Justice Report on Regulations Protecting FBI Whistleblowers (Apr. 2014) ["DOJ FBI Whistleblower Report"].
[22] DOJ FBI Whistleblower Report at 7.
[23] *Id.* at 13.
[24] *Id.* at 14.
[25] PPD-19 at 7 (emphasis added).

RESPONSE: I believe that whistleblowers play a vital role in protecting against waste, fraud, and abuse of taxpayer funds. As you have described above, I understand that the Department recently released a lengthy report analyzing the system in place to protect FBI whistleblowers, and made a number of recommendations to improve that process. If I am confirmed as Attorney General, I will be committed to reviewing those recommendations and working to ensure that the system to protect FBI whistleblowers is fair, effective, and properly protects whistleblowers against prohibited retaliation.

b. Do you believe that there is anything unique about the FBI that suggests its policy on this issue should be different from the rest of the law enforcement and intelligence communities? If so, please explain why.

RESPONSE: While I am aware that the Department recently released a report on how best to protect FBI whistleblowers, I am not familiar with its details or recommendations. If I am confirmed as Attorney General, I am committed to reviewing this issue.

c. If confirmed, will you commit to personally reviewing any changes the Department makes to its policies and procedures in handling FBI whistleblower complaints?

RESPONSE: Yes.

d. If confirmed, will you provide this committee with regular updates on the Department's progress in improving the effectiveness and timeliness of its policies and procedures for addressing these claims?

RESPONSE: If I am confirmed as Attorney General, I hope to have an ongoing dialogue with the Committee not just about the issue of FBI whistleblower policies but also about the other important issues raised in my hearing and in these questions.

51. On September 5, 2014, I wrote to the Office of Juvenile Justice and Delinquency Prevention (OJJDP) within the Office of Justice Programs (OJP) regarding allegations that OJJDP knowingly granted millions of taxpayer dollars to states that incarcerated runaway youth, foster youth, and other vulnerable minors in violation of the Juvenile Justice and Delinquency Prevention Act (JJDPA). OJJDP's responses to my inquiry confirmed whistleblowers' accounts of compliance monitoring failures at OJJDP.[26] The Inspector General has also detailed some of these failures in a January 2014 report.[27]

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[26] Letter from Sen. Charles E. Grassley, Chairman, S. Comm. on the Judiciary, to Hon. Karol Mason, Assistant Attorney General, U.S. Department of Justice (January 14, 2015), http://www.grassley.senate.gov/sites/default/files/news/upload/CEG%20to%20OJP%20%28JJDP%20Act%20Grant%20Fraud%29%2C%201-14-15.pdf..

[27] *Id*.

The core problem appears to be OJJDP's failure to understand or implement its separate and distinct compliance monitoring obligations under the law:

- OJJDP is required to reduce a state's funding for a given year by 20 percent for each core requirement violated in the previous fiscal year.[28]

- OJJDP is *also* required to ensure that such a state does not receive *any* JJDPA funds for the year, unless that state meets one of two criteria, including a showing of subsequent, substantial compliance with the requirement(s) it was violating.[29]

Yet, OJJDP has admitted and defended a policy that appears to conflate these two obligations, by allowing non-compliant states to avoid the 20 percent reductions so long as they are able to demonstrate subsequent, substantial compliance with the non-compliant requirement(s).[30]

Moreover, OJJDP admitted that "this [policy] does not appear to have been reduced to writing" even though "it has been the common practice since at least 1986."[31] In addition, OJJDP explained that "[it] has not historically maintained a comprehensive record of all communications with the 55 participating states and territories."[32]

This gives rise to a concern that this policy, questionable on its face, may be arbitrary as applied. Moreover, there is a growing concern as to just how many taxpayer dollars OJJDP has awarded to states that imprisoned vulnerable youth in violation of the JJDPA since then.

a. Do you agree that it is an inappropriate use of taxpayer dollars to reward states that lock up foster youth and runaways in violation of the Juvenile Justice Delinquency Prevention Act?

RESPONSE: I believe that all federal employees share an obligation to protect taxpayer dollars from misuse. This is especially true for the grant-making components of the Department of Justice. If I am confirmed as Attorney General, I will work with the Office of Justice Programs to ensure that funds dispensed by the Office of Juvenile Justice and Delinquency Prevention are distributed consistent with the restrictions of the Juvenile Justice and Delinquency Prevention Act.

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[28] 42 U.S.C. § 5633 (c)(1).
[29] 42 U.S.C. § 5633 (c)(2). Significantly, subsections (c)(1) and (c)(2) are conjoined by the operative "and."
[30] Letter from Hon. Peter J. Kadzik, Assistant Attorney General, U.S. Department of Justice, Office of Legislative Affairs, to Sen. Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary (October 28, 2014).
[31] Email from U.S. Department of Justice, Office of Legislative Affairs, to Staff of Sen. Charles E. Grassley, Ranking Member, and Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary (November 21, 2014).
[32] *Id*.

b. If confirmed as Attorney General, will you personally look into this issue and cooperate fully with our inquiry—including ensuring that the replies to our letters are timely?

RESPONSE: If I am confirmed as Attorney General, I will work with the Office of Justice Programs to ensure that funds dispensed by the Office of Juvenile Justice and Delinquency Prevention are distributed consistent with the restrictions of the Juvenile Justice and Delinquency Prevention Act, and that the Committee receives information to perform its oversight function.

52. In 2013, the Government Accountability Office (GAO) reported that Attorney General Holder took 366 flights for non-mission purposes aboard Department aircraft at a cost of $5.8 million.[33] This report also states that in 2009 the FBI stopped reporting to the General Services Administration (GSA) flights taken by senior federal officials aboard its aircraft, although reporting is required by Office of Management and Budget (OMB) Circular A-126.[34] Circular A-126 states that agencies must report semiannually to GSA each use of such aircraft for non-mission travel by senior executives.[35]

    a. As it stands now, the Department does not report the Attorney General's travel as other agencies do under OMB Circular A-126. If you were confirmed as Attorney General, would you commit to publicly reporting the amount of your travel on FBI jets? If not, why not?

RESPONSE: As the United States Attorney for the Eastern District of New York, I have not had occasion to study this issue and am not familiar with the specific reporting requirements for official travel on government aircraft.

    b. If confirmed, would you limit your travel in order to save taxpayer money and ensure that the FBI aircraft are always available for counter-terrorism operational flights? If not, why not?

RESPONSE: It is my understanding that all Department of Justice aircraft, including the FBI's fleet, are always used for mission purposes first. If I am confirmed as Attorney General, I am committed to utilizing the Department's aircraft resources in a way that supports the Department's mission and is a cost-effective, appropriate use of taxpayer dollars.

    c. If confirmed, would you be willing to develop internal guidance or policies that would help guide and regulate the extent to which "required use" travelers do not inappropriately or overly use government aircraft for personal reasons? If not, please explain why.

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[33] GAO, Executives' *Use of Aircraft for Nonmission Purposes*, GAO-13-235 (Washington, D.C : February 2013).
[34] *Id.*
[35] *Id.*

RESPONSE: As the United States Attorney for the Eastern District of New York, I am not familiar with Department policies and guidance regarding "required use" travelers' use of government aircraft. As noted above, if confirmed as Attorney General, I am committed to utilizing the Department's aircraft resources in a cost-effective and mission-supportive manner.

