

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

QUESTIONS FROM SENATOR PERDUE

1. As a career federal prosecutor, I know you are familiar with the concept of prosecutorial discretion. What, if any, are the limits of the President's discretion to enforce federal law?

RESPONSE: That is a question best suited for the Office of Legal Counsel, based upon the facts of a particular case. I would not want to prejudge any issue that the Department may be presented with in the future, should I be confirmed as Attorney General. There are, of course, recognized constitutional limitations on the President's authority.

2. With respect to the President's executive action on immigration, please explain the legal basis for your belief that the Office of Legal Counsel memorandum setting forth the argument for the President's action is constitutional and "reasonable."

RESPONSE: As I noted during my testimony before Committee, the opinion by the Office of Legal Counsel is based upon a thorough review of precedent, prior actions by Congress, as well as the discretionary authority of the Department of Homeland Security to prioritize the removal of the most dangerous aliens within the United States and recent border crossers. Accordingly, the legal analysis by the Office of Legal Counsel appears reasonable.

3. Please explain your view on how, or whether, the President's executive action on immigration comports with the Constitution's Take Care Clause and Congress's Article I authority over immigration and naturalization.

RESPONSE: It is my understanding that this issue is currently the subject of pending litigation and that this issue has been addressed in a brief filed by the Department. I would respectfully refer you to the Department's brief for a full discussion of this issue.

4. At your confirmation hearing, Senator Sessions asked whether you agreed that "someone who enters the country unlawfully" has a "civil right" to work. You responded: "I believe that the right and the obligation to work is one that is shared by everyone in this country, regardless of how they came here. And certainly if someone is here, regardless of status, I would prefer that they be participating in the workplace than not participating in the workplace."

- a. Please explain the legal basis for your assertion that all persons, including persons having entered the United States illegally, have “the right...to work.”

RESPONSE: I was stating my personal belief that it would be better for individuals in this country to be working to support themselves and their families and contributing to our economy than remaining unemployed. But it is my understanding that only citizens and those duly authorized to seek employment by the Department of Homeland Security are legally able to work.

- b. Please explain whether you believe your assertion that all persons present in the United States have a right to work conflicts with provisions of Title 9, specifically 8 U.S.C. § 1324a *et seq.*

RESPONSE: As I previously indicated, only United States citizens and non-citizens who have been duly authorized to seek employment by the Department of Homeland Security have a legal ability to work in the United States.

5. It is now indisputable that the Internal Revenue Service (“IRS”) targeted conservative organizations that were seeking to obtain tax-exempt status. Senate investigators with the Permanent Subcommittee on Investigations found that over 80% of the targeted groups had a conservative political ideology. The Department of Justice (“DOJ” or “Department”) responded by initiating a criminal probe led by a Civil Rights Division attorney who had contributed to President Obama’s campaign in 2012. Little, if any, progress has been made in this investigation thus far.

- a. With respect to IRS targeting of individuals and organizations who ostensibly identify with a conservative or Tea Party viewpoint, will you commit to reassignment of the DOJ’s investigation to a special prosecutor if you are confirmed?

RESPONSE: I believe that it is very important that all investigations by the Department of Justice are conducted in a fair, objective, professional, and impartial manner, without regard to politics or outside influence. We must follow the facts wherever they lead, and must always make our decisions regarding any potential charges based upon the facts and the law, and nothing more. That is what I have always done as a United States Attorney, and it is what I will do if I am confirmed as Attorney General.

In the many years that I have worked at the Department of Justice, I have developed tremendous faith in the ability of career prosecutors and professional law enforcement agents to conduct investigations in a fair, objective, professional, and impartial manner, without regard to politics or other outside influence. As the Attorney General and his predecessor have stated in memoranda directed to all Department employees during election years, “[s]imply put, politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges.” See Memorandum of The Attorney General to All

Department Employees Regarding Election Year Sensitivities (March 9, 2012, and March 5, 2008). I am committed to those principles.

It is my understanding that the investigation into IRS targeting of certain tax-exempt organizations is being conducted by career prosecutors in the Department's Criminal Division and Civil Rights Division, working alongside professional law enforcement agents with the FBI and the Treasury Inspector General for Tax Administration (TIGTA). I also understand that the Attorney General has committed that those career professionals will carry out this investigation thoroughly and fairly, and he has determined that there is no need for the appointment of a Special Counsel under the Department's regulations, 28 C.F.R. § 600.1. Under those regulations, which I understand have been used very rarely, the Attorney General has the discretion to appoint a Special Counsel if an investigation or prosecution by the Department of Justice would present a conflict of interest, or in other extraordinary circumstances such that the public interest would be served by such an appointment. I have no reason to question the ability of our dedicated career prosecutors and law enforcement agents to conduct the IRS investigation fairly and professionally. At the same time, I assure the Committee that, if I am confirmed as Attorney General, I will apply the Special Counsel regulations faithfully and will exercise my discretion as Attorney General in an appropriate manner.

