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

**QUESTIONS FROM SENATOR LEE**

1. As the Nation's chief legal officer, the Attorney General is responsible for giving the President and other government agencies candid advice about the legality of proposed Executive action. With that in mind, please answer the following:

    a. If confirmed, you (or the Office of the Legal Counsel under your supervision) would be asked to definitively opine on the legality of a variety of proposed Executive actions. As an experienced lawyer, you know that often both sides of a legal dispute can muster reasonable arguments in their defense. And yet one side's arguments, however reasonable, are nevertheless wrong—or at least weaker than those opposed to them. In your view, is it the duty of the Department of Justice to give a favorable opinion of the legality of proposed action so long as reasonable arguments can be made in its defense? Or must the Department decide, *de novo*, whether those arguments are in fact correct?

    b. At your hearing, you testified repeatedly that you had reviewed the OLC memo concerning the legality of the President's executive action on immigration, and found its arguments "reasonable." Do you agree that, if confirmed, you must independently determine whether those arguments are not just "reasonable" but in fact correct?

**RESPONSE**: If I am confirmed as Attorney General, as I testified at my confirmation hearing, the Constitution and the laws of the United States will be my guide as I exercise my powers and responsibilities as Attorney General, and I will fulfill those responsibilities with integrity and independence. As United States Attorney, I have not yet had occasion to have extensive interaction with the Office of Legal Counsel (OLC). As your question suggests, OLC is charged with advising whether proposed executive actions are lawful. OLC is not an advocate charged with defending executive actions in litigation, and it is not OLC's mission to devise any possible argument to defend such action, or to advance all arguments that would be available to support such action in court. Rather, if I am confirmed as Attorney General, I would expect OLC to provide candid, independent, and principled advice, especially where that advice is inconsistent with the aims of policymakers. OLC's value to the President and Executive Branch turns on the strength of its analysis, and so I believe OLC's advice should be clear, accurate, thoroughly researched, and soundly reasoned. Because, in providing its advice, OLC is exercising the delegated authority of the Attorney General, I will appropriately supervise the Office in its work.

2. How would you describe your approach to statutory interpretation?

    a. To what sources would you look in deciding a legal question that turned on interpretation of a federal statute?

**RESPONSE**: Consistent with Supreme Court precedent, I would approach statutory interpretation using all of the tools available to me, including the statute's text, structure, context, history, and purpose, as well as relevant case law.

b. Does a statute have a purpose beyond the purpose expressed in the enacted text of the legislation and if so, how would a lawyer be capable of adducing a statute's purpose?

**RESPONSE**: Supreme Court precedent demonstrates that the purpose of a statute can be discerned from a range of available tools, including the statute's text, structure, context, and history.

3. In the case of the Commerce Clause, apart from circumstances present in *Lopez* and *Morrison*, what are the limits on Congress's Commerce Clause power?

**RESPONSE**: I have not undertaken a systematic review of Commerce Clause jurisprudence. However, it is my understanding that the Commerce Clause grants Congress broad authority to regulate commerce among the states and activities that have a substantial effect on interstate commerce, but would not extend to legislation not necessary and proper to such regulation. The precise contours of Congress's Commerce Clause power have been (and are being) developed in the courts.

4. Do you believe that Congress has at any time overstepped its authority under the Commerce Clause since *Wickard*, other than in *Lopez* and *Morrison*?

**RESPONSE**: As noted above, I have not undertaken a systematic review of Commerce Clause jurisprudence in connection with this question, but I am not aware of other instances since *Wickard* where the Supreme Court struck down a statute based on a conclusion that Congress had exceeded its authority under the Commerce Clause.

5. Under the Supreme Court's decision in *Bolling v. Sharpe*, the Federal Government may not constitutionally discriminate on the basis of race. With that in mind, do you believe it is consistent with the constitutional equal-protection principle for Congress to require local governments or private employers to take explicit account of the racial impact of employment policies?

**RESPONSE**: I believe that employers have a right to select the best candidates for a job. For forty years, the Supreme Court has recognized that employment practices that disproportionately screen out people of a particular race, national origin, or gender can deny an individual a job as effectively as directly excluding persons of a group. Congress included this established principle in the Civil Rights Act of 1991, and the Department of Justice has enforced it for decades, through both Republican and Democratic administrations. My understanding is that the Department brings job discrimination cases based on the law, never solely on the number of persons hired from any racial group.

6. Do you believe that *Citizens United v. FEC* was correctly decided?

**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 *Citizens United v. FEC* 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.

7. During a State of the Union address, President Obama said the *Citizens United* decision would allow "foreign corporations to spend without limits in our elections." Do you believe that is an accurate description of the holding of that case?

**RESPONSE**: I am not familiar with the President's comment that you have quoted above or the context in which it was made, and I would not want to speculate on what he may have intended by it.