53. Although administrative leave is not authorized by statute, precedent allows it as an exercise of agency discretion, but only for occasional, short periods of time and only when it is in the best interests of the taxpayer.[36] In a 2002 Department of Justice (DOJ) memorandum on administrative leave, DOJ acknowledged that "components too frequently are placing employees on administrative leave rather than utilizing other more appropriate options."[37] As a result, DOJ changed its policy to limit the use of administrative leave to 10 work days unless approved by the assistant attorney general for administration or his designee for a longer period.[38]

[36] To the Chairman, U.S. Civil Service Commission, 38 Comp. Gen. 203 (1958) (where removal of an employee is necessitated by safety concerns, only 24 hours administrative leave is appropriately authorized, and extensive paid leave pending an investigation does not qualify as a proper use of "administrative leave," but rather "immediate" steps should be taken to reduce time during which an employee is on paid leave); Navy Department-Reduction In Force-Administrative Leave During 30-Day Notice Period, 66 Comp. Gen. 639, 640 (1987) (holding that decisions of the Comptroller General and the guidelines of the Office of Personnel Management limit an agency's discretion to grant administrative leave to situations involving brief absences); Ricardo S. Morado – Excused Absence, 1980 WL 17293, 1 (1980) (when it became clear that an employee would not be returning to work, an agency was not authorized to grant administrative leave pending the separation); Miller v. Department of Defense, 45 M.S.P.R. 263, 266 (MSPB, 1990) (a settlement agreement was declared invalid as the Merit Systems Protection Board determined that the Department of Defense did not have the authority to grant an employee nine months of paid administrative leave, where said employee was to be removed at the end of the period of administrative leave, because there was no statutory provision that authorized the agency to grant paid administrative leave for such an "extended period of time"); *pet. for rehearing denied by* Miller v. Dep't of Defense, 1992 U.S. App. LEXIS 2457 (Fed. Cir. Feb. 18, 1992); In the Matter of the Grant of Administrative Leave Under Arbitration Leave, 53 Comp. Gen. 1054, 1056-57 (the Comptroller General refused to grant an employee thirty days of administrative leave, where that employee was injured on the job and unable to work in his full capacity, as the grant of administrative leave constituted an "extended period of excused absence" that was not permitted under any statute); Nina R. Mathews-Age Discrimination/Title VII Resolution Agreement-Compensatory Damages, 1990 WL 278216, 1-2 (where an employee was granted twenty-two weeks of administrative leave pay in settlement of a personnel claim, the agreement was deemed invalid by the GAO, as the Comptroller determined that there was no relevant legal basis by which the employee could be placed on extended administrative leave with pay); Excused Absence for Bar Examination Preparation, 1975 WL 8763, 1 (1975) (periods of 14, 28 and 31 days did not constitute "periods of brief duration" under which an agency had authority to grant administrative leave for employees to take their Bar examinations); Department of Housing and Urban Development Employee-Administrative Leave, 67 Comp. Gen. 126, 128 (1987) (The Comptroller General held that the agency's "decision to allow the employee to participate in a NIH therapeutic trial for 3 days a month in a cancer research effort being run by the National Cancer Institute is consistent with the broad framework of decisions of this Office and the FPM Supplement addressing the discretionary agency review of administrative leave requests"); Frederick W. Merkle, Jr. – Administrative Leave, 1980 WL 14633, 1 (1980) (an eight-week period could not constitute administrative leave for an employee awaiting a decision on his eligibility for early retirement, as it constituted an "extended period of time"); Gladys W. Sutton-Administrative Leave in Lieu of Leave Without Pay, 1983 WL 27142, 1 (a five-week period constituted an "extended period" where administrative leave could not be properly granted by an agency so that an employee could preserve her eligibility for a discontinued service retirement program).

[37] Diegelman, R. *Proper Use of Administrative Leave* [Memorandum]. (Washington , DC: September 27, 2002) Department of Justice

[38] *Id.*

However, an October 2014 Government Accountability Office (GAO) report found that from fiscal years 2011 to 2013, DOJ placed 1,849 employees on paid administrative leave for one month to one year.[39] The average number of days on administrative leave for these 1,849 employees was 38 days, which is significantly higher than the 10 work day limit stated in DOJ policy.[40] Moreover, 23 employees were on paid administrative leave for six months or more.[41] It appears that DOJ is approving much more administrative leave than its policy suggests is appropriate.

In November 2014, I wrote Attorney General Holder about this issue. Given significant costs to the taxpayer for salaries and benefits and the fact that DOJ has an administrative leave policy that purports to limit its use to 10 days or less absent unusual circumstances—it is unclear why so many DOJ employees are taking so much administrative leave.

a. If confirmed, how would you ensure that the Department actually limits its use of administrative leave?

RESPONSE: In my tenures as the United States Attorney for the Eastern District of New York, I have managed a large number of Department employees and found that administrative leave is appropriate in some circumstances. In addition, Department policies and procedures govern the use of and approval process for administrative leave to ensure proper and limited use. I do not, however, have a nationwide perspective on this issue. If I am confirmed as Attorney General, I will commit to ensuring that the leave policy is being administered appropriately.

b. How would you strengthen the Department's 10-day administrative leave policy to ensure that DOJ employees are not sitting at home for a six months or more collecting a check for not working?

RESPONSE: If I am confirmed as Attorney General, I will commit to ensuring that the leave policy is being administered appropriately.

c. If confirmed, will you to respond to my letter promptly and thoroughly so that this Committee can examine the detailed facts and circumstances that led to each of these employees being on leave for such extended periods of time?

RESPONSE: If I am confirmed as Attorney General, I will review your letter and ensure that you receive a response that is thorough and timely.

54. On November 19, 2013, and again on September 9, 2014, Inspector General Michael Horowitz testified that the Department is improperly impeding his access to grand jury

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

records, Title III electronic surveillance documents, and Fair Credit Reporting Act consumer credit information.[42]

Recognizing that Inspectors General cannot fulfill their statutorily-mandated duty to conduct oversight without access to Department records, Section 6(a)(1) of the Inspector General Act authorizes Inspectors General to access:

> *all* records, reports, audits, reviews, documents, papers, recommendations or other material available to the applicable establishment which relates to programs and operations with respect to which that Inspector General has responsibilities under this Act.[43]

In certain limited circumstances, the law does allow the Attorney General to "prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpoena."[44] However, the Attorney General is required to provide written notice to the Inspector General of the reasons for doing so and to forward a copy of that written notice to Congress.[45]

Yet, the statutory procedure for written notice by the Attorney General and a report to Congress were not followed when the Department withheld grand jury records, wiretap documents, and consumer credit information from the Inspector General.[46] Eventually, the Inspector General obtained these records after the Attorney General and the Deputy Attorney General granted written permission.[47]

Under the Act, however, the Attorney General is required to write to the Inspector General not when *permitting* access to records, but when *preventing an OIG review, altogether*.[48] In other words, the burden is placed on the Attorney General to explain in writing why the Inspector General's work should be impeded, not *vice versa*. Under the statute, the Attorney General's blessing on the IG's work is not required. That is the essence of independence.

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[42] U.S. Senate Committee on Homeland Security and Government Affairs, Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce; *Strengthening Government Oversight: Examining the Roles and Effectiveness of Oversight Positions Within the Federal Workforce*, (November 19, 2013) [hereinafter Senate Homeland Security Hearing]; http://www.hsgac.senate.gov/subcommittees/fpfw/hearings/strengthening-government-oversight-examining-the-roles-and-effectiveness-of-oversight-positions-within-the-federal-workforce; accessed March 5, 2014; *see also* U.S. House of Representatives Committee on the Judiciary: *Access to Justice?: Does DOJ's Office of Inspector General Have Access to Information Needed to Conduct Proper Oversight?* (September 9,2014); http://judiciary.house.gov/index.cfm/2014/9/hearing-access-to-justice-does-doj-s-office-of-inspector-general-have-access-to-information-needed-to-conduct-proper-oversight; accessed September 23, 2014.

[43] 5 U.S.C. App. § 6(a)(1).

[44] 5 U.S.C. App. § 8E(a)(1), (2).

[45] 5 U.S.C. App. § 8E(a)(3).

[46] *See* Senate Homeland Security Hearing.

[47] *Id*.

[48] 5 U.S.C. App. § 8E(a)(3).

Last May, the Department's leadership asked the Office of Legal Counsel to issue an opinion on this topic. In October, I asked that this opinion specifically address the legality of the Attorney General's current practice. House Judiciary Committee Ranking Member, John Conyers, joined me in this request. We are still waiting for the OLC Opinion.