- b. Do you believe it was appropriate to assign management of the DOJ's investigation of IRS targeting to a DOJ lawyer who contributed to President Obama's campaign?

RESPONSE: As stated above, in the many years that I have worked at the Department of Justice, I have developed tremendous faith in the ability of career prosecutors and professional law enforcement agents to conduct investigations in a fair, objective, professional, and impartial manner, without regard to politics or other outside influence. As the Attorney General and his predecessor have stated in memoranda directed to all Department employees during election years, "[s]imply put, politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges." See Memorandum of The Attorney General to All Department Employees Regarding Election Year Sensitivities (March 9, 2012, and March 5, 2008). I am committed to those principles.

It is my understanding that the investigation into IRS targeting of certain tax-exempt organizations is being conducted by career prosecutors in the Department's Criminal Division and Civil Rights Division, working alongside professional law enforcement agents with the FBI and the Treasury Inspector General for Tax Administration (TIGTA). I understand that this is a team of many investigators and prosecutors who have worked together to investigate the matter thoroughly and professionally for more than a year and a half. I also understand that the Attorney General has committed that those career professionals will carry out this investigation thoroughly and fairly, and he has determined that there is no need for the appointment of a Special Counsel under the Department's regulations, 28 C.F.R. § 600.1. Under those regulations, which I understand have been used very rarely, the Attorney General has the discretion to appoint a Special Counsel if an investigation or prosecution by the Department of Justice would present a conflict of interest, or in other extraordinary circumstances such that the

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- c. Do you believe that assigning management of the DOJ's investigation of IRS targeting to a DOJ lawyer who contributed to President Obama's campaign could reasonably be expected to create the appearance of partiality or lack of objectivity on the part of the DOJ?

RESPONSE: As stated above, in the many years that I have worked at the Department of Justice, I have developed tremendous faith in the ability of career prosecutors and professional law enforcement agents to conduct investigations in a fair, objective, professional, and impartial manner, without regard to politics or other outside influence. As the Attorney General and his predecessor have stated in memoranda directed to all Department employees during election years, "[s]imply put, politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges." See Memorandum of The Attorney General to All Department Employees Regarding Election Year Sensitivities (March 9, 2012, and March 5, 2008). I am committed to those principles.

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- d. If you are confirmed, will you commit to keeping Congress informed in a more timely way than the current DOJ leadership has about the status of the investigation?

RESPONSE: If I am confirmed as Attorney General, I am committed to working effectively

and productively with Congress and this Committee. Although I am not familiar with the details of this particular investigation, I assure you that I will provide information to the Committee within the parameters permitted by law and consistent with the Department's law enforcement and confidentiality interests.

6. National security is always of paramount importance for the Attorney General. The recent Paris attack and the rise of ISIS are episodes that show two emerging national security threats that you will confront, if confirmed: foreign fighters and so-called "lone wolf" attacks.
 - a. In your view, does the recent emergence of these threats have any impact on the debate over the impending renewal of the Foreign Intelligence Surveillance Act of 1978 ("FISA")?

RESPONSE: I share your concern regarding the emerging national security threats posed by foreign fighters and lone-wolf attacks and believe that these threats should inform the congressional debate regarding the reauthorization of certain provisions of FISA. It is important that our intelligence and law enforcement professionals have the full panoply of investigative tools and techniques to deal with the ever-evolving threat presented by terrorism and other national security threats, while also ensuring that we use those tools in a way that effectively protects privacy and civil liberties. The Administration has supported the USA FREEDOM Act, which would ensure that the government retained the authority to conduct electronic surveillance of foreign lone wolf terrorists. If I am confirmed as Attorney General, I will work with Congress to pass legislation consistent with the USA FREEDOM Act.

- b. Do you believe that the current "bulk collection" regime under FISA Section 215 is lawful?