8. I would like to give you another opportunity to answer a question you were asked several times at your hearing about the limits of Executive power. Imagine the President decided that, because Congress had failed to act to reform the tax laws, the federal government would simply no longer collect any taxes above a 25% marginal rate. Could such an act be a constitutionally permissible exercise of prosecutorial discretion? Please include, in your answer, a yes or no.

**RESPONSE**: It is not clear to me that the collection of taxes is an activity subject to principles of prosecutorial discretion, and I am not familiar with whether or, if so, how the Internal Revenue Service relies on the concept of prosecutorial discretion in connection with its tax collection efforts.

9. INA § 212(d)(5)(A) limits the government's authority to parole aliens into the United States to certain limited circumstances. It provides in relevant part that parole may be granted "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." Nevertheless, USCIS's Form I-131 permits recipients of deferred action to obtain advance parole—*i.e.*, permission to leave the country and then be paroled back into the United States upon their return—for "educational purposes, employment purposes, or humanitarian purposes."[1] According to USCIS, "[e]ducational purposes include, but are not limited to, semester abroad programs or academic research" and "[e]mployment purposes include, but are not limited to, overseas assignments, interviews,

[1] *See* Instructions to USCIS Form I-131, OMB Doc. No. 1615-0013, at p. 4.

conferences, training, or meetings with clients."[2] Do you believe that an undocumented alien's need to attend meetings with clients abroad presents an "urgent humanitarian reason[]" or a significant benefit to the American public within the meaning of INA § 212(d)(5)(A)?

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

10. If an inadmissible alien approached our border, without a visa, and asked to be paroled into the United States in order to take a business meeting in New York, or attend a conference in Washington, D.C., do you agree it would be unlawful to parole the alien into the country for that purpose?

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

11. Will you commit to independently determining whether USCIS's advance parole program complies with INA § 212(d)(5)(A) and release your conclusions to the Congress?

**RESPONSE**: If the Office of Legal Counsel is presented with this question in the course of its duties, or if the Department is tasked with defending actions by USCIS relating to advance parole, I would expect these actions to take into account the applicable statutory criteria.

12. In April 2014, DHS Secretary Jeh Johnson told the U.S. Council of Mayors that immigrants who entered this country illegally have "earned the right to be citizens." Do you agree with that assertion?

**RESPONSE**: I am not familiar with the context of the Secretary's remark. I believe that eligibility for citizenship is established by statute and implementing regulations. I would defer to Congress and those officials entrusted with citizenship determinations as to how these laws should be amended or enforced.

13. You recently announced that your office was prosecuting, for conspiracy to commit murder, foreign terrorist fighters accused of engaging in combat with U.S. troops on battlefields abroad. What criteria were used to decide whether these combatants should

[2] *Id.* at p. 5.

be criminally prosecuted rather than detained under the law of war and prosecuted by military commissions under the Military Commissions Act?

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

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

14. Do you believe foreign terrorist fighters' engaging in combat with American military forces is best described as a conspiracy to murder American nationals?

**RESPONSE**: As indicated above, I believe strongly that the United States government must use every available tool, including detention of unlawful enemy combatants and military commission trials, as well as Article III prosecutions, to protect the American people. In Article III prosecutions, the government can bring a range of charges against a foreign terrorist fighter, and conspiracy to murder American nationals can be one such charge, depending on the facts. If I am confirmed as Attorney General, I will pursue an 'all-tools' approach, and where an Article III prosecution was the most effective tool, will continue to support the Department's longstanding approach of bringing the most serious charges the government could sustain at trial.

15. Are you concerned that Article III criminal trials afford enemy combatants the opportunity to summon our troops from their duties elsewhere in order to appear as witnesses in criminal court?

**RESPONSE**: As indicated above, I believe strongly that the United States government must use every available tool, including detention of unlawful enemy combatants and military commission trials, as well as Article III prosecutions, to protect the American people. If I am confirmed as Attorney General, I will support careful consideration of all appropriate factors in any decision about which tool to employ, including any burden on U.S. military personnel or operations. From my experience as United States Attorney leading an office that has prosecuted many of our nation's most significant terrorism cases, I know first-hand that our skilled prosecutors and law enforcement agents can obtain convictions in many cases without adversely affecting the mission of the U.S. military.

16. At your hearing, you testified that civil asset forfeiture was a "wonderful tool" for law enforcement. No doubt that can sometimes be true, when the person who owns the seized asset is in fact guilty of using the asset to commit crimes. But our current laws permit the government to seize assets without first proving that guilt. Please answer whether you believe it is fundamentally just for the government to seize a citizen's bank account on the belief that it contains the proceeds of crime, but without having to carry a burden to prove the owner's guilt.