On February 3, 2015, the Inspector General issued a report pursuant to Section 218 of the Department of Justice Appropriations Act, 2015,[49] stating that the Federal Bureau of Investigation (FBI) has failed – for reasons unrelated to any express limitation in Section 6(a) of the Inspector General Act (IG Act) to provide the Office of the Inspector General with timely access to certain records.[50]

Section 218 provides that no appropriated funds shall be used to deny the Inspector General timely access to all Department records, or to impede his access to such records, unless in accordance with an express limitation of Section 6(a) of the IG Act.[51] Section 218 also requires the Inspector General to report to Congress within five calendar days of any failures to comply with this requirement.[52]

According to the February 3, 2015 report, the unfulfilled document requests were made on September 26, 2014 and October 29, 2014 as part of two investigations being conducted by the OIG under the Department's Whistleblower Protection Regulations for FBI employees, 28 C.F.R. pt. 27.[53]

The main reason for the FBI's unwillingness to produce the requested records by the deadline requested by the Inspector General is the FBI's desire to continue its review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access, such as grand jury, wiretap, and consumer credit information.[54] Further, the FBI further informed the OIG that the FBI would need the approval of the Attorney General or Deputy Attorney General in order to produce the requested records.[55]

However, as noted above, the Attorney General's blessing on the IG's work is not required.

a. If confirmed as Attorney General, will you commit to providing the OLC opinion to the Committee by a date certain?[56]

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[49] Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014).
[50] Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Thad Cochran and Sen. Barbara Mikulski, Sen. Comm. on Appropriations, and Rep. Harold Rogers and Rep. Nita Lowey, House Comm. on Appropriations (February 3, 2015) [hereinafter February 3 Report].
[51] Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014).
[52] *Id*.
[53] February 3 Report.
[54] *Id*.
[55] *Id*.
[56] In January 2012, OLC issued an opinion one month after it was requested, defending the power of the President to make recess appointments even when the Senate convenes for pro forma sessions. Of course,

RESPONSE: I believe strongly in the independence of the Inspector General, and share his goal of ensuring a well-functioning Department of Justice. I understand that the Office of Legal Counsel is currently working on an opinion that would address the interpretation of the Inspector General Act. Regardless of the outcome of this review, if confirmed, I will commit to providing the Inspector General with the documents necessary for him to complete his reviews.

b. Given the clear language of the Inspector General Act, will you give me your commitment that, if confirmed, you will not stonewall the Inspector General or delay his work?

RESPONSE: If confirmed, I will commit to providing the Inspector General with the documents necessary for him to complete his reviews.

c. And if you do find it necessary to delay an inquiry for legitimate reasons, will you commit to immediately provide the written notice required by Section 8E(a)(3) of the Inspector General Act?

RESPONSE: If confirmed, I will commit to providing notifications to Congress consistent with Section 8E(a)(3) of the Inspector General Act.

d. If you believe a clarification to the law is necessary to ensure unlimited access to records for the Inspector General, would you support adding "notwithstanding any other provision of law" to the access statute as a solution adequate to prevent further access denials and delays? If not, please explain why not?

RESPONSE: As noted above, I believe strongly in the independence of the Inspector General, and share his goal of ensuring a well-functioning Department of Justice. I understand that the Office of Legal Counsel is currently working on an opinion that would address the differences of opinion between the FBI and the Inspector General regarding the interpretation of the Inspector General Act. Regardless of the outcome of this review, if I am confirmed as Attorney General, I will commit to providing the Inspector General with documents necessary for him to complete his reviews. If necessary, I will also work with Congress on any appropriate legislation.

e. Given the FBI's ongoing impediment of the Inspector General's independence and timely access to records, as detailed in the February 3, 2015 report, will you commit to resolving this dispute as soon as possible according to the explicit provisions of the Inspector General Act, should you be confirmed?

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the Supreme Court unanimously struck down OLC's erroneous interpretation. But this shows that OLC can issue opinions rather quickly when it wants to.

RESPONSE: I am confident that the Inspector General and I will form a good working relationship, as we share the goal of a well-functioning Department of Justice. I understand that the Office of Legal Counsel is currently working on an opinion that would address the differences of opinion between the FBI and the Inspector General regarding the interpretation of the Inspector General Act. Regardless of the outcome of this review, if I am confirmed as Attorney General, I will commit to providing the Inspector General with documents necessary for him to complete his reviews.

55. Department of Justice attorneys have a great deal of power and discretion but I am concerned that without proper oversight, this power and authority can be abused without consequences. For example, the Department of Justice's Inspector General (IG) does not have the ability to investigate attorney misconduct. Rather, attorney misconduct is currently investigated by the Office of Professional Responsibility but this office does not have the same strong statutory independence as the IG. Currently, there are at least three examples of attorneys who remain employed by the Department despite evidence that these attorneys committed serious misconduct.

    a. A Federal judge found that Karla Dobinski, a trial attorney in the Civil Rights Division, engaged in a "wanton reckless course of action" when she posted comments to Nola.com news stories under a pseudonym about a trial where she provided evidence as a disinterested expert witness.[57] If confirmed, what steps will you take to ensure that appropriate disciplinary action is taken in this case, and will you pledge to provide updates to this committee about the status?

RESPONSE: Consistent with the positions taken by previous Attorneys General, across Administrations, I support the role of the Office of Professional Responsibility (OPR) in investigating attorney misconduct. OPR has been recognized consistently as a strong, independent entity within the Department that has a long and distinguished history of investigating allegations of attorney misconduct and recommending appropriate punishment. I understand that OPR is unique in that it has a singular focus on investigating attorney misconduct. If confirmed, I will commit to ensuring that the Department holds accountable any employees who are found to have committed misconduct.

    b. Stephanie Celandine Gyamfi, an attorney with the Department's Voting Rights section, was found to have engaged in perjury during a 2013 DOJ IG investigation. In addition, Ms. Gyamfi posted comments regarding an ongoing matter at the Voting Rights section suggesting that the State of Mississippi should change its motto to "disgusting and shameful."[58] If confirmed, what steps will you take to ensure that appropriate disciplinary action is taken in this case, and will you pledge to provide updates to this committee about the status?

[57] http://www.nola.com/crime/index.ssf/2013/09/doj_prosecutor_karla_dobinski.html
[58] http://www.wtok.com/home/headlines/Comment_Flap_Continues_150703975.html

RESPONSE: As the United States Attorney for the Eastern District of New York, I am not familiar with the details of this matter, so I am not in a position to know what personnel actions have taken place to date or whether they were appropriate. If I am confirmed as Attorney General, I will commit to ensuring that the Department holds accountable any employees who are found to have committed misconduct.

c. A Federal judge wrote that DOJ attorneys attempted to perpetrate a "fraud upon the court" in a case involving Bureau of Alcohol, Tobacco, and Firearms Agent Jay Dobyns. U.S. District Court Judge Francis Allegra also took the unusual step of submitting these findings to Attorney General Holder.[59] If confirmed will you personally review Judge Allegra's submission to ensure that appropriate disciplinary action is taken in this case, and will you pledge to provide updates to this committee about the status?

RESPONSE: As noted above, as the United States Attorney for the Eastern District of New York, I am not familiar with the details of this matter, so I am not in a position to know what personnel actions have taken place to date or whether they were appropriate. If I am confirmed as Attorney General, I will commit to ensuring that the Department holds accountable any employees who are found to have committed misconduct.

d. On January 22, 2015, the District Court of the Southern District of Georgia received a letter from the U.S. Attorney's Office informing it that Assistant U.S. Attorney Cameron Ippolito and ATF Special Agent Lou Valoze engaged in an improper relationship and provided potentially false or misleading information to a government agency in order to secure a visa for an informant. This has compromised cases in which Ms. Ippolito and Mr. Valoze collaborated and has already required Giglio disclosures in four separate cases. Ms. Ippolito and Mr. Valoze's actions have harmed the Federal government and the Department of Justice. If confirmed, what steps will you take to ensure that appropriate disciplinary action is taken in this case, and will you pledge to provide updates to this committee about the status?

RESPONSE: As noted above, As the United States Attorney for the Eastern District of New York, I am not familiar with the details of this matter, so I am not in a position to know what personnel actions have taken place to date or whether they were appropriate. If I am confirmed as Attorney General, I will commit to ensuring that the Department holds accountable any employees who are found to have committed misconduct.

e. What steps would you take to create a more independent and credible system of attorney discipline at the Department?

RESPONSE: OPR has been recognized consistently as a strong, independent entity within the Department that has a long and distinguished history of investigating allegations of attorney

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[59] http://www.foxnews.com/politics/2015/01/29/federal-judge-blasts-doj-lawyers-in-case-fast-furious-whistleblower/

misconduct and recommending appropriate punishment. If I am confirmed as Attorney General, I commit to ensuring that OPR continues to be a strong, independent entity, within the Department of Justice.

f. Would you support transferring the DOJ/OPR function to the Inspector General so that there can be an independent reviews of attorney misconduct allegations at the Department?