RESPONSE: Yes. The "bulk collection" program operates pursuant to court order, has been reviewed and approved by multiple federal judges, and is subject to rigorous oversight by all three branches of government. Our collection of foreign intelligence, however, needs not only to be lawful, but to be conducted in a manner that best protects both our national security and our privacy and civil liberties. I understand that, based on recommendations from the Department of Justice and the Intelligence Community, the President proposed that the government end the bulk collection of telephony metadata records under Section 215, while ensuring that the government has access to the information it needs to meet its national security requirements. The Administration supported the USA FREEDOM Act as a means of enacting this proposal, and, if confirmed, I would work with Congress to reform Section 215 in a manner consistent with the President's proposal.

- c. Do you believe that the incidental collection provision, Section 702, is lawful?

RESPONSE: Yes. My understanding is that Section 702 may only be used to target non-United States persons located outside the United States and may not be used to target foreigners for the purpose of acquiring Americans' communications. Some communications of Americans, however, may be incidentally collected when an American communicates with a 702 target located outside the United States. I understand that such communications are governed by "minimization procedures" that have been found lawful by both the courts and the Privacy and Civil Liberties Oversight Board. If I am confirmed as Attorney General, I will ensure that 702 collection continues in a lawful manner that meets our national security needs and appropriately protects privacy and civil liberties.

- d. President Obama has indicated that he supports a legislative reform of Section 215 bulk collection regime. What are your thoughts on amending Section 215?

RESPONSE: If I am confirmed as Attorney General, I will work with Congress to amend Section 215 in a manner consistent with the President's proposal in order to strengthen the privacy and civil liberties protections, while preserving essential authorities that our intelligence and law enforcement professionals need.

- e. Do you think law enforcement currently has sufficient investigative and legal authority to address the increasing threat from foreign fighters and "lone wolves"?

RESPONSE: It is important that our intelligence and law enforcement professionals have the full panoply of investigative tools and techniques to deal with the ever-evolving threat presented by terrorism and other national security threats, while also ensuring that we use those tools in a way that effectively protects privacy and civil liberties. If I am confirmed as Attorney General, I will work with law enforcement and Congress to evaluate any gaps in existing authorities and to ensure all appropriate tools are brought to bear to respond to these threats.

7. If you are confirmed, would the FBI, ATF, or any other DOJ agencies be permitted to allow criminals to obtain firearms as part of investigations undertaken by your Justice Department? If so, please describe the circumstances under which you believe such operations would be appropriate.

RESPONSE: The Department's law enforcement components and the United States Attorneys' Offices take seriously the need to ensure that investigations and prosecutions are conducted in a way that preserves public safety as well as officer safety. Accordingly, the Department has provided guidance to all United States Attorneys' Offices and Department law enforcement components regarding risk assessment and mitigation for law enforcement operations in criminal matters.

8. Are you committed to transparency between the DOJ and Congress, and will you commit to prompt, complete, and truthful responses to requests to information from Congress about outstanding issues related to Operation Fast and Furious?

RESPONSE: I am committed to transparency between the Department and Congress and, if I am confirmed as Attorney General, I will work to promote such transparency while also preserving the Executive Branch's proper functioning and the separation of powers.

9. The DOJ announced two weeks ago that two Yemeni nationals charged with conspiring to murder American citizens abroad and providing material support to al-Qaeda will be prosecuted by your office in the Eastern District of New York. What specific circumstances that you can address here lead you to believe that civilian courts are a more appropriate or effective venue than military tribunals for the prosecution of the Yemeni nationals that have been charged by your office?

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.

10. Do you believe that detainees currently being held at the United States Naval Base at Guantanamo Bay, Cuba, are entitled to criminal trials in the civilian court system within the United States?

RESPONSE: It is lawful for the United States to detain enemy combatants at the military facility at Guantanamo Bay without criminal charge or trial for the duration of the conflict, consistent with the 2001 AUMF, as informed by the law of war, and subject to review of their detention by the courts.

11. In 2013, the DOJ intervened in litigation over the Louisiana Scholarship Program, a state initiative that provides school vouchers to low-income families. An analysis by the State of Louisiana found that the program promoted diversity in Louisiana schools and actually assisted in speeding up federal desegregation efforts. Most of the schoolchildren who

benefit from this program are members of minority groups. This year, more than 13,000 students applied and nearly 7,500 schoolchildren were awarded a scholarship voucher. These children now get the chance to excel and attend high-quality schools that their parents can choose for them because of the program. Ultimately, after public pressure, the Justice Department backed off trying to kill the program entirely, but still insisted that the state provide demographic data about the students to a federal judge overseeing the lawsuit. Accordingly now Louisiana has to provide data for the upcoming school year and for every school year as long as the program is in place.