**RESPONSE**: Assets can be seized by the government for civil forfeiture only if there is probable cause linking the particular asset to criminal activity. The probable cause requirement is a core tenet of our legal system, and there is nothing about the forfeiture process, civil or otherwise, that allows for the seizure of property in the absence of probable cause. Because civil asset forfeiture is a proceeding against property and not against an individual, it does not require an accompanying criminal conviction. Rather, to forfeit the asset, the government must ultimately prove by a preponderance of the evidence that the property at issue is linked to criminal activity. Civil forfeiture law further provides protection for any innocent owner of an asset who is unaware of its link to criminal activity.

17. I understand from news reports that in 2012 your office froze bank accounts belonging to the Hirsch brothers, but did not file a criminal or civil complaint, and ultimately agreed to return the funds only if the brothers agreed not to attempt to recover their expenses in trying to persuade you to return their money. Please explain whether you believe this case is a good example of why civil asset forfeiture is an important law enforcement tool.

**RESPONSE**: 31 U.S.C. § 5324 provides that "[n]o person shall, for the purpose of evading" certain statutory reporting requirements primarily set forth in 31 U.S.C. §§ 5313(a), 5325 and 5326 "cause or attempt to cause a domestic financial institution to fail to file a report" for the deposit of amounts in excess of $10,000.00. In May 2012, my Office presented evidence to a federal magistrate judge that the Hirsch brothers' business, Bi-County Distributors, Inc. ("Bi-County"), had deposited over $1.4 million in cash in what the evidence indicated was likely a "structured" manner, intended to evade federal currency reporting requirements. Based upon this showing, the federal magistrate judge found that there was probable cause for the seizure of the structured deposits and issued a warrant to seize Bi-County's account.

Frequently, structured cash deposits are designed to conceal crimes such as narcotics offenses, money laundering and tax evasion. The currency reporting requirements have been an effective tool in assisting law enforcement in its detection of such criminal conduct. In order for the forfeiture statutory scheme to achieve its purpose, it authorizes the seizure of structured funds at the outset of a case, regardless of whether the case is pursued civilly or criminally. If such seizures were not authorized, then the statutory scheme would be rendered largely ineffective as cash assets likely would be dissipated long before any court could issue an order of forfeiture.

In all cases like the Bi-County case, where bank accounts are seized, such seizures can be effectuated only after the review, approval and authorization of a United States Magistrate Judge.

Before seizure warrants even are submitted for judicial authorization, my Office carefully reviews all available information which has resulted in the declination of many civil asset forfeiture cases presented for prosecution. These judicial safeguards, in conjunction with my Office's internal vetting process, have prevented wrongful seizures in the past and will prevent them in the future. If, following a seizure, my Office is presented with or obtains information that leads to a determination that the forfeiture of the seized asset should not be pursued on the merits, then my Office has, and will continue to, consider settlement or a return of the asset, as appropriate.

18. You testified that you understood that the Attorney General had discontinued the federal government's previous program of adopting state and local seizures as its own. But the Attorney General's order to which you referred contains several exceptions, one of which is for "seizures pursuant to federal seizure warrants, obtained from federal courts to take custody of assets originally seized under state law." In your experience as a prosecutor, are you aware of any legal impediments to obtaining a federal seizure warrant, whether under Federal Rule of Criminal Procedure 41 or otherwise, for the types of property seized by state officials that were previously subject to asset-forfeiture adoption?

**RESPONSE**: Attorney General Holder's January 16, 2015, Order generally prohibited the practice of adoption by federal agencies of assets seized by state and local law enforcement. The use of federal seizure warrants is an altogether different practice. The obtaining of a federal seizure warrant necessitates an independent, judicial finding that the seizure is supported by evidence demonstrating probable cause that a federal crime has been committed and the asset in question is linked to that crime. Thus, where a federal prosecutor obtains a federal seizure warrant for an asset, there are enhanced safeguards that the case is federal in nature.

I have been informed that the Department's review of civil asset forfeiture is ongoing. 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 I am confirmed, I pledge to continue that review.

19. Dating back to the 1960's and 1970's, the Department of Justice has been concerned about organized crime and other criminal enterprises profiting from the proceeds of illegal gambling. By way of example, the American Gaming Association estimated that the Super Bowl would attract some $3.8 billion in illegal wagers, which is 38 times the amount wagered lawfully. Please describe any actions you have taken as United States Attorney to combat illegal gambling; and please describe what can be done to better address the growing problem of illegal gambling.

**RESPONSE**: During my time as the United States Attorney for the Eastern District of New York, my Office has brought prosecutions for illegal gambling, including as part of larger racketeering cases. In 2011, my Office led the largest ever nationally coordinated organized crime takedown against organized crime in the United States. Twelve indictments were unsealed in Brooklyn against eighty-five individual defendants, including charges against members of all five New York-based La Cosa Nostra families. Those charges included charges for illegal gambling, including illegal sports betting and operation of illegal card games and illegal gambling devices. As in other areas, when it comes to illegal gambling, we generally prioritize the most egregious conduct, including conduct tied to organized crime or instances where illegal gambling is part of a larger criminal scheme. I would welcome the opportunity to work with Congress to address this issue.