RESPONSE: As I described above, consistent with the positions taken by previous Attorneys General, across Administrations, I support the role of the Office of Professional Responsibility in investigating attorney misconduct.

g. If not, please explain what is special or unique about attorney misconduct that should shield it from oversight by the Department's Inspector General like all other types of misconduct?

RESPONSE: It is my understanding that OPR's extensive experience and singular focus is in investigating attorney misconduct related to the exercise of their authority to investigate and litigate, including by analyzing conduct through the lens of relevant state bar rules.

56. According to media reports, in Fairfax County, Virginia, an unarmed man, John Geer, was shot by a police officer while standing in his home, and while, according to other police officers who were present at the scene, his arms were raised above his shoulders, and he was then left unattended for an hour where he bled to death.[60]

    In December 2014, the Department's Civil Rights Division found the Cleveland Division of Police engaged in a pattern or practice of unreasonable and unnecessary use of force.[61] The investigation was launched in March 2013 following a number of high-profile use of force incidents and requests from the community and local government to investigate.[62]

    On January 21, 2015, the Department of Justice confirmed that the following investigations are still ongoing at the Civil Rights Division,[63]

    - Shooting death of Mike Brown (Ferguson, Missouri) – initiated August 11, 2014
    - Shooting death of Eric Garner (Staten Island) – initiated July 18, 2014
    - Shooting death of John Geer (Fairfax County, Virginia) – initiated February 11, 2014

[60] Tom Jackman, "John B. Geer had hands up when shot by police, four officers say in documents," The Washington Post, January 31, 2015, http://www.washingtonpost.com/local/crime/officer-who-shot-john-geer-says-he-moved-hands-toward-waist-3-other-officers-say-no/2015/01/31/7cc2c0da-a7f6-11e4-a06b-9df2002b86a0_story.html.
[61] U.S. Department of Justice, *Justice Department and City of Cleveland Agree to Reform Division of Police After Finding A Pattern or Practice of Excessive Force*, December 4, 2014, http://www.justice.gov/usao/ohn/news/2014/04deccpd.html.
[62] *Id*.
[63] Email from U.S. Department of Justice, Office of Legislative Affairs, to Staff of Sen. Charles E. Grassley, Chairman, S. Comm. on the Judiciary (January 21, 2015).

a. It is imperative that cases of alleged police misconduct are handled on a fair, impartial, and timely manner so that officers who have used force in an inappropriate way are held accountable and those who have acted lawfully are swiftly exonerated so that they may reclaim their reputations and resume their duties. If confirmed as Attorney General, will you ensure the thorough and timely resolution of these cases?

RESPONSE: We must ensure that these and other cases of alleged misconduct by law enforcement are handled in a fair, impartial, and timely manner. Similarly, we must ensure that pattern and practice investigations of police departments are conducted in a fair, impartial, and timely manner.

b. If confirmed as Attorney General, what would you do to ensure more transparency and better statistics on law enforcement's use of deadly force *nationwide*?

RESPONSE: I understand that the FBI and the Department's Bureau of Justice Statistics carry out statistical work in this area. If I am confirmed as Attorney General, my goal will be to conduct a comprehensive review of these data collection efforts, identify information gaps, and develop plans to ensure that the Department collects and makes public accurate and timely information on all uses of force by law enforcement.

57. On December 23, 2014 Senator Leahy and I sent Attorney General Holder a letter concerning the use of cell-site simulators by law enforcement agencies.[64] According to information provided to Judiciary Committee staff by the Federal Bureau of Investigation, these devices can capture the serial numbers of thousands of cell-phones in its vicinity by mimicking cell-phone towers.

    The FBI is in a unique position to shape how the device is used by law enforcement, because state and local police departments are required to coordinate their use of the device with the FBI.[65] The FBI only recently began requiring its agents to obtain a search warrant whenever the device is used as part of an FBI operation, but there are several broad exceptions that may swallow this rule.[66]

    For example, the FBI's new policy does not require a search warrant in cases in which the technology is used in public places or other locations at which the FBI deems there is no reasonable expectation of privacy.[67]

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[64] Letter from Sen. Charles E. Grassley, and Sen. Patrick Leahy, S. Comm. on the Judiciary, to Hon. Eric Holder, Attorney General, and Hon. Jeh Johnson, Secretary of Homeland Security, (December 23, 2014), http://www.leahy.senate.gov/download/12-23-14-pjl-and-ceg-to-doj-and-dhs1.
[65] *Id*.
[66] *Id*.
[67] *Id*.

I am concerned about whether the FBI and other law enforcement agencies at the Justice Department have adequately considered the privacy interests of other individuals who are not the targets of the interception, but whose information is nevertheless being collected when these devices are being used. I understand that the FBI believes it can address these interests by maintaining that information for a short period of time and purging the information after it has been collected.[68] But there is a question as to whether this sufficiently safeguards privacy interests if there is insufficient oversight and transparency regarding the use of this type of technology.

a. If confirmed as Attorney General, will you commit to reviewing the legal authority used to collect information from the cell phones of innocent third parties who are not the targets of an interception order to ensure that it meets constitutional requirements and protects their privacy interests?

RESPONSE: The Department is committed to using all law enforcement resources in a manner that is consistent with the requirements and protections of the Constitution and other legal authorities, and with appropriate respect for privacy and civil liberties. If I am confirmed as Attorney General, I will uphold that commitment.

b. What steps would you take to strengthen oversight to ensure that there is no unauthorized retention of data collected by these devices?

RESPONSE: From my work as a United States Attorney, I know that the Department takes seriously its responsibilities concerning any data that is collected during lawful investigations. If I am confirmed as Attorney General, I am committed to taking any necessary steps to ensure that the Department's practices concerning the collection or retention of such data are lawful and respect the important privacy interests of the American people.

c. Given the FBI's role in making the devices available to state and local authorities, do you believe the Department has any responsibility to ensure that state and local authorities have sufficient oversight and safeguards in place to prevent abuses? If so, what steps would you take to do so if confirmed?

RESPONSE: I understand the Department works with its state and local law enforcement partners and provides technological assistance under certain circumstances. In all cases, law enforcement authorities in the United States must conduct their missions lawfully and in a manner that respects the rights of the citizens they serve. The Department has a responsibility to ensure that its resources are employed to advance lawful and legitimate public safety and national security objectives. If confirmed as Attorney General, I will commit to ensuring that the Department's technological practices and its partnerships with other agencies and state and local authorities are approached with due consideration for the harmful consequences of any potential misuse of Department resources.

[68] *Id*.

58. According to the State Department, "[t]hose who patronize the commercial sex industry form a demand which traffickers seek to satisfy."[69] Attorney General Holder has identified human trafficking and sexual exploitation of children as priority goals for investigation and litigation at the Justice Department.[70] In December 2012, Inspector General Michael Horowitz reported that three Drug Enforcement Administration agents admitted to having used their DEA Blackberry devices to arrange for paid sexual services while stationed in Cartagena, Colombia.[71]

These actions were an embarrassment to our nation, but the true victims are the children, women, and other vulnerable individuals who are trafficked into prostitution to satisfy this demand. In the Inspector General's words:

Even where prostitution is legal, it is often an abusive activity that involves coercive relations and it can contribute to human trafficking, a crime that DOJ seeks to eradicate. [E]mployees who engage in the solicitation of prostitution while on official travel or when stationed in foreign countries undermine their own credibility and DOJ's effectiveness in addressing this priority.[72]

For this reason, I am deeply troubled to learn that the Department of Justice does not have a zero-tolerance policy requiring the dismissal of employees who engage in the solicitation of prostitution.[73] The Department currently employs more than 1,200 permanent positions abroad, and employees go on more than 6,100 trips a year to more than 140 countries.[74]

According to a 2012 State Department cable on human trafficking:

It is the position of the U.S. government that the procurement of commercial sex can fuel the demand for sex trafficking. Women, children, and men are trafficked into the commercial sex trade *regardless of whether prostitution is legal or criminalized in a country,* and thus, the procurement of commercial sex runs the risk of facilitating or supporting human trafficking.