- a. Do you agree with the DOJ's decision to intervene in this case?
- b. If confirmed, will you use Justice Department resources, like your predecessor has, in an effort to obstruct, monitor, or regulate school-choice programs?
- c. Will you commit to asking the federal district court with jurisdiction over this case to discontinue the reporting requirement if you are confirmed?

RESPONSE: I cannot comment on this issue because it is my understanding that it is in active litigation. It is my understanding that the Department has not taken a position against school voucher programs. That would continue to be my position if I am confirmed as Attorney General.

12. A 2013 report by the DOJ's Inspector General revealed disturbing systemic problems related to the operation and management of the DOJ's Civil Rights Division. If confirmed, will you commit to implementing the recommendations made by the Inspector General in that report?

RESPONSE: If I am confirmed as Attorney General, I will commit to ensuring that all Department components are responsive to recommendations made by the Office of Inspector General.

13. At your confirmation hearing, I asked you about the Francois Holloway case and why you consented to an order by Eastern District of New York Judge John Gleeson vacating two of Mr. Holloway's convictions for armed carjacking. In your response, you mention "a judicial proceeding before the court at that time" that "the court wanted us to take a second look at."

- a. Please describe what you meant by the term "judicial proceeding before the court."

RESPONSE: A motion had been filed pursuant to the Federal Rules of Civil Procedure to reopen the defendant's habeas corpus proceedings.

- b. Which party initiated the "judicial proceeding before the court" that you referred to in your answer?

RESPONSE: The defendant initiated the proceeding by filing the motion referenced above.

- c. You stated that “our view was that we had to look at the case consistent with many of the initiatives that we were being put in place now by the DOJ certainly with respect to clemency and with respect to how we look at offenders who have served significant time.” Please state the DOJ initiatives you consulted in your re-examination of the Holloway sentence and identify any initiatives on which you based your decision to consent to Judge Gleeson’s order vacating Mr. Holloway’s armed carjacking sentences.

RESPONSE: The Department of Justice’s Smart on Crime initiative calls upon federal prosecutors to ensure that finite Department resources—including finite corrections resources—are devoted to the most important law enforcement priorities, to promote fairer enforcement of the law and eliminate unwarranted sentencing disparities, and to ensure that the punishment for all offenders fits the crime.

- d. Please identify any DOJ initiatives that provide for early release for violent offenders or recidivist violent offenders like Mr. Holloway.

RESPONSE: Federal prosecutors must evaluate the circumstances of each offense and each offender in order to determine what sentence to seek. Ultimately, of course, it is up to the sentencing judge to impose sentence, and to decide any application to reduce a sentence after it has been imposed.

- e. You testified that you reconsidered whether to consent to an order to vacate Mr. Holloway’s sentence “numerous times.” Please explain why you ultimately consented to the vacatur after initially refusing to and suggesting to the court that Mr. Holloway contact the Office of the Pardon Attorney or seek executive commutation of his sentence.

RESPONSE: After studying the facts of the case, the conduct of Mr. Holloway during his twenty years of incarceration, and soliciting the view of the victims of the crime, I decided not to oppose Mr. Holloway’s request that Judge Gleeson reconsider his sentence.

- f. Mr. Holloway’s case had achieved a remarkable degree of finality—his appeal was rejected by the Supreme Court and he had been sentenced decades before Judge Gleeson released him, effectively, for time served. Please state the legal and policy basis for your decision to re-examine the case given the degree of finality it had achieved.

RESPONSE: After examining the facts of the case, the defendant’s motion, and after

receiving input from the victims, I decided that it was appropriate not to oppose the Court reconsidering the sentence imposed. This decision was in keeping with the obligation of all prosecutors to seek just outcomes, and to carefully weigh the facts and circumstances of each offense and offender.

- g. You stated that your office had “the ability to let the judge review [Mr. Holloway’s] sentence again by keeping it in the court system.” Please explain your understanding of the circumstances under which federal prosecutors should consent to review by a federal judge of sentences which have achieved finality and explain when federal prosecutors should act, as you testified, to “keep[]” those sentences “in the court system.”

RESPONSE: Federal prosecutors must evaluate any request for resentencing based on a thorough review of the facts and circumstances of the case, the conduct of the defendant both before and after conviction, and the applicable laws governing the defendant’s application.

- h. Do you agree with Judge Gleeson, who wrote in his May 14, 2014, memorandum in the Holloway case, that your prosecutors from the Eastern District of New York employ “ultraharsh mandatory minimum provisions to annihilate a defendant who dares to go to trial,” like Mr. Holloway?

RESPONSE: Federal prosecutors in the Eastern District of New York, like those throughout the country, strive to seek just penalties that are commensurate with the severity of the crime and the characteristics of the offender.

- i. Do you believe that the prosecutors who tried Mr. Holloway employed “ultraharsh minimum sentences to annihilate” him because he exercised his constitutional right to a jury trial?

RESPONSE: The prosecutors who tried Mr. Holloway sought to hold him accountable for the serious crimes he had committed. As United States Attorney, it is my obligation to consider defendants’ applications based on a careful review of all of the circumstances that exist at the time such application is made.

- j. Do you agree with the recommendation of the U.S. Sentencing Commission in its 2011 report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, that Congress should amend 18 U.S.C. § 924(c) to confer on federal district judges the discretion to impose concurrent sentences under that provision?

RESPONSE: If I am confirmed as Attorney General, I look forward to continuing the dialogue between the Department, the Sentencing Commission, and Congress regarding

the important issue of mandatory minimums. It would be premature for me to opine on that specific recommendation before soliciting input from all relevant stakeholders.

- k. Please describe with particularity—citing case numbers, captions, etc.—any other cases in which your office, during your tenure as U.S. Attorney consented to an order vacating convictions under 18 U.S.C. § 924 or any other criminal conviction.

RESPONSE: I am not aware of any such cases.

- 14. As a U.S. Attorney and the Chair of the Attorney General’s Advisory Committee, you are no doubt familiar with DOJ’s recent “Smart on Crime” Initiative, which addresses a number of criminal justice issues like prioritizing prosecutions, sentencing disparities, recidivism, and incarceration of non-violent offenders. Attorney General Holder has advocated reduction of the federal sentencing guideline levels that apply to most drug-trafficking offenses, including trafficking of hard drugs like heroin. The Holder Justice Department also announced a new clemency initiative last year that invites clemency petitions from offenders who meet a number of criteria. Thousands of offenders, including drug traffickers, fall within those criteria.

- a. What are your views on those DOJ initiatives and proposals?

RESPONSE: The Smart on Crime initiative is designed to ensure finite public safety resources are devoted to the most important law enforcement priorities; to promote fairer enforcement of the laws and alleviate disparate impacts of the criminal justice system; to ensure just punishments for all offenders; to improve prevention and reentry efforts to reduce reoffending; and to strengthen protections for vulnerable populations. I support these goals. I also fully support the ongoing effort to identify for the President worthy candidates for clemency to assist him in properly executing the President’s constitutional responsibility in this area.

- b. Do they make the work of federal prosecutors harder?

RESPONSE: The role of the federal prosecutor is to see that justice is done. Every day, federal prosecutors across the country seek to improve public safety, reduce crime and do justice. I believe the Smart on Crime initiative is designed to be consistent with these goals. I think the initiative supports the work of federal prosecutors.

- c. Do they make the American people safer?

RESPONSE: Yes. By ensuring finite public safety resources are devoted to the most important law enforcement priorities, by reducing reoffending and by preventing crime, the Smart on Crime initiative will make the American people safer.

- d. Are you going to continue them if you are confirmed as Attorney General?

RESPONSE: If I am confirmed as Attorney General, I will review the Smart on Crime initiative and evaluate its impact. I will continue the parts of it that are effective and consider new initiatives to further the goals of public safety and justice.

- e. Do you believe that these or other DOJ initiatives should be expanded to encompass early release for violent offenders who have served a substantial portion of the sentences?

RESPONSE: As I indicated above, if I am confirmed as Attorney General, I will review these initiatives and evaluate their impact. I will continue those that are effective and consider new initiatives to further the goals of public safety and justice. I do not support release of violent offenders for no corrections or public safety purpose. However, I believe sentencing and corrections policies should be reviewed periodically to ensure that just punishment is meted out for all offenders, that reoffending is minimized through programming and other corrections policies, that those considering criminal activity are deterred to the greatest extent possible, and that the purposes of punishment, as set out in the Sentencing Reform Act, are otherwise served.

- f. Do you believe that these or other DOJ initiatives should be expanded to encompass early release for offenders who have received so-called “stacked” or consecutive mandatory minimum sentences under 18 USC 924 or other provisions of federal law?