There are concerns that prostituted youth, including LGBT youth, are especially vulnerable to human trafficking and other forms of exploitation. Department employees should understand that a victim of sex trafficking may not appear to be under duress, given that coercion and threats of violence are often used to hold people in servitude. Indeed, there is a good chance that a sex trafficking victim will appear to be engaging in a commercial sex transaction willingly . . . .

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[69] U.S. Department of State, Trafficking in Persons Report (June 2008), 24.
[70] U.S. Department of Justice, Strategic Plan, Fiscal Years 2014-2018 (February 2014), 2.
[71] Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Joe Lieberman, Chairman, and Sen. Susan Collins, Ranking Member, Sen. Comm. on Homeland Sec. and Gov. Affairs (Dec. 20, 2012), 3.
[72] U.S. Department of Justice, Office of Inspector General, *Review of Policies and Training Governing Off-Duty Conduct by Department Employees Working in Foreign Countries* (January 2015), 7.
[73] *Id.* at 48-50.
[74] *Id.* at ii.

Further, assumptions based on appearances as to whether or not an individual is 18 years old are frequently erroneous, as many brothel managers and pimps dress minors to look older. Purchasing sex from a minor is a serious crime under U.S. law.[75]

Given the gravity of these concerns, it is unclear why the Department has *not* instituted a policy that incentivizes employees to *steer well clear* of facilitating or committing these heinous crimes.

If confirmed as Attorney General, will you implement a zero-tolerance policy that requires the dismissal of any employee who engages in the solicitation of prostitution, without exception? If not, please explain why.

RESPONSE: I believe that all government employees have a responsibility to hold themselves to the highest standards of conduct both within and outside of the workplace. This is especially true for the employees of the Department of Justice who are entrusted to enforce the law. If I am confirmed as Attorney General, I will commit to reviewing the Department's policies and procedures regarding off-duty conduct to ensure that we hold accountable those employees who do not meet these high standards.

59. The incumbent Attorney General criticized state so-called "stand your ground" laws under which a person who otherwise has a legitimate claim of self-defense is not required to flee before exercising the option of defensive force. This rule is also part of federal common law, as articulated by the U.S. Supreme Court in cases such as Beard v. U.S., 158 U.S. 550, 564 (1895) and Brown v. U.S., 256 U.S. 335, 343 (1921).

    a. What is your position on state stand your ground laws? If you oppose such laws, do you believe DOJ has a role in opposing such laws? If you believe that DOJ has such a role, what is it?
    b. Under what circumstances do private citizens have the right to use force, including deadly force, to defend themselves and others from imminent threats of unlawful, deadly harm?

RESPONSE: The determination of whether a private citizen has the right to use force to defend against an imminent threat of unlawful, deadly harm is a fact-based inquiry made pursuant to state law. States have the lead in pursuing criminal offenses, and I have not had occasion to consider state "stand your ground" laws sufficiently to take a position.

60. I believe we should do everything in our power to stop the poaching of elephants, as well as the illicit trade of ivory and other wildlife products. It is my understanding that the administration is moving forward with a regulation that would make it illegal to sell items containing ivory in the United States unless the owner can prove with documentation the

[75] *Id.* at 40-41.

item is more than 100 years old. The administration claims this regulation would reduce poaching and international illicit trade in ivory.

Ivory is commonly found in chess sets, tea pots, firearms, musical instruments and myriad other objects. Can you please explain how banning the domestic sale of these legally possessed items – most of which were acquired long ago when documentation was not required – would help achieve the administration's goals? Don't you believe the Department of Justice should be directing resources to combat actual wildlife traffickers, much like you have done in New York?

RESPONSE: I applaud and share your commitment to protecting endangered species, like elephants and rhinos, by prosecuting those who kill and traffic in these animals. As you recognize, prosecutors in my office and throughout the Department of Justice have worked on a group of recent prosecutions involving the black market trade of rhinoceros horn, which causes similar harms as the illicit trade in elephant ivory. I understand that the Fish and Wildlife Service is working to update the regulations that govern sales of elephant ivory in the United States, but I am not familiar with the details of that process. I am confident, however, that the regulatory process will allow for broad public input in accordance with the usual process for agency rulemaking so that the Service can consider the issues you identify.

61. The Executive Office for U.S. Attorneys (EOUSA) is responsible for the administration of FOIA requests for records held by the 94 U.S. Attorneys Offices (USAOs). Annual FOIA statistics are presented in aggregate by EOUSA and do not provide FOIA performance data on individual USAOs. EOUSA reported that it had 1,525 pending FOIA requests at the start of fiscal year 2014. How many of those pending requests were pending with the Eastern District of New York?

RESPONSE: I have been informed that of EOUSA's 1,525 total pending FOIA requests at the start of Fiscal Year 2014, 49 remained pending with the Eastern District of New York.

62. EOUSA reported in aggregate that only 191 (7%) of the 2,729 FOIA requests processed in fiscal year 2014 were "fully granted." How many FOIA requests were processed by the Eastern District of New York and how many of them were "fully granted"?

RESPONSE: I have been informed that the Eastern District of New York processed a total of 29 FOIA requests in Fiscal Year 2014, a total of five of which were fully granted.

63. EOUSA reports the aggregate response time for all processed perfected FOIA requests. In fiscal year 2014, the median number of days for response was 90 and the average number of days was 132. What was the Eastern District of New York's median and average number of days for response?

RESPONSE: I have been informed that this information is not readily available.

64. EOUSA reported that 1,783 FOIA requests were "backlogged" at the end of fiscal year 2014. How many FOIA requests were "backlogged" with the Eastern District of New York?

RESPONSE: At the end of Fiscal Year 2014, a total of 47 FOIA requests were "backlogged" with the Eastern District of New York.

65. As you know, the Judiciary Committee has oversight responsibility over the Department of Justice. And to help fulfill those responsibilities, last fall, one of the attorneys on my committee staff, a former Department prosecutor, traveled to Iowa to meet with federal law enforcement.

    While there, he spent time in both judicial districts in Iowa. He met with the FBI, the DEA, with local law enforcement, and with the U.S. Marshals. But he was told by the Department of Justice here in Washington that the Department would not make anyone from either of the United States Attorney's Offices in Iowa available for a meeting with him, even as a courtesy.

    Are you committed to making sure Congressional staff can meet, as appropriate, with local Department of Justice personnel in the states, while of course observing all ethical rules about discussing specific cases or investigations? I think most Americans would be surprised that local U.S. Attorney's offices are not allowed to speak with their Senator's staff under this administration.

RESPONSE: As I testified before the Committee, if I am confirmed as Attorney General, I look forward to fostering a new and improved relationship with this Committee, the United States Senate, and the U.S. House of Representatives, and will do what I can to forge a relationship based on mutual respect and constitutional balance. In particular, I believe the oversight role of the Senate Judiciary Committee is important. If I am confirmed, I commit to you to work together to allow appropriate contacts between Congressional staff and Department officials in the field.

66. In September 2014, it was reported that the President was expected to sign an executive order that would require the Pentagon, the Justice Department, the Department of Homeland Security and other agencies to reveal more details about the size and surveillance capabilities of their drone programs. The order would also reportedly require these agencies to reveal the policies they have in place to protect privacy and civil liberties in connection with their use of drones.

    The President, however, has not yet issued this executive order. Do you support the issuance of such an order, and if you are confirmed, will you commit to both explaining this delay to me and for advocating for one?

RESPONSE: I am unfamiliar with the White House's specific plans for executive action in this area. If I am confirmed as Attorney General, I look forward to studying these issues further and working together with you to identify any unresolved concerns.

67. I wrote to the Department of Justice back in October 2013 concerning its handling of a small number of cases referred to it in which National Security Agency employees intentionally and willfully abused surveillance authorities, in many cases to spy on their significant others. The press calls these cases "LOVEINT." I also spoke to Attorney General Holder about the request when he was before the committee last January. He told me he would respond soon.

    It has been over a year, and I have not received a response. I understand that the overwhelming majority of those who work in our national security and intelligence communities are dedicated, law-abiding people who deserve our profound thanks for helping to keep us safe. Nonetheless, there must be appropriate accountability for those few who violate the trust placed in them.

    Can you commit to me that if you are confirmed, you will respond to my letter within 30 days?

RESPONSE: Yes, if I am confirmed as Attorney General, I will commit to responding to your letter within 30 days.

68. FBI Director Comey has been talking a lot recently about the increasing inability of law enforcement officers to be able to access evidence on computers, cell phones and other devices because of encryption, even when they have obtained a valid search warrant. He is clearly worried about what he calls "Going Dark," and I hear the same from state and local law enforcement in Iowa.

    On the other hand, the civil liberties community and technology companies argue that building in a door for law enforcement to bypass this encryption on their products, even when law enforcement has obtained proper legal authority, will weaken the encryption and make their customers more vulnerable to being hacked. That would obviously be a serious problem as well.

    Do you have a perspective on this problem and any potential solutions? Have you felt the effects of the "Going Dark" issue in cases your office has handled?

RESPONSE: I know from my time as a United States Attorney how important lawfully authorized electronic surveillance can be. Sometimes, it is the only way to obtain evidence of terrorist or criminal activity. Lawful electronic surveillance can help law enforcement prevent crime and save lives. If I am confirmed as Attorney General, I would welcome the chance to study the issue further and to work with you and others to identify potential solutions.

69. In December 2014, President Obama announced that the administration would begin to normalize diplomatic relations with Cuba. However, it is estimated that as many as 70 fugitives from our criminal justice system are being provided political asylum there. Among them are a number of accused killers of law enforcement officers, including Joanne Chesimard, who was convicted of executing a New Jersey police officer in 1977. She subsequently escaped from prison, and is currently on the FBI's list of Ten Most Wanted Terrorists. But almost immediately after President Obama announced the change in U.S. policy toward Cuba, the Cuban government made clear that there would be no change in their refusal to hand over fugitives like Chesimard.

    a. Do you think it was appropriate for the President to change U.S. policy toward Cuba, and to provide that government the benefit of increased trade and contact with the United States, without that government agreeing to return these fugitives to our criminal justice system to face justice?

RESPONSE: I was not privy to the communications and factors considered leading up the President's decision to change U.S. policy toward Cuba, and I am thus unable to comment on this action.

    b. If confirmed, what will you do to bring these fugitives to justice in the United States?

RESPONSE: Apprehending fugitives who are abroad is a high priority of the Department of Justice. If I am confirmed as Attorney General, I would continue to make that a top priority, whether the fugitives are in Cuba or elsewhere.

70. I was glad to hear you say during your hearing that you do not support the legalization of marijuana. As you know, in 2013, the Department of Justice decided that it would not seek to strike down state laws in Colorado, Washington, and elsewhere that have legalized the recreational use of that drug, so long as these states implement effective regulatory regimes that protect key federal interests. This policy is outlined in the August 29, 2013 Cole Memorandum.

    a. In some of these states, like Colorado, businesses are currently advertising the availability of recreational marijuana on websites and on television news programs such as 60 Minutes. To be clear, do you agree that individuals that manufacture and distribute marijuana in that state are breaking federal law, no matter what state law permits?

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.

b. I understand the Department of Justice is not gathering data on the federal priorities identified in the Cole Memorandum to evaluate whether that policy needs re-visiting. Yet these priorities are already being negatively affected, including through the increasing diversion of recreational marijuana to nearby states like Iowa. This sounds to me like the Department does not want to know how its policy is functioning. Even the New York Times has editorialized that it's important to evaluate whether the states are "holding up their end of the bargain." Do you believe the Department should be systemically collecting data related to these federal priorities in a centralized place, establishing metrics, and analyzing the data for the purpose of evaluating whether the policy outlined in the Cole Memorandum is working, and if you are confirmed will you commit to taking these steps?

RESPONSE: If I am confirmed as Attorney General, I will commit that the Department will continue to consider data of all forms—including existing federal surveys on drug usage, state and local research, and, of course, feedback from communities and from federal, state, and local law enforcement—on the degree to which existing Department policies and the state systems regulating marijuana-related activity protect federal enforcement priorities and the public. The Department will continue to collect data and make these assessments through its various components, and will continue to work with the Office of National Drug Control Policy and other partner agencies throughout the government to identify other mechanisms by which to collect and assess data on the effects of these state systems.

c. As you also mentioned in your testimony, in some of these states there is a specific problem presented by edible marijuana products falling into the hands of children. Some of these marijuana products, as well as other products containing different illegal drugs like methamphetamine, are marketed and packaged like candy. Would you support legislation to address this problem by increasing the penalties for those manufacturers or distributors of controlled substances that know, or have reasonable cause to believe, that their controlled substances will be distributed to minors? If confirmed, would you commit to working with me on such legislation?

RESPONSE: As I stated in my testimony before the Committee, the issue of edible marijuana products and the possibility of these products falling into the hands of children is of particular concern, as reflected by the Department's explicit enforcement priority of preventing the distribution of marijuana to minors, as well as the Department's enforcement priority of addressing threats to public health. If I am confirmed as Attorney General, I look forward to working with this Committee to address this issue in a comprehensive manner that most effectively protects public health and safety.

d. Attorney General Holder has indicated that he believes that marijuana businesses in states like Colorado should have access to the U.S. banking system. Do you agree? If so, doesn't depositing the proceeds of marijuana businesses into banks violate the federal laws prohibiting money laundering, and do you believe it is appropriate for the nation's top law enforcement officer to advocate for conduct that violates those laws?

RESPONSE: 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. Accordingly, in determining whether to charge individuals or institutions with offenses related to financial transactions based upon marijuana-related activity, prosecutors should assess this activity in light of the Department's stated enforcement priorities. Further, as made clear in the Department's February 14, 2014, guidance, financial institutions must continue to apply appropriate risk-based anti-money laundering policies, procedures, and controls sufficient to address the risks posed by customers engaged in marijuana-related activity, including by conducting customer due diligence designed to identify conduct that relates to any of the eight priority factors. As the Department of Justice's and the Department of the Treasury's FinCEN guidance are designed to complement each other, it also is essential that financial institutions adhere to guidance issued by FinCEN on this subject.

71. I have concerns with this Administration's preference to treat al-Qaeda terrorists as criminal defendants with the same rights as U.S. citizens, as opposed to unlawful combatants subject to military detention and prosecution under the law of war. Below is a hypothetical situation that could well present itself to you if you are confirmed.

    If on your first day as Attorney General, the U.S. military captured Ayman Al-Zawahiri, the current leader of Al-Qaeda, and transported him to a ship in the Mediterranean Sea or the Persian Gulf, what advice would you give the President about his detention, interrogation, and possible trial, and what factors would you would weigh in formulating that advice?

    a. Specifically, would you recommend that he be sent to Guantanamo Bay for detention and interrogation with those who planned the 9/11 attacks? If not, where would you advise that this detention and interrogation take place? And by whom? Why?
    b. When, if at all, would you recommend that he be read Miranda rights? Why?
    c. Would you advise that he be tried in civilian court or through the military commissions system, and why?

RESPONSE: Every case presents its own unique set of facts that would bear on the decision about the appropriate trial venue of a terrorist; therefore, I cannot comment on this specific hypothetical without additional information. If I am confirmed, I can assure you that I would support the careful evaluation and use, as appropriate, of all lawful options in the fight against terrorism, including military, diplomatic, economic, law enforcement, and intelligence activities, and including law of war detention and prosecutions in federal courts or in military commissions in appropriate cases. 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.

I agree with the President's commitment not to add to Guantanamo's population. 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 have experienced firsthand the concerns Guantanamo raises in the context of trying to secure the cooperation of foreign governments in terrorist cases.

With respect to Miranda rights, I believe that FBI policy makes clear that the first priority for interrogation of terrorists is to gather intelligence. In the civilian justice system, the Miranda rule generally requires that, for statements to be admissible in court, an individual must be advised of his or her right to remain silent and the right to have counsel present during a custodial interrogation. However, the Miranda warning would not be required for interrogations that are solely for the purposes of intelligence collection and will not be used in a criminal prosecution, and there is also a public safety exception as articulated by the Supreme Court in *New York v. Quarles* under which public safety-focused questions may be admissible at trial even if Miranda warnings are not provided. The government uses that exception to the fullest extent possible to gather intelligence and identify imminent threats. I believe that our first priority should be to exhaust all appropriate avenues of inquiry to identify imminent threats posed by terrorists who are arrested or detained, or by others with whom they may be working, but we can do so while preserving prosecution options.