RESPONSE: In an era of advisory guidelines, I believe mandatory minimum sentencing statutes remain important to promote the goals of sentencing and public safety. At the same time, I recognize that some reforms of existing mandatory minimum sentencing statutes are needed. I understand that Members of Congress have introduced various bills in the 113th Congress to reform mandatory minimum sentencing statutes. If I am confirmed as Attorney General, I look forward to working with these Members of Congress to identify those mandatory minimum statutes that need reform and to enact legislation to do so.

15. The 2013 Cole Memorandum explains the DOJ’s priorities on enforcement of federal law regarding marijuana offenses. Several jurisdictions have recently legalized cultivation

and distribution of marijuana for personal use, in effect, initiating a series of state regulatory regimes that contravene federal drug laws.

- a. Do you agree with the current DOJ enforcement policies and priorities outlines in the Cole Memorandum?

RESPONSE: As United States Attorney, and if I am confirmed as Attorney General, I am committed to enforcing the Controlled Substances Act (CSA). The Cole Memorandum sets out eight priority areas for federal marijuana enforcement. The Cole Memo also acknowledges the importance of examining the particular circumstances of each case and the authority of the Department to pursue investigations and prosecutions that otherwise serve an important federal interest. Accordingly, the Department's focus is on applying its limited investigative and prosecutorial resources to enforcing the CSA in a manner that addresses the most significant threats to public health and safety.

- b. Do you consider the DOJ's policy, as it is being implemented now, to reflect legitimate enforcement discretion consistent with the Take Care Clause?

RESPONSE: In all areas of civil and criminal enforcement, the Department uses its discretionary enforcement authority in a manner that seeks to focus limited investigative and prosecutorial resources to address the most significant public health and public safety threats. In every instance, prosecutors must make decisions about how limited resources are brought to bear to best confront those threats. The Department's policies, including in the area of marijuana enforcement, are crafted to provide guidance on doing so in an effective, consistent and rational way, while giving prosecutors discretion within the constraints of that guidance to take into account the circumstances of each case.

- c. If you are confirmed, how do you plan to measure the effect of the DOJ's policy on the federal interest in enforcement of drug laws?

RESPONSE: If I am confirmed as Attorney General, 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 the community 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.

16. The recent hacking of Sony's computers has demonstrated that a major area of vulnerability to our national security and infrastructure is cyber attacks, often by foreign hackers or governments.

- a. In your view, what are the greatest threats we face from cyber terrorism?

RESPONSE: As I mentioned during my testimony before the Committee, a cyber attack carried out on behalf a terrorist entity is one of the greatest fears of any prosecutor, and we must be nimble in our efforts to prevent, to detect and to disrupt such a threat. My impression, based on my experience as United States Attorney, is that while terrorist groups have generally not reached the skill level of nation-state actors, we cannot ignore their expressed desires to attack us through any means, including through cyber attacks. Regardless of the specific adversary at issue, they could cause significant damage and destruction through cyber attacks—in particular, through attacks on systems that support our critical infrastructure, including industrial control systems, hospitals, government networks and similarly essential systems. If I am confirmed as Attorney General, I plan to use the full extent of our authorities to identify and disrupt—whether through prosecution or other means at our disposal—those who would threaten our country by seeking to attack these systems or to position themselves to do so in future.

- b. What tools does law enforcement need, based on your experience as a U.S. Attorney, to protect networks and critical infrastructure?

RESPONSE: In my experience as the United States Attorney for the Eastern District of New York, I believe a comprehensive approach, including a collaborative relationship between government and private sector, is necessary to protect networks and critical infrastructure. Emphasis on the prevention and detection of this threat is critical and, if I am confirmed as Attorney General, I would work to ensure that our law enforcement community has the technological resources and legal authorities needed to stay ahead of this threat, and strengthen the relationship between government and private industry.

17. In recent years, the DOJ has aggressively pursued states that have enacted a wide array of voter ID provision. You have made a number of public comments about the DOJ's litigation in this area of the law and have pledged to continue litigation that Attorney General Holder has initiated. Please describe, with particularity, examples of voter ID provisions that a state could enact which you believe would pass statutory and constitutional muster.

RESPONSE: I do not 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.

However, 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.

18. A number of commentators have expressed the opinion that voter fraud simply doesn't exist or the alternative opinion, that, if it does, it is minor problem with no real effect on the integrity of elections.