72. Law enforcement and national security officials have discussed how critical the surveillance authorities under Section 702 of the Foreign Intelligence Surveillance Act were to stopping a plot by Najibullah Zazi, an American who was born in Afghanistan, to bomb the New York City subway in 2009. Your office, the Eastern District of New York, handled that case.

    How important were these authorities to that case, and how were they used to identify and stop Mr. Zazi from killing an untold number of Americans?

RESPONSE: It is my understanding that Section 702 authorities played an important role in uncovering Najibullah Zazi's plot to bomb the New York City subway. In 2009, using Section 702 to target the email of a Pakistan-based al-Qaida terrorist, the National Security Agency (NSA) discovered that the terrorist was communicating with an unknown person located in the United States about a plot involving explosives. NSA provided this information to the FBI, which used its investigative tools to identify the unknown person as Mr. Zazi. The FBI then tracked Mr. Zazi as he left Colorado a few days later to drive to New York City, where he and co-conspirators were planning to detonate explosives in the New York City subway system in Manhattan. Law enforcement apprehended Mr. Zazi and his coconspirators, and Mr. Zazi pleaded guilty in the United States District Court for the Eastern District of New York to conspiracy to use weapons of mass destruction against persons or property in the United States, conspiracy to commit murder in a foreign country, and providing material support to al-Qaeda. Zazi's New York City-based co-conspirators were later convicted for their roles in the plot as well. Without the original tip from NSA to the FBI, the plot might not have been disrupted.

73. As you probably know, I've been extremely concerned about increased agribusiness concentration, reduced market opportunities, fewer competitors, and the inability of family farmers and producers to obtain fair prices for their products. I've also been concerned about the possibility of collusive and anti-competitive business practices in the agriculture sector. Do I have your commitment that the Antitrust Division will pay close attention to agribusiness competition matters? Can you assure me that agriculture antitrust issues will be a priority for the Justice Department if you are confirmed to be U.S. Attorney General?

RESPONSE: Agriculture is an important part of the nation's economy. I fully support the Antitrust Division's (Division) resources that are used to police those markets. I understand that the Division has a number of attorneys who focus on agricultural matters, including mergers and conduct aimed at acquiring or exercising market power. I also understand that the Division has a dedicated Special Counsel for Agriculture, who engages in outreach with the agricultural community, including the Department of Agriculture and the state attorneys general, to uncover potential anticompetitive activity, and who works with the litigating sections to evaluate and investigate complaints. If I am confirmed as Attorney General, I will be committed to ensuring that the Antitrust Division remains vigilant in policing anticompetitive mergers and conduct in agricultural markets.

74. Historically, the Justice Department has not paid much attention to monopsony (buyer power) issues, focusing more on monopoly (seller power) and consumer effects. Do you intend to use your antitrust authorities to look into monopsony issues in the agriculture sector? Please explain.

RESPONSE: My understanding is that the antitrust laws cover buyer power, also known as monopsony power, and the 2010 revision to the Horizontal Merger Guidelines issued by the Department and the Federal Trade Commission includes a separate section on buyer power. I am also aware that in conjunction with the Department requiring Tyson Foods to divest its sow purchasing business in order to proceed with an acquisition in 2014, Assistant Attorney General for the Antitrust Division, William J. Baer, noted that, "farmers are entitled to competitive markets for their products." I agree with that statement and believe that abuse of monopsony power is an appropriate area for antitrust enforcement.

75. In 1986, Congress amended the Lincoln-era False Claims Act to strengthen the right and incentives of private citizens to help the federal government hold contractors accountable for submitting false and fraudulent claims. Those whistleblowers, called relators, uncover the vast majority of incidents of waste, fraud, and abuse in federal contracting. In Fiscal

Year 2013, relators accounted for 89 percent of new FCA actions.[76] And the FCA overall has been hugely successful in recovering funds for the federal government. In Fiscal Year 2014 alone, the FCA was responsible for nearly $6 billion in recovered funds.[77] Because the FCA is so effective, well-funded interests in various industries are always attempting to undermine it.

a. How many FCA complaints have you received during your tenure as U.S. Attorney for the Eastern District of New York? In how many of those cases did your office intervene? What policies and procedures did you look to in reaching these intervention determinations?

RESPONSE: According to the records from my Office, from May 2010 to date, 94 qui tam cases were filed in the Eastern District of New York. During the same time period, my Office intervened or partially intervened in six of those qui tam matters. In addition, during this time period our Office intervened in cases that were filed before I took office, and in some of the 94 cases filed after I took office, the government is still considering whether intervention is warranted. When making decisions on whether to intervene, or to recommend intervention, in a qui tam case, I evaluate many factors, including the potential merits of the case, the potential damages involved, and whether there are other reasons to dedicate resources to the matter.

b. If confirmed, will you vigorously enforce the provisions of the False Claims Act, and will you devote adequate resources to investigating and prosecuting FCA cases?

RESPONSE: The False Claims Act, and its qui tam provisions, play a critical role in the Department's ability to ensure that those who do business with the Government do so honestly and accurately. As your question notes, the Department recovered nearly $6 billion in settlements and judgments in Fiscal Year 2014, which marks the fifth straight year that False Claims Act recoveries have exceeded $3 billion. Moreover, since 1986, the Department, working with United States Attorneys' Offices, government agencies, and private citizens, has returned more than $45 billion in public monies to government programs and the Treasury.

Of the nearly $6 billion recovered by the Department this past Fiscal Year, nearly $3 billion were associated with qui tam cases. Since 1986, the Department has recovered over $30 billion in qui tam cases. If I am confirmed as Attorney General, I will continue my longstanding, robust use of the False Claims Act and its qui tam provisions, including by ensuring that the Department has adequate resources to investigate and pursue FCA cases.

c. What should DOJ's policy be with respect to the settlement of False Claims Act cases which the Justice Department does not join, where the law provides that the qui tam plaintiff may prosecute the action? For example, is it the policy of the

[76] Department of Justice, Civil Division, Fraud Statistics – Overview (Oct. 1, 1987 – Sept. 30, 2013).
[77] Press Release, Department of Justice, Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014 (Nov. 20, 2014).

DOJ to undertake direct negotiations with the defendant without qui tam counsel in such cases? 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?

RESPONSE: The United States is the real party in interest in every qui tam case, including cases in which it may not elect to intervene (at least initially). Accordingly, it is my understanding that the Department continues to monitor such matters and may, in appropriate circumstances, further investigate, seek to intervene for good cause, and/or attempt to negotiate a settlement.

It is my further understanding that, in determining whether to settle a False Claims Act case, including a qui tam case, the Department evaluates whether it would be in the public interest to reach an out-of-court resolution. As in all investigations, the factors considered as part of such an evaluation will depend on the particular facts and circumstances of each case.

76. What should DOJ's policy be with respect to the settlement of False Claims Act cases which the Justice Department does not join, where the law provides that the qui tam plaintiff may prosecute the action? For example, is it the policy of the DOJ to undertake direct negotiations with the defendant without qui tam counsel in such cases? Are there any circumstances where it would be appropriate for the Justice Department to negotiate settlement of a non-intervened FCA case without qui tam counsel's involvement?

RESPONSE: As noted above, the United States is the real party in interest in every qui tam case, including cases in which it may not elect to intervene (at least initially). Accordingly, it is my understanding that the Department continues to monitor such matters and may, in appropriate circumstances, further investigate, seek to intervene for good cause, and/or attempt to negotiate a settlement.

It is my further understanding that, in determining whether to settle a False Claims Act case, including a qui tam case, the Department evaluates whether it would be in the public interest to reach an out-of-court resolution. As in all investigations, the factors considered as part of such an evaluation will depend on the particular facts and circumstances of each case.

77. What should DOJ's policy be with respect to multipliers on single damages in False Claims Act cases? Are there ever instances where the Justice Department should seek to collect less than single damages?

RESPONSE: As noted above, there may be times when the public interest is served by reaching an out-of-court resolution in a particular case. The factors supporting such a result may, in some circumstances, counsel in favor of a resolution that is less than the Government's potential loss, including, for example, where the defendant lacks the resources to pay a higher amount.

78. On August 1, 2013, you wrote to me in your capacity as the U.S. Attorney for the Eastern District of New York seeking information in connection with an investigation conducted by your office. The request was signed on your behalf by Assistant U.S. Attorney James D. Gatta. Your letter sought copies of two letters and their attachments from my office—one letter addressed to Representative Elijah Cummings and the other addressed to me and Representative Darrell Issa.

The letters your office sought copies of were written by Joshua Levy, the attorney for David Voth. Mr. Voth was the ATF Group Supervisor responsible for Fast and Furious. The letters from Mr. Levy contained numerous attachments of internal ATF and DOJ documents in an attempt to defend Mr. Voth's role in Fast and Furious and attack the whistleblowers who eventually exposed the operation. It is unclear how Mr. Levy or Mr. Voth came into possession of some of the documents. In addition to Mr. Levy providing his letter and attachments to my office, it appears someone provided them to the press as well.[78]

Following receipt of your letter, Mr. Gatta also contacted the Office of Senate Legal Counsel seeking permission to conduct an interview with members of my staff. Following a cordial and cooperative discussion, there was no further follow-up from your office.

a. Were you personally aware of this document request or interview request at the time, and did you approve either of them?
b. What potential crime was your office investigating?
c. What were the facts and circumstances that served as the predicate for the investigation?
d. What nexus to the Eastern District of New York justified the involvement of your office?
e. What is the current status of the investigation?
f. In your testimony before the Committee, you indicated that your involvement with Fast and Furious-related matters was limited to your service on the Attorney General's Advisory Committee, which focused on disseminating lessons learned from the flawed investigative techniques to your U.S. Attorney colleagues. Yet your August 2013 letter request to me suggests that your office investigated something involving the ATF Group Supervisor in Phoenix most directly responsible for the operation. Please explain the apparent discrepancy.

RESPONSE: Yes, I was aware of the matter and the investigative steps you have referred to in your letter. The inquiry by my Office about which you have inquired did not pertain to any matters investigated during Operation Fast and Furious nor the Department's interactions with Congress in connection with the Congressional investigation of Operation Fast and Furious itself, and it did not result in charges. As you may know, 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.

[78] Associated Press, "Key ATF agents in Fast and Furious case blame prosecutors," April 16, 2012, http://azcapitoltimes.com/news/2012/04/16/key-atf-agents-in-fast-and-furious-case-blame-prosecutors/.

With respect to your question regarding the nexus of the Eastern District of New York, I would note that there need not always be a nexus between a United States Attorney's Office (USAO) and a matter it investigates. For instance, a case in which a USAO with a nexus is recused from a matter, the Department commonly seeks out another office without such a nexus to conduct the investigation.

During my testimony before the Committee, I testified that I was not involved in Operation Fast and Furious or the Department of Justice's response to the Congressional investigation regarding Operation Fast and Furious. The matter about which you have inquired above was, as described here, not related to the underlying investigation of Operation Fast and Furious nor the Department's interactions with Congress. Accordingly, there was no discrepancy between my testimony and the fact of the investigation you have referenced.

79. The Firearms Owners Protection Act of 1986 amended the Gun Control Act of 1968 by adding the following language, now located in 18 U.S.C. 926(a):

    No…rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. [79]

    During the course of my investigation into ATF's Operation Fast and Furious, my office received allegations from multiple gun dealers in Arizona that ATF personnel routinely photocopy all ATF form 4473s (Firearms Transaction Record) and book bound entries in connection with routine annual inspections of licensed gun dealers. Dealers from other parts of the country have made similar allegations more recently.
    Although federal firearms licensees felt uncomfortable turning over the records of lawful gun purchases *en masse*, they also felt obligated to comply for fear of regulatory reprisals from ATF. These administrative requirements could be used to create a national gun registry of law-abiding gun owners, which is specifically prohibited by law.

    Also in the course of the Fast and Furious investigation, Congress learned about the ATF's use of the Suspect Gun Database, a feature of ATF's Firearms Tracing System. ATF agents added extensive numbers of firearms into the Suspect Gun Database. It is unclear what, if any, administrative guidelines detail when it would be appropriate to do so. The Suspect Gun Database could be used to track information about gun owners even when ATF does not have enough evidence to meet the legal standard for seizing a firearm or any other articulable criteria for entering the information about the gun and the purchaser into a database. With no clear criteria for adding a firearm connected to an

[79] Firearms Owners Protection Act, 1986; Pub. L. No. 99-308, May 19, 1986; 100 Stat. 449, 459.

investigation to the Suspect Gun Database, the decision appears to be largely up to the discretion of an individual ATF agent.

a. Does the Suspect Gun Database, which contains purchaser, dealer and transaction information, comply with the Firearms Owners' Protection Act of 1986? If so, what is the legal basis for that claim? And if confirmed, what steps would you take to ensure that ATF only adds information about gun owners into its databases in compliance with the law?
b. If confirmed, what steps would you take to determine the extent to which ATF is photocopying or photographing all ATF form 4473s and book bound entries in connection with routine annual inspections of licensed gun dealers?
c. Do you agree that such a practice would be tantamount to a national gun registry of all gun owners who purchased firearms from a licensed dealer? If so, please explain what steps you would take, if confirmed, to ensure that no such practice was sanctioned or permitted by the Justice Department? If not, please explain why not.
d. Does 18 U.S.C. Section 923(g)(7) govern the addition of data to the Suspect Gun Database and does it impose any limiting criteria or legal standards on the addition of data to the Suspect Gun Database?
e. What administrative steps would you propose to ATF to ensure that only firearms truly related to a criminal investigation are added to the Suspect Gun Database?
f. Will you require ATF to purge any purchaser information that is illegally in its databases, including in the Multiple Sales System, which, under ATF's own rules, must be taken out of the system after two years if there is no connection to any firearms trace?

RESPONSE: As United States Attorney, I have limited knowledge of the operation of the Suspect Gun Program. If I am confirmed as Attorney General, I look forward to familiarizing myself with the manner in which it is populated, used, and maintained to ensure that it complies with all applicable laws. I am aware that GAO is conducting a review of this program as well, and if confirmed, I look forward to working with the GAO on their review of this issue.

80. In 2012, the Department of Justice and Securities Exchange Commission (SEC) issued joint guidance detailing Foreign Corrupt Practices Act (FCPA) enforcement information and the agencies' enforcement priorities. While the guidance clarified portions of the law and some of the agencies' enforcement theories, many companies and individuals seeking to comply with the FCPA have asked for further, and continued, clarification. This request was expressed to Attorney General Eric Holder and Assistant Attorney General Leslie Caldwell during previous Committee hearings.

    a. If confirmed, will you commit to working with companies and individuals to further improve the Guidance?

RESPONSE: If I am confirmed as Attorney General, I look forward to continuing the outreach efforts that the Department has been making with the private sector to understand their needs and concerns and, if necessary, update and/or improve the Guide.

b. Will you commit to updating the Guidance, when necessary, to reflect changes in DOJ enforcement practices?

RESPONSE: If I am confirmed as Attorney General, I look forward to continuing efforts that the Department has been making to provide meaningful guidance in the FCPA context where necessary and appropriate.

81. In the area of FCPA enforcement, there is little guiding case law available for compliance practitioners to rely on. However, the FCPA Guidance that was issued in 2012 took an important first step in helping practitioners understand how the enforcement agencies' interpret the statute. The Guidance includes six anonymized examples of declinations—instances where the DOJ and SEC declined to bring FCPA-related enforcement actions in recognition of the companies' timely voluntary disclosures, meaningful cooperation, and sophisticated compliance policies and controls. The continued publication of FCPA declinations would foster greater FCPA compliance by providing practitioners with a better understanding of how the FCPA is interpreted. If confirmed, would you support increasing DOJ transparency regarding declination decisions?

RESPONSE: As you know, the United States Attorney's Manual provides a mechanism to allow for notification to an individual (or entity), where appropriate, that an investigation as to that individual (or entity) is being closed. If I am confirmed as Attorney General, I look forward to continuing the Department's practice of providing meaningful guidance in the FCPA context (such as procedures to respond to opinion requests) and 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.