- a. Do you agree that voter fraud does not exist or is so insignificant that it does not threaten the integrity of elections?

RESPONSE: I am not personally familiar with the specifics of studies regarding these issues, nor do I have any categorical views on these issues in the abstract. 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.

- b. Do you think that voter fraud is a bona fide issue that states should be entitled to address with voter ID laws?

RESPONSE: As stated above, I do not 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 law and facts in the jurisdiction.

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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.

19. You previously stated in the context of North Carolina's voter ID law that:

Fifty years after the March on Washington, 50 years after the Civil Rights Movement, we stand in this country at a time when we see people trying to take back so much of what Dr. King fought for....People try and take over the State House and reverse the goals that have been made in voting in this country....But I'm proud to tell you that the Department of Justice has looked at these laws, and looked at what's happening in the Deep South, and in my home state of North Carolina [that] has brought lawsuits against those voting rights changes that seek to limit our ability to stand up and exercise our rights as citizens. And those lawsuits continue.

Do you believe that North Carolina's voter ID law is a pretext for, or was motivated by, racial discrimination?

RESPONSE: My general understanding is that the Department has brought suit challenging certain aspects of North Carolina's 2013 omnibus election law as racially discriminatory in purpose and result. Because this matter is the subject of pending litigation by the Department, I cannot comment further.

20. First Amendment freedoms that protect the press became a lot more tenuous during Mr. Holder's administration of the DOJ. In May 2013, the Department obtained phone records for the Associated Press ("AP") without the knowledge of that organization, reportedly as part of an investigation of an AP story on CIA operations in Yemen. It then came to light that in 2010 the Holder Justice Department obtained a warrant to search the emails of a Fox News reporter James Rosen—the Department claimed Rosen was a potential co-conspirator with a State Department contractor in violation of the Espionage Act. Since then the DOJ has issued new guidelines governing how it obtains evidence from journalists. The guidelines maintain in that notice of a subpoena may be withheld only if notifying the journalist would present a "clear and substantial threat" to an investigation or to national security.

a. Do you agree that the Department's treatment of journalists has been heavy-handed and that reform of DOJ practices was necessary?

RESPONSE: Because my Office was not involved in the investigations described above, I cannot address those specific matters.

I agree that the revisions to the Department's policies and practices regarding the use of certain law enforcement tools to obtain information from, or records of, members of the news media were appropriate. In my view, the revised policies and practices strike the proper balance between law enforcement and free press interests. Significantly, the revised policies and practices cover law enforcement tools and records, and ensure robust, high-level consideration of the use of those tools to obtain information from, or records of, members of the news media.

- b. Do you believe that the DOJ investigations described above pose a serious risk of chilling free speech?

RESPONSE: Because my Office was not involved in the investigations described above, I cannot address those specific matters.

As a general matter, I believe that persons entrusted with safeguarding information related to our national security should be held accountable when they breach that trust. I also believe that a free press plays a critical role in ensuring government accountability. In my view, the Department's revised media policies and practices strike the proper balance between law enforcement and free press interests.

- c. Do you support the new guidelines?

RESPONSE: Yes, I believe the revised policies and practices strike the proper balance between law enforcement and free press interests.

- d. As a federal prosecutor, you are no doubt aware of the balance between individual liberties and the need to conduct thorough and effective investigations. Do the guidelines strike the right balance?

RESPONSE: Yes, in my view, the Department's revised policies and practices strike the proper balance between law enforcement and free press interests.

- e. How would the Lynch Justice Department distinguish itself from the Holder Justice Department when it comes to the investigation of journalists?

RESPONSE: Given the essential role that members of the news media play in our society, I believe that federal investigators and prosecutors should view the use of certain law enforcement tools to obtain information from, or records of, non-consenting members of the news media as an extraordinary measure, not a standard investigatory practice. If I am confirmed as Attorney General, I would give careful consideration to, and closely scrutinize, any request for authorization to obtain information from, or records of, a member of the news media; or to investigate or prosecute a member of the news media. In my view, the revised media policies and practices both provide an appropriate framework with which to conduct this critical analysis, and strike the appropriate balance between law enforcement and free press interests.

21. There have been significant developments recently at the DOJ regarding policies on civil asset forfeiture in response to abuses by U.S. Attorney's Offices and federal and state agencies. Attorney General Holder just announced that the DOJ will end the Equitable Sharing Program, which essentially apportions billions of dollars in seized assets between

federal, state, and local authorities—a huge pool of money that clearly created a risk of encouraging aggressive, if not unlawful, seizures from individuals who are not charged with a crime, have not been indicted and have not enjoyed any due process whatsoever. Your office in the Eastern District of New York alone has seized over \$100 million in recent years.

- a. Do you believe that there have been inappropriate or excessive seizures by your office or by the DOJ with respect to civil asset forfeitures, adoptive seizures, and equitable sharing practices? If so, please describe with particularity any such cases.

RESPONSE: First of all, to clarify, I understand that Attorney General Holder’s January 16, 2015, Order generally prohibited the practice of federal adoptions of assets seized by state and local law enforcement. It did not end the Equitable Sharing Program. That said, the adoption Order came as part of the Department’s comprehensive, ongoing review of the Asset Forfeiture Program, including the Equitable Sharing Program.

I can speak with regard to the seizures made in connection with civil forfeiture actions prosecuted in the Eastern District of New York, and I believe they have been appropriate. Every seizure in my district, and indeed across the country, must be based on probable cause that the property is connected to crime, and is often pursued only after a federal judge issues a warrant based on such a finding. That probable cause is the same burden of proof required to arrest someone. In any contested forfeiture, the government must prove by a preponderance of the evidence, in federal court, that the property is connected to a crime.

As indicated by my Office’s forfeiture records, adoptive seizures represent a tiny fraction of the Eastern District of New York’s forfeiture litigation. An internal review revealed that approximately thirty-four adoptive seizures, representing a total asset value of roughly \$2.95 million in seized assets, were referred by federal agencies to the Office since 2010. Further, of these thirty-four adoptive seizure referrals, my Office declined to accept half based upon its own assessment of the merits of the seizure.

- b. After inquiries by members of Chairman Grassley’s staff, a company in your district, Hirsch Brothers, was recently returned \$500,000 that your office seized from it as part of a civil asset forfeiture. Please explain the basis for the seizure and the reason why the funds were returned only after a congressional inquiry was initiated.

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.

Immediately after the seizure, my Office notified Bi-County and its then-attorney of the seizure. From May 2012 to May 2014, the parties engaged in settlement discussions, during which Bi-County organized its records relating to its cash receivables, provided them to the government and produced a forensic accounting of its cash business. As discussions with Bi-County's prior attorney did not result in a resolution of the matter, Bi-County retained new attorneys who, in October 2014, filed an action seeking return of the seized funds. In response, and to avoid further litigation, my Office renewed its efforts to resolve this matter with Bi-County's new attorneys.

After Bi-County filed its action and upon completion of the investigation and exchange of information, my Office determined that the settlement represented an appropriate resolution of this matter. These efforts culminated in a mutually agreeable settlement in principle of the action. The parties ultimately memorialized their settlement in a publicly-filed stipulation. As with all settlements, both parties, represented by their counsel, negotiated aspects of a settlement upon which they could agree. The stipulation also sets forth a mutually agreed upon description of the procedural history of the negotiations between the parties and includes, among other things, an acknowledgment by Bi-County and its principals that they have been advised of the laws against structuring.

The Bi-County settlement was negotiated and resolved in the ordinary course of litigation. The parties had drafted and agreed upon a final settlement stipulation, which the Hirsch brothers and their counsel already had signed before my Office received Senator Grassley's January 20, 2015 correspondence containing an inquiry about the Bi-County case.

- c. Has your office implemented the reforms announced by Attorney General Holder?

RESPONSE: My Office has implemented and is in compliance with the reforms that Attorney General Holder recently announced with respect to adoptive forfeitures.

- d. What steps are you taking in your office to ensure that no additional individuals or companies like Hirsch Brothers will have their assets wrongfully seized?

RESPONSE: As noted above, the action against Bi-County's assets was commenced pursuant to a seizure warrant issued by a United States Magistrate Judge based upon an independent, judicial determination of probable cause to believe that Bi-County had deposited over \$1.4 million of United States currency in a "structured" manner, in violation of 31 U.S.C. § 5324.

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.

- e. What steps do you plan to take, if confirmed, to ensure that the DOJ returns wrongfully seized assets promptly and does not continue to seize assets wrongfully?

RESPONSE: I am keenly aware of concerns about civil asset forfeiture, and I take those concerns very seriously. As mentioned above, the Department has embarked on an ongoing review of its Asset Forfeiture Program (which has so far resulted in the policy change on adoptions) and if I am confirmed as Attorney General, I look forward to continuing that review, to ensure that Asset Forfeiture tools 